



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 13 OF 2011

(Being an Appeal from the Judgment of the Senior Principal Magistrate Honourable Lilian Mutende in Chief Magistrates Civil Suit No. 3010 of 2007 wherein Peter Musau Nzuki -versus- Goshrani Printers Limited delivered and dated 17th January 2011)

GOSHRANI PRINTERS.....APPELLANT

VERSUS

PETER MUSAU NZIOKI.....RESPONDENT

JUDGMENT

Introduction

1. The appellant has impugned the judgment of the lower court Hon.Lilian Mutende,SPM, as she then was, dated 17/01/2015 on the grounds that:-
 - i. The learned Magistrate erred in law and in fact when she failed to examine the evidence adduced before the Court in support of the case and arrived at a decision contrary to the weight of the evidence adduced.
 - ii. The learned Magistrate erred in law and in fact in holding the Defendant 100% liable and not awarding any proportion of liability on the Respondent hence the Learned Trial Magistrate's finding on the key issue of negligence was biased and totally unsupported and has resulted in the miscarriage of justice.
 - iii. The learned Magistrate erred in fact and in law in totally ignoring the credible evidence of the Defendant negligence.
 - iv. The learned Magistrate erred in fact in awarding the Plaintiff general damages for pain and suffering loss of future earnings and special damages being in total of Kshs.1,255,200/= which award is manifestly excessive to the injuries sustained by the Respondent.
 - v. The learned Magistrate erred in law and in fact in misapprehending and misunderstanding the principles applicable in the computation of loss of future earnings by making an award of Kshs.855,000/= for loss of future earnings based on 25 days per month leading to a grossly erroneous award under this head.
 - vi. The learned Magistrate erred in fact and in law by failing to consider that the Respondent can do

work and earn a living considering that only three of his fingers were amputated.

vii. The learned Magistrate erred in law and in fact when she failed to consider the appellant's submissions and the cases cited of similar injuries in respect of the same matter in question thereby giving the Respondent an award that was inordinately excessive in the circumstances of the case.

viii. The Judgment is manifestly unreasonable and unjustified.

2. By directions given on the 15/9/2015 the parties were ordered to file skeleton argument and to attend court for highlighting of such argument. Pursuant to that order the parties filed their respective submissions supported by decided cases.
3. The facts leading to this appeal are brief and straight forward. It was pleaded in the plaint dated 3/9/2007 that the plaintiff/respondent was on the 25th June 2007 engaged as an employee of the Appellant as a machine operator when a rope holding the rollers got cut, the rollers fell and crushed the Respondent's fingers thus causing to him severe injuries loss and damage. The injuries were thus attributed to negligence on the part of the Defendants as appellant herein and particulars of such injuries were given together with the particulars of special damages in the sum of Kshs.2,000 being the costs of procuring a medical report.
4. To the suit the defendant/appellant filed a statement of defense dated 2011 November 2007 in which the allegations in the plaint regarding negligence were denied and the plaintiff blamed for the negligence leading to his injuries on the basis that he was attempting to set paper reel on a sheeting machine when he got injured. Particulars of negligence were attributed to the plaintiff.
5. At trial the plaintiff's side called two witnesses; the plaintiff and the doctor who prepared the medical report while the defendant called one witness who was the supervisor on duty.
6. After hearing the parties and after written submissions were filed, the trial court delivered its judgment dated 17/1/2011 by which it found the defendant (now appellant) liable to the Respondent on liability at 100% and assessed damages in the sum of Kshs. 1,255,200 (*my calculation put it at 1,257,000*) made up as follows:-

Pains and suffering	Kshs. 400,000
Loss of future earning ...	Kshs. 855,000
Special damages.....	<u>Kshs. 2,000</u>
total	Kshs. 1,257,000

It is that judgment which has provoked this appeal by which the appellant challenges both finding on both liability and award of quantum of damages.

7. My jurisdiction as a first appellate court is to reevaluate, analyse and reexamine the entire evidence as presented before the trial court afresh with a view to coming to my own conclusion while being aware that I lack the benefit of having heard and observed the witnesses as they testified.

Was the finding on liability supported by the evidence adduced?

8. The question and determination of the liability in a Civil matter is a matter of evidence unless in those instances when the law impose strict liability. In the case before me, the onus was upon the plaintiff/respondent having alleged negligence on the appellant to prove that negligence and its particulars on a balance of probabilities.
9. In this case the Respondent gave evidence that his station of work involved the use of a roller operated by a chain block and a rope. The rope snapped and the roller injured his fingers. The question is whether it was foreseeable that a rope used to control such a roller could snap and result in an injury. It is the question of foreseeability.
10. In his evidence the plaintiff said in examination in chief:-

“I used chain block. My colleague was pulling it.....rope from the opposite side, the rope got out the roller fell on my head (hand!!) cutting my two (2) fingers on the left hand. I blame my employer for the accident. I had complained about the decision it was dangerous to use a rope. It is a chain that ought to have been used not a rope. After I got injured they fixed the chain. The sisal rope was old. It was in use for two years hence kept cutting.” (emphasis provided)

11. Against that evidence the appellant called ABEDNEGO KALAMA MWANGOME, who was the supervisor on duty but who did not witness the incident. His evidence was that indeed the rope got cut and it was still hanging when he arrived. His evidence did not address the complaint by the Respondent that the rope was old and had kept cutting. To that extent the evidence by the Respondent which tended to show that the Appellant failed in his statutory duty to provide safe systems of work, was never rebutted.
12. The burden in Civil Proceeding is proof on a balance of probabilities. Having proved that the rope was old and susceptible to snapping, what was expected of the appellant was to prove that it did its best in the circumstances by repairing it or indeed that the rope was new and the incident of cutting was thus unforeseeable or not reasonably foreseeable or just that it was inevitable.
13. I am not convinced that the Respondent had a duty other than that expected of a reasonable machine operator to observe the state of the rope and report. It could not be expected of him to do more than report and be observant. In fact the evidence by Dw1 was that the respondent had been at the same station for a period since 1992 initially as a casual without an incident.
14. It was not the Respondents duty to devise and implement a safe system of work. That duty was at all times upon the Appellant to ensure that the system of work was made as safe as possible. I therefore find and hold that the Respondent did prove at trial, on a balance of probabilities, that the Appellant did not provide safe system of work and therefore exposed the plaintiff to injury it knew and ought to have known to becon.
15. In the filed statement of defense the Appellant had attributed negligence as against the Respondent at paragraph 5 to the effect that the Respondent failed to keep a proper look out while operating the machine, that he did not take regard for his own safety; failed to wear provided safety protective gear provided and generally acting in manner not expected of a person of his experience. One again, the evidential burden, once the Respondent proved that the rope was old and prone to cutting, shifted upon the Appellant to prove otherwise. In the instant case no attempt was made to prove the particulars pleaded and as I have said above the evidence of DW1 did not in any way disturb the evidence as led by the Respondent. It would be interesting to understand, what precaution or lookout would be expected of any person in the Respondents position to obviate the rope snapping.

I hold that the appeal against the finding on liability lacks merit and the same is dismissed.

Was there an error by the that court in assessing damages:-

16. The trial court awarded to the Respondent damages as follows:-

General damages

Pain and Suffering.....Ksh.400,000

Loss of future earnings.....Ksh.855,000

Special damages.....Ksh. 2,000

Total Ksh.1,257,000

17. That award has been challenged by the Appellant in grounds 1,5,6,7, & 8 in the Memorandum Of Appeal on the basis that the judgment was manifestly and inordinately high, unreasonable and unjustified. It is therefore sought that this court sets aside the Assessment of damages and make an

- assessment of its own.
18. An order in award of damages is essentially an order on discretion which an appellate court can only interfere with on established and well beaten path of *stare decisis*. The grounds upon which an appellate court would interfere with exercise of discretion is assessment of damages are that an award by the trial court was reached based on a wrong principle or that the award is so inordinately high and excessive or inordinately so low as to be a wholly erroneous estimate of the damages due in compensation for injury suffered. see **KEMFRO AFRIKA LTD. -VS- A.M. LUBIA & OLIVE LUBIA [1982-1905]1KLR727**.
 19. Granted that sitting as a first appellate court my jurisdiction extend to reviewing and reevaluating the entire evidence, I must also take into account the fact that I need not substitute my discretion for that of the trial court, which had the benefit of having heard, seen and observe its witnesses as they testified.
 20. The evidence at trial was that as led by the plaintiff and **DR.STEPHEN KEWEGENY NAEWA**. The totality of the evidence was that the Respondent suffered injuries to the left hand namely
 - Traumatic amputation of the 4th digit of the base
 - Traumatic amputation of the 3rd digit of the joint.
 - Fracture of that middle phalanx.
 - Extensive cut wound on the palm.
 21. He was admitted in hospital for a period 4 days. The doctor assessed residual incapacity at 10%. The Respondent also gave evidence in which he said that he was rendered unable to use the left hand and that he could not lift anything with that hand.
 22. It is noteworthy that evidence was never challenged at all. I therefore remained the only evidence to guide the court on measure of damages when applied to past decided cases.
 23. The parties before the trial court filed written submissions supported with decided cases. The filing of submissions has found its place in the memorandum of appeal as the appellant complains that its submissions were never regarded but ignored. I will strive to consider this appeal while taking into account the pleadings before the trial court, the evidence led, the submissions offered and authorities cited as well as the award made by the trial court to establish whether or not an error was made in principle or if the award is inordinately high and excessive as to amount to disclose outright error in exercise of discretion.

General damages for pairs, suffering and loss of amenities:

24. Under this heading the factors that the court takes into account is the extent of injuries suffered, the persistence of the injuries and any residual effects on the claimant.
25. The plaintiff cited to court the decision in **PATRICK ODHIAMBO OBIRO -VS CATHOLIC DIOCESS OF NAKURU NKU HCCC NO.177 OF 1995** in which Rimita J, awarded to the plaintiff the sum of kshs 400,000 for injuries involving amputation of 3rd & 4th fingers as well as the thumb with a residual incapacity approximated at 14% the judgment was delivered in the year 1997. The Plaintiff also cited **MOMBASA HCC. 350 OF 1996** in which the plaintiff who suffered amputation of three fingers and laceration of the little finger was awarded Kshs.500,000 in the year 2000. The decision in **MOMBASA HCC NO. 133 OF 1998** in which the plaintiff suffered injuries leading to amputation of four fingers and was awarded Kshs.540,000 in the year 2001.
26. On their part the Defendant, now appellant, cited the decision by the court of appeal in NAIROBI CACA no. 211 of 2002 in which the court of appeal seem to have confirmed an award of Ksh.320,000 for loss of three fingers. The judgment of the court of appeal is dated 29/1/2004 but it is not evident when the decision by the High Court was made. The applicant further cited MSA HCC NO. 338 OF 2002 in which for loss of 3 fingers resulting in incapacity of 35%, Mwera J awarded Kshs.200,000 in the year 2005.
27. The decided cases to me were of comparable injuries and were thus a good guide to the trial court on what damages were awardable. As is conventional, the ages of those cases were to be taken into account noting that passage of time erodes the value of money. What is however important is that the decision were all binding upon the trial court and it was thus open for the court, while exercising a judicial discretion to be guided on the sum awardable without necessarily being bound to award the exact amount by one particular , since no two case are 100% similar. The trial

court upon consideration of the submissions, without stating so, in her judgment awarded to the Respondent the sum of Kshs.400,000.

28. For me to upset the assessment by the trial court findings, I must be satisfied that the parameter set as stated earlier in this ruling have been met. In my judgment, the award by the trial court is not one in the nature inviting description as being too high and excessive to manifest whole error in estimates. Being a discretionary jurisdiction I am guided by the decisions in MBOGO & ANOTHER VS SHAH on this point.

Loss of future earnings

29. Damages under this heading are also at large and are awarded on the basis that by virtue of the injury the claimant has suffered disables him for continuing with the source of income as before. It is not that the claimant be rendered totally incapacitated. It is enough that he cannot do the same work or cannot perform it as efficiently as before the injury. In the case of **LALJI -VS- TOKA CACA NO. 40 OF 1980**, the court of appeal said:-

“it does not seem to be disputed that the appellant cannot work as efficiently as he used to: he can no longer drive 20 miles a day soliciting orders and making deliveries; he cannot lift weights, nor can he sit or stand for a long period without undue discomfort..... this alone, in my view, is sufficient to show that the appellant has suffered in regard to further earnings... in my view made out a case for some sort of award in respect of diminished earning power.”

30. In the instant case the trial court found as a fact that the appellant was unable to work as a machine operator. The court then adopted the multiplier principle to assess the damages and adopted a multiplier of 10 years with his proven earnings and a 25 day per month as the basis of calculation.

31. In my view the trial court was perfectly within its rights to proceed as it did. I am unable to find an error in principle on the trial court. In fact, had I been the trial court, I would have adopted a higher multiplier and even a higher multiplicand for I am of the view that to pay an employee as a casual, daily wages, is not to be countenanced for a period as long as disclosed in this matter. I however refrain myself nothing that I should not interfere with a discretionary decision merely because I would have exercised my discretion differently.

32. The upshot of the foregoing is that the appeal on both limbs of liability and assessment of damages lack merit and I dismiss the same in entirety with costs to the Respondent.

Dated, signed and delivered at Mombasa this 18th day of December 2015.

In the presence of:

Ms Adagi, for the Appellant.

No Appearance for the Respondent

P.J.O. OTIENO

JUDGE