



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CIVIL APPEAL NO. 130 OF 2012**

**MAJI MAZURI FLOWERS LTD ..... APPELLANT**

**VERSUS**

**BETHWEL KIPLAGAT BWALEY ..... RESPONDENT**

***(Being an Appeal from the Judgment and Decree of the Principle Magistrate Honourable A. Alego (PM), in Eldoret CMCC No. 403 of 2011, dated and delivered on 19.11.2012)***

**JUDGMENT**

1. This appeal arises from the judgment and decree of the lower court in Eldoret CMCC NO 403 of 2011. The respondent who was the plaintiff in the lower court had sued the appellant, his employer, seeking special and general damages for injuries allegedly sustained on or about 28<sup>th</sup> March, 2011 in an accident which occurred in the course of his employment.
2. It was the Respondent's case that the accident was occasioned by the appellants and or its servants or agents' negligence, breach of contract of employment or statutory duty. The particulars of negligence, breach of statutory and/or contractual duty were pleaded in paragraph 6 of the plaint dated 29<sup>th</sup> June, 2011.
3. In response to the allegations in the plaint, the appellant filed a statement of defence dated 6<sup>th</sup> December, 2011 in which it denied all the averments made by the respondent in the plaint and put him to strict proof thereof. In the alternative, the appellant pleaded that if any accident occurred which was denied, the same was solely caused or substantially contributed to by the respondent. The particulars of the alleged contributory negligence were set out in paragraph 7 of the plaint.
4. After full trial, the learned trial magistrate delivered her judgment on 19<sup>th</sup> November, 2012 in which she found for the respondent against the defendant on liability at 100%. She also awarded the respondent general damages in the sum of Kshs.150,000/- and special damages in the sum of Kshs.3,050 together with costs and interest.
5. Being dissatisfied with the aforesaid decision, the appellant proffered the instant appeal on liability and quantum on the following grounds:-
  - 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 balance of probability as is required by law.***
  - iv. ***The learned trial magistrate's award of damages was inordinately too high and manifestly excessive for the 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.**

6. By consent the parties, the appeal was presented by way of written submissions. The appellant's advocates ***Kibichy & Company Advocates*** filed their written submissions on 9<sup>th</sup> June, 2015 while the Respondent's advocates ***Alwange & Co. Advocates*** filed theirs on 13<sup>th</sup> April, 2015.
7. This is a first appeal to the High Court. In the premises, this court is not bound by the findings of fact made by the lower court but it is under a duty to re-evaluate and reconsider the evidence on record and reach its own independent conclusions – **See : *Selle V. Associated Motor Boat Company Ltd (1968) E.A.123; Williamson Diamonds Ltd V. Brown [1970] E.A.*** The court should however be slow to interfere with the findings of fact made by the trial court bearing in mind that it did not have the advantage of seeing or hearing the witnesses. See: ***Peters V. Sunday Post Ltd [1958] E.A. 424.***
8. I have considered the evidence adduced before the trial court, the judgment of the learned trial magistrate, the rival submissions presented by the parties and all the authorities cited. Having done so, I find that the respondent's case that he was injured in the course of his employment with the appellant on 28<sup>th</sup> March 2011 in an accident occasioned by its driver was not challenged or controverted by any material evidence by the appellant.
9. The respondent testified that on the material date, he had been assigned the duty of collecting rubbish from some green houses which was to be loaded into a tractor which had a trailer for transportation elsewhere; that while sitting on the trailer, the driver unleashed the same without any warning as a result of which he was thrown to the ground as a result of which he suffered a dislocation of the right shoulder. On cross-examination, he stated that he was careful during his duties and that he blamed the driver for the mishap.
10. The appellant on the other hand called three witnesses. The witnesses admitted in their evidence that the respondent was indeed one of the appellant's employees and that he had been on duty on the material date.

Though DW1 and DW3 testified that the respondent had told them that he had fallen from a motor bike the previous day, they confirmed that the appellant used to maintain an injury book in which entries were made recording how a worker had sustained injuries.

The appellant however failed to produce the said book in support of its case that the respondent had sustained his injuries by falling from a motor bike and not by falling off a tractor in the course of his employment. It is also important to note that the respondent was indicated to be the source of the information DW1 and DW3 had testified about but in his evidence on oath, he gave a different account on how he had sustained the injuries. His evidence was not challenged on cross-examination.

11. In view of the foregoing evidence, I find that the trial court cannot be faulted for having accepted and relied on the evidence adduced by the respondent and in disregarding the appellant's evidence on liability. From the recorded evidence, I am unable to see how the respondent could have contributed to the accident.

It is clear that the tractor trailer's driver caused the accident in question by failing to exercise due care and attention by alerting the respondent that he was about to unleash the trailer. And as it is not disputed that the said driver was

the appellant's employee or servant, I find that the appellant was vicariously liable for his negligence. I am therefore satisfied that the trial magistrate was right in entering judgment against the appellant on liability at 100%. Consequently, the appeal on liability fails and it is accordingly dismissed.

12. Turning to the appeal against quantum, it is trite that the award of damages is at the discretion of the trial court. That discretion must however be exercised judiciously in accordance with the law and the established legal principles. It is now settled that an appellate court should interfere with

an assessment of damages by the trial court only when it is satisfied that in arriving at its decision, the trial court applied a wrong principle of law or took into account some irrelevant factor or left out of some relevant one or that the amount awarded was so inordinately low or so inordinately high as to lead to an inference that it must be a wholly erroneous estimate of the damages. See: *Ziphorah Wambui Wambaira and 17 Others v Gachuru Kiogora & 2 others C.A at Nairobi Civil Appeal No. 10 of 2004 [2004] eKLR; Kemfro Africa Limited & Another vs. Lubia & Another (No. 2) [1987] KLR*

13. In this case, the respondent's injuries were pleaded as follows;

- a) Swollen and tender right shoulder
- b) Dislocation of the right acromio clavicular
- c) Severe pains during and after injury.

The medical report prepared by **Dr. S.I Aluda** confirmed that the respondent had only sustained soft tissue injuries. The injury the respondent had suffered was a swelling, tenderness and dislocation of the right shoulder. The report shows that when he was examined by the doctor on 28th June 2011 about three months later, the injury had healed save for occasional pains which were expected to subside with the use of analgesics

In her judgment, the trial magistrate stated as follows;

***“There is no doubt as per PW2 that PW1 sustained the following injuries;***

- a) Blunt tender trauma to the chest***
- b) Blunt tender trauma to the lumbo sacral***
- c) Blunt tender trauma to the pelvis***
- d) Loss of lumbas lordosis***
- e) Severe pains during and after injury***

***For this injuries, the trial court awarded general damages in the sum of Kshs 150,000”***

14. From the foregoing, it is clear that the trial court erred in analysing the injuries suffered by the respondent which were supposed to form the basis of the award. The trial court took into account injuries which were apparently much more severe than the actual injuries sustained by the respondent. It then follows that the trial court applied the wrong principle while awarding damages in the sum of Kshs. 150,000 since it based the award on injuries not actually sustained by the respondent.

15. On my part, taking into account the respondent's injuries, comparable awards at the time and the element of inflation, I find that an award of Kshs. 100,000 would have been fair and reasonable compensation for the injuries the respondent had suffered. In the circumstances, I am satisfied that the appeal on quantum is merited. The same is accordingly allowed. The award of Kshs. 150,000 as general damages is thus set aside and is substituted with an award of Kshs, 100,000. The award of special damages in the sum of Kshs 3,050 was not challenged on appeal. The same will therefore remain undisturbed.

16. In the end, there will be judgment for the respondent against the appellant in the total sum of Kshs. 103,050. The amount will attract interest from today's date until full payment. The respondent is awarded costs of the lower court but as the appeal has partially succeed, each party will bear its/ his cost of the appeal.

It is so ordered.

**C.W GITHUA**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 30<sup>th</sup> day of July 2015**

In the presence of:

Ms Mwagoni holding brief for Ms Kemei for the Appellant.

Mr. Oduol for the Respondent

Mr. Lesinge Court clerk