REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 129 OF 2012

MAJI MAZURI FLOWERS LTD..... APPELLANT

VS.

BATHWELI KIPLAGAT BWALEY.....RESPONDENT

(Being an Appeal from the Judgment and Decree of the Principle Magistrate Honourable A. Alego (PM), in Eldoret CMCC No. 402 of 2011, dated and delivered on 19.11.2012)

JUDGMENT

1. This appeal arises from the judgment and decree in Eldoret CMCC NO. 402 of 2011. The respondent who was the plaintiff in the lower court had sued the appellant who was the defendant seeking special and general damages for injuries sustained in an accident which he claimed occurred in the course of his employment with the appellant. It was the respondent's case that the accident occurred on or about 18th May 2011 and was caused by the appellant's negligence or breach of its contractual or statutory duty.

2. The appellant in its defence dated 6th November 2011 denied all the allegations made by the respondent in his plaint dated 29th June 2011 and put him to strict proof thereof. It averred in the alternative that if the accident occurred as alleged, then it was solely caused or substantially contributed to by the respondent. The particulars of the alleged contribution by the respondent were stated in paragraph 7 of the defence.

3. After full trial, the learned trial magistrate rendered her decision on 19th November 2012. She entered judgment for the respondent against the appellant on liability at 100%. She also awarded him general damages in the sum of Kshs. 500,000, special damages of Kshs. 3,050 together with costs and interests.

4. The appellant was aggrieved by the trial court's decision on both liability and quantum. It proffered the instant appeal relying on the following grounds of appeal;

> **i). The** ***learned trial Magistrate erred by arriving at a finding on liability, which was not supported by evidence.***
>
> ***ii). The learned trial Magistrate erred in law and fact in basing her finding on irrelevant matters.***
>
> ***iii). The respondent's case was not proved on a balance of probability as required by the law.***
>
> ***iv). The learned trial Magistrate's award of damages was inordinately too high and manifestly excessive for injuries allegedly suffered by the plaintiff.***

V). The learned trial Magistrate erred on all points of fact and law in as far as both liability and award of damages is concerned.

5. By consent of the parties, the appeal was prosecuted by way of written submissions: those of the appellant were filed on 9th June 2015 while those of the respondent were filed on 13th April 2015.

6. This is a first appeal to the High Court. This court is therefore not bound by the findings of fact made by the trial court but it is under a duty to re-evaluate the evidence on record and reach its own independent conclusions –***See : Selle V. Associated Motor Boat Company Ltd (1968) E.A.123*** ***and Williamson Diamonds Ltd V. Brown [1970] E.A. 1.)***

The court should however be slow to interfere with findings of fact by the trial court for reasons that were aptly captured by Sir Kenneth O'Connor who was the president the East African Court of Appeal, the predecessor to our Court of Appeal when he stated in ***Peters V. Sunday Post Ltd [1958] E.A. 424 at p. 429*** as follows;

> ***"It is a strong thing for an appellate court to differ from the finding on a question of fact of a Judge who tried the case and who had the advantage of seeing and hearing the witness. An appellate court has, indeed , jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand…"***

7. I have considered the evidence on record, the judgment the rival submissions made by the parties and the authorities cited.

> In his evidence before the lower court, the respondent testified that on the material date, he was greasing some bearings in the green house which were 60 feet high when he slipped and fell as there was nothing to hold him and prevent him from falling. He stated that he was not provided with a ladder and that employees used to climb manually. He blamed the appellant for the accident. He testified that if the appellant had provided him with a ladder or a wrist belt, he would not have fallen as he did.

8. To counter the respondent's case, the appellant called three witnesses. The defence witnesses admitted in their evidence that the respondent was in fact the appellant's employee and that he slipped and fell when greasing bearings on the date alleged. They did not however controvert the respodent's evidence regarding the appellant's failure to supply him with a ladder and safety belt to prevent or minimize the risk of him falling when carrying out his duties. In the circumstances, the learned trial magistrate cannot be faulted for finding that the appellant had breached its statutory duty of providing a safe working environment for the respondent by failing to provide him with relevant protective gear. In my view, as it was not disputed that the respondent's assigned duty on the material date involved working on a height of about 60 feet, provision of the two apparatus was crucial. They would have given him some reasonable measure of safety as he carried out his duties. See: ***Sokoro Saw Mills Ltd vs. Benard Muthimbi Njenga H.C at Nakuru, Civil Appeal No. 38 of 1995*** for the duty of employer to provide employees with a safe working environment**.**

> In view of the foregoing, I find no merit in the appellant's submission that the learned trial magistrate had erred in finding against the appellant on liability at 100%. In my view, the trial court's finding on liability was sound in law as it was supported by the evidence on record.

9. On quantum, the pleadings in the plaint show that the respondent sustained the following injuries;

(i) Blunt trauma injury to the chest.

(ii) Blunt tender trauma to the lumbo sacreal

(iii) Loss of lumbar lordosis

(v) Severe pains during and after the injury

These injuries were confirmed in the medical report made by ***Dr. S.I Aluda*** dated 28th June, 2011. According to the report, the injuries were described as very severe and at the time of examination which was about a month later, the respondent was still in pain. The pain was expected to continue but could be managed by use of analgesics. In the doctor's opinion, the loss of lumbar lordosis was a permanent feature and was a source of permanent disability. To describe this injury the doctor used the following words;

" He has loss of lumbar lordosis and this will remain a permanent feature and disability in him.."

10. It is trite that the award of damages is at the discretion of the trial court and that an appellate court would not normally interfere with the discretion of the trial court in its assessment and award of damages unless it is satisfied that in making the challenged award, the court took into consideration wrong principles of the law, took into account irrelevant factors or that the award was either too high or too low as to amount to an erroneous estimate of the damage.

In expounding on this principle, the Court of Appeal in ***Ali V Nyambu t/a Sisera Stores (1990) KLR*** at page 538 quoted with approval the principles laid down by the Privy Council in ***Nance- vs British Columbia electric Railways Co.Ltd (1951) AC 601*** at Page 613 where it held that:

"***The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of the law (as by taking into account some irrelevant factor or leaving out of account some relevant one);or short of this, that the amount awarded is so inordinately low or so inordinately high that it must a wholly erroneous estimate of the damages.***

See: also ***Kemfro Africa Limited & Another vs Lubia & Another [1987] KLR 27 .***

In the instant appeal, the appellant has faulted the trial court's award on grounds that it was too high and not commensurate with the injuries suffered by the respondent which were soft tissue injuries. It proposed an award of Kshs. 60,000.

11. The respondent on the other hand according to submissions filed on his behalf appeared to be under the impression that he had been awarded a sum of Kshs.350,000/- in general damages which amount he urged the court to uphold. He relied on several authorities namely ***Catherine Wanjiru Kingori & 3 others V Gibson Theuri Gichubi (2005) eKLR, Samuel Muthama V Kenneth Muindi Machakos HCCA No.102 of 2008 and Joseph Kivuvi V Mwangi Gatete & 3 others Nairobi HCC No. 4196 of 1991*** in which he claimed that the plaintiffs had suffered more or less similar injuries as the respondent and they had been awarded general damages in the range of Kshs.300,000 to Kshs. 380,000.

12. The judgment of the trial court and the subsequent decree however show that the respondent in this case had been awarded Kshs. 500,000/- in general damages. The record shows that the learned trial magistrate awarded the respondent that amount since in her view, it was commensurate with the injuries suffered.

There is nothing in the court record which suggests that in arriving at its decision on quantum, the trial court applied the wrong legal principles or took into account irrelevant considerations.

13. In this case, it is clear from the medical report that the respondent did not suffer entirely soft tissue injuries. There was loss of lumbar lordosis which was described as permanent in nature and source of an undisclosed permanent disability.

As this court cannot substitute its own discretion with that of the trial magistrate and there is no evidence of the magistrate having applied the wrong legal principles or taking into account irrelevant factors in arriving at the award, I find that there is no basis for this court to interfere with the award made by the learned trial magistrate. In fact I agree with the trial magistrate that a sum of Kshs. 500,000 was reasonable compensation and was commensurate with the injuries suffered by the respondent in view of the permanent disability. It cannot be said that the amount was too high as to amount to an erroneous estimate.

14. The fact that the respondent's advocate urged the court to uphold a lesser amount on the mistaken belief that this is what the trial court had awarded is not a good reason to interfere with the award since the court in making its decision is not bound by the submissions made by the parties.

15. For all the foregoing reasons, I am satisfied that this appeal is not merited. It is accordingly dismissed with costs to the respondent.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this **30th** day of July 2015.

In the presence of:-

Ms Mwagoni holding brief for Miss Kemei for the Applicant

Mr. Oduol for the Respondent

Mr. Lesinge Court clerk