



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL NO. 1 OF 2014
BETWEEN
GOGNI RAJOPE CONSTRUCTION COMPANY LIMITED...APPELLANT
AND
FRANCIS OJUOK OLEWE.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. P. Mayova, RM at the Chief Magistrates Court at Homa Bay in Civil Case No. 60 of 2012 dated 22nd January 2014)

JUDGMENT

1. At the time of the accident, the respondent was a grader operator employed by the appellant. Before the subordinate court he averred that on 25th October 2011, while working using a motor grader machine levelling the Rodi-Karungu Road near Ndhiwa, he suddenly slipped and fell from the motor grader machine causing him to sustain very serious injuries. He pleaded that he sustained the following injuries; a fracture of the left distal ulna and radius, a fracture and dislocation of the left elbow joint, left arm, left wrist joint, injuries to the left knee, injuries to the left side of the chest, neck injuries, head and back injuries.

2. In the statement of defence, the appellant contended that the respondent was qualified to operate a motor grader machine and on the material day the appellant stopped to take a short call and upon return he complained of dizziness and when he attempted to mount the motor grader he collapsed and fell. The appellant therefore contended that the accident was caused wholly by the respondent's negligence. As regards the injuries alleged to have been sustained by the respondent, the appellant contended that the injuries were not caused by the alleged accident and were in fact pre-existing and if there were any injuries sustained as a result of the accident, the same were minor.

3. After hearing the matter the learned magistrate found the appellant 100% liable and awarded the sum of Kshs. 800,000/- as damages. It is this judgment that precipitated the appeal. In summary the grounds of appeal set out in the memorandum of appeal dated 3rd February 2014 relate to the issues of liability and quantum.

4. In support of the appeal, Mr Oguttu-Mboya, learned counsel for the appellant, submitted that given the nature of the work the respondent was involved in and as a trained grader, he was obliged to take necessary caution for his safety. He contended that the respondent did not require provision of safety gear like a helmet and gloves as he was a driver. He further submitted that the manner in which the accident occurred did not disclose any negligence or breach of statutory duty and that the learned magistrate failed

to appreciate the fact that the respondent slid and the finding of liability could not be supported by the facts and evidence. The appellant relied on several decisions to support its arguments among them ***Kipkebe Limited v Evans Kibagendi* KSI HCCA No. 270 of 2005 (UR)**, ***Philip Omosa Roiba v Kipkebe Limited* KRC HCCA No. 48 of 2005 (UR)** and ***Wilson Nyanyu Musigisi v Sasini Tea & Coffee Limited* KRC HCCA No. 15 of 2003 (UR)**.

5. Ms Kuke, learned counsel for the respondent, supported the findings of the trial magistrate. She contended that the appellant's evidence confirmed that the respondent was exposed to various known risks as the tractor had only one ladder which was broken and this is what caused the accident. She submitted that the appellant did not tender any evidence to rebut the respondent's allegations. She cited ***Kimatu Mbuvi v Benson Nguli* MKS HCCA No. 27 of 2000 [2010]eKLR** and ***John Njuguna Chege v Esther Wambui Kariuki* NRB HCCA No. 597 of 2003 [2005]eKLR** to support her submissions.

6. The arguments made by the parties call upon the court to review the evidence before the subordinate court. This is consistent with the duty of the first appellate court which is called upon to analyse and re-assess the evidence on record and reach its own conclusions bearing in mind that it neither saw nor heard the witnesses testify (see ***Selle v Associated Motor Boat Co.* [1968] EA 123** and ***Kiruga v Kiruga & Another* [1988] KLR 348**).

7. It was not in dispute that the respondent was employed by the appellant. The respondent (PW 1) testified that on the material day he stopped to answer a call of nature and as he climbing the ladder of the mechanical grader, he slid on the metal rungs and fell. John Okemba Omondi (DW 1) who was working at the site on the material day, did not witness the accident but he found the appellant had fallen when he spoke to him he said that he was feeling dizzy and that he had slipped and fallen off as he was alighting from the grader.

8. In considering the issue of liability the learned magistrate held that since the DW 1 was not present when the accident occurred, the testimony of PW 1 was uncontroverted. He concluded that because the respondent was assigned a defective grader and that he was not provided with protective gear the appellant was liable. He concluded that, *"If the Defendant had provided the plaintiff with a grader with two functional ladders, the plaintiff would not have slipped as he did."*

9. I have evaluated the evidence and I find that the grader has a ladder which had to be climbed in order to get into the driver's seat. DW 1 admitted that one of the ladders was defective as the lower part was broken. I therefore find that the appellant therefore failed to provide a safe working environment by providing a safe ladder in which to climb the grader. On the other hand, the climbing of a ladder does not require special skill or competence and the respondent had a duty to look out for his own safety. In the circumstances, I assign an element of contributory negligence which I assess at 30%. Given the nature of the task, I doubt that protective equipment would have prevented the accident. I note though, that the appellant pleaded in the particulars of contributory negligence that the respondent was guilty of, *"failing to put on a helmet which he had been provided with"* and *"failing to put on gloves which he had been provided with."*

10. I now turn to the issue of quantum of damages. The general principal is that the assessment of damages is within the discretion of the trial court and the appellate court will only interfere where trial court, in assessing damages, either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is not based on any evidence (see ***Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another* [1982-88] 1 KAR 727**, ***Peter M. Kariuki v Attorney General* CA Civil Appeal No. 79 of 2012 [2014]eKLR** and ***Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5**).

11. The appellant's contention revolves around the nature and extent of the injuries sustained by the respondent. Mr Oguttu-Mboya submitted that the accident occurred on 25th October 2011 and the respondent was treated and discharged on the next day. In his view, this confirms that the injuries were not as serious as was alleged. He also pointed to the fact that the respondent did not go back to the hospital until two months later on 23rd January 2011 confirming that the injuries were not as serious as

alleged.

12. On the respondent's part, Ms Kuke submitted that the general damages awarded reflected the injuries sustained and the treatment notes and medical report produced by consent confirm that the respondent sustained a fracture.

13. PW 1 testified that when he fell he was injured on his chest, neck, spinal cord and left leg. DW 1 when arrived at the scene after the accident he saw that the respondent with a broken hand. Both witnesses therefore confirm that the appellant had a broken hand. Apart from the treatment notes from Homa Bay District Hospital and New Nyanza General Hospital, the medical reports of Dr L. W. Okombo prepared on 7th march 2012 and that of Dr George Adari prepared on 17th September 2012 show that he respondent sustained a fracture of the left distal radius and ulna and dislocation of the left elbow. He was managed with plaster of paris for 6 weeks.

14. In the subordinate court, the respondent prayed for an award of Kshs. 1,500,000/- based on the decision in ***Anthony Mwundu Maina v Samuel Gitau Njenga NRB HCCC No. 1150 of 2001 [2006]eKLR*** where the plaintiff sustained heard injuries, compound fracture of the radius and ulna of the left arm, the elbow joint, the neck of the humerus, the left clavicle and the scapula bone. He was awarded Kshs. 1,200,000/- in 2006. The appellant submitted that the sum of Kshs. 50,000/- was adequate but did not cite any decisions to support the contention.

15. Ms Kuke submitted that in the case of ***John Njuguna v Esther Wambui Kariuki NRB HCCA No. 597 of 2003 [2005]eKLR***, Visram J., stated that he was not persuaded in that case that the award of general damages was excessive or unfair because, "*Counsel for the appellant did not refer to a single authority, and did not guide this court or make submissions on why he believed the award was excessive.*" I am alive to the fact that the assessment of general damages is not an exact science and the court in doing the best it can takes into account the nature and extent of injuries in relation to awards made by the court in similar cases. It is ensures that the body politic is not injured by making excessively high awards and that the claimant is fairly compensated for his or her injuries.

16. I find that the respondent sustained a fracture of the radius and ulna and a dislocation of the elbow joint. I consider that the other soft tissue injuries were minor. The decisions cited by the appellant was much more serious as therefore were multiple fracture and while the respondent was not of any assistance is guiding the court, I am of the view that consistent with the principles I have cited an award of Kshs. 350,000/- would be most appropriate and reasonable in the circumstances.

17. In the result I allow the appeal and substitute the award the award in the subordinate with the following award **Kshs. 350,000/-** less 30% liability makes a total of **Kshs. 245,000/-**. The said sum shall accrue interest from the date of judgment in the subordinate court.

18. The appellant shall have the costs of the appeal.

DATED and DELIVERED at HOMA BAY this 22nd day of May 2015.

D.S. MAJANJA

JUDGE

Mr Oguttu-Mboya instructed by Rachuonyo and Rachuonyo Advocates for the appellant.

Ms Kuke instructed by Kuke and Company Advocates for the respondent.