



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 621 OF 2004

GEM COURT LIMITED. APPELLANT

VERSUS

CHARLES ANDOLE. RESPONDENT

(From the judgment of Hon. El Kindy Principal Magistrate, Milimani CMCC No. 2049 of 2001 delivered on 22/7/2004)

J U D G M E N T

1. The Respondent was the Plaintiff in the Chief Magistrate's Court case No. 2049 of 2001, **Charles Andole Vs Gem Court Ltd.** By a Plaint dated 23rd March, 2001, the Respondent claimed that he was employed by the Appellant as a casual labourer in or about April 1999 for a sum of Ksh.150/- per day. That on the 28th April, 1999, at about 11.00 a.m., whilst in the course of his duties, the Respondent was carefully climbing a ladder when it collapsed whereby he fell and was injured. He attributed the cause of the accident to the negligence on the part of the Appellant. He alleged that he was injured as a result of the accident. He claimed general damages and special damages of Ksh.2000/-.
2. In its defence, the Appellant denied there having been any contract of service between it and the Respondent as alleged; it denied the occurrence of the accident or having been negligent as claimed. All the particulars of negligence pleaded by the Respondent were also denied. In the alternative, the Appellant alleged that the Respondent was the cause of or contributed to the occurrence of the accident and gave particulars of such negligence. The Appellant further pleaded the doctrine of "***volenti non-fit injures***" as against the Respondent and prayed that the suit be dismissed.
3. The matter came up for hearing before Hon. A. El Kindy PM who after hearing the witnesses and submissions of learned counsel found the Appellant liable, and entered judgment in favour of the respondent for Ksh.400,000/- general damages and ksh.5,000/- special damages. He also awarded the Respondent the costs of the suit.
4. Aggrieved by the said decision, the Appellant has appealed to this court setting out seven (7) grounds of appeal in its Memorandum. These may be summarized as follows:-
 - a. ***That the trial court erred in holding that the suit had been proved on a balance of probabilities and for finding the Appellant to be 100% liable whilst the defence raised triable issues and pleaded contributory negligence on the part of the Respondent;***
 - b. ***That the trial court erred in proceeding with the case in the absence of the Defence and for failing to appreciate that the failure to call evidence on the part of the defence was a mistake of the previous advocates for the Appellant.***

c. ***That the trial court erred in awarding Ksh.400,000/- for general damages considering the injuries sustained by the Respondent.***

5. This being the first Appellate court, it behoves it to re-examine and re-evaluate the evidence afresh and reach its own independent findings and conclusions. See **Selle & Another Vs Associated Motor Boat Company & Others (1968) EA 123**. In so doing, the court has to bear in mind that it did not see the witnesses testify. **Peter Vs Sunday Post Ltd (1958) EA 424**
6. During the appeal, Mrs. Maina the learned counsel for the Appellant relied on her written submissions dated 24th July, 2014. She submitted that the Respondent did not produce any evidence to prove his employment with the Appellant; that he did not call any of his other fellow employees to corroborate his evidence; that the Respondent had admitted that the ladder from which he fell was not properly built; that in the circumstances the trial court erred in holding the Appellant 100% liable. It was Mrs. Maina's further submission that, the failure to call evidence on the part of the Appellant was a mistake of the previous advocates for the Appellant and that mistake should not be visited upon the Appellant. The cases of **Abdalla Ali Abdulrahman Vs Alya Apartments Ltd (2006) eKLR** were cited in support of that contention. On damages, it was submitted that on the authority of **Khilna Enterprises Ltd Vs Charles Maina Migwi (2006) eKLR** and **Kimatu Mbuvi & Bros. Augustine Munyao Kioko (2006) eKLR**, the award of Ksh.400,000/- for the injuries suffered was excessive. Mrs. Maina urged that the appeal be allowed.
7. On behalf of the Respondent, Mrs. Wachira relied on her written submissions and further submitted that the evidence of the Plaintiff as to his employment by the Defendant was uncontroverted; that since no evidence was called by the Appellant to challenge or controvert that of the Respondent, the trial court could not be faulted. That there was no evidence that was tendered by the Appellant to attribute any negligence on the part of the Respondent; that in the circumstances, the trial court could not be faulted for holding the Appellant 100% liable. On the quantum of damages, Mrs. Wachira submitted that the Respondent suffered 12% deformity; that the cases relied on by the Appellant were inapplicable and the award of Ksh.400,000/- was not excessive. She urged that the appeal be dismissed.
8. I have carefully examined the pleadings, the proceedings in the trial court the judgment arising therefrom and the written submissions and oral highlights thereon by learned counsel. At the trial the Plaintiff testified on oath that he was engaged by the Appellant as a casual labourer at Ksh.150/- per day payable weekly; that on 28th April, 1999 while on duty the ladder he was using collapsed and he fell down. He sustained injuries as a result thereof. He produced medical records to prove the injury. On being cross-examined, he told the court that the ladder was not properly built and it was not firm. He further told the court that his other fellow employees could not be traced at the time to testify on the occurrence of the accident. The defence called no evidence.
9. This was the evidence give on oath that the trial court was confronted with. The Appellant did not call any evidence to controvert the same. From the cross-examination it is clear that the evidence of the Respondent was not challenged at all. The issue as to his employment and the amount and mode of payment were never challenged at all. The only challenge was the nature and status of the equipment (ladder) that he was using at the time the accident occurred. To my mind therefore, the trial court cannot be faulted for having held that the Respondent had proved his case on a balance of probability.
10. As to the failure to call his co-workers to testify on his behalf and corroborate his evidence, the Respondent did explain that they could not be traced as at the time he was testifying. Further, under Section 143 of the Evidence Act, Chapter 80 of the Laws of Kenya, it is not the number of witnesses who testify that matters, but rather the quality of evidence. In this regard, the testimony of a single witness if consistent, relevant and unchallenged is enough to establish case. Accordingly, the trial court cannot be faulted for making the finding that the Respondent had proved his case.
11. As regards contributory negligence, under Section 107 of the Evidence Act, it is he who alleges that must prove. It is the Appellant who alleged in its defence at paragraph 6 that the Respondent contributed to the occurrence of the accident. The Appellant did not call any evidence to prove any of the particulars set out therein. Can the trial court be faulted for not attributing any negligence on the part of the Respondent in the circumstances?

12. I have seen the defence filed before, the trial court. Paragraphs 6(b) and (c) alleged negligence on the part of the Respondent as follows: -

“b) climbing a ladder which he knew, ought to have known and was informed was defective.

d. ***Undertaking a method of work and using implements which he knew or ought to have reasonably known to have been risky to his safety.” (underlining mine)***

13. In cross-examination, the Respondent stated: -

“It was not a properly built ladder. It was not firm.”

It is clear from that answer that the Respondent was confirming that the implement he had been given was defective and risky. Firstly, the Respondent did not say whether that was the only ladder available. Secondly, he did not explain at what stage he discovered that the ladder was not properly built or was not firm and if he did what steps he took to avoid the accident. Finally, he never alleged that there was absolutely nothing he would have done on his part to avoid the accident. To my mind, whilst it is the primary obligation of the employer to provide an employee with a safe and secure environment of work, it behoves the employee always to act in a reasonable manner in the course of his duties so as to avoid exposing himself to any risk. In this case, I am satisfied that the Respondent did not act, prudently and if he did, he never told the court so or there is nothing on record to show that he did so.

14. Accordingly, I am of the view and so hold that notwithstanding that the Appellant did not call any evidence to rebut the Respondent's evidence, the circumstances under which the accident occurred and as narrated by the Respondent they were such that the Respondent could not be held to be blameless. Some contribution should have been apportioned to him. This I assess at 15%.

15. The second ground was that the trial court erred in proceeding with the trial in the absence of the Defendant's witnesses and that failure to call evidence was a mistake of counsel which should not be visited upon the Appellant. The general rule is that a case belongs to a party and not to an advocate. But at the same time, since an Advocate acts on instructions, unless in very clear circumstances, where there is evidence of an advocate acting contrary to express instructions, this is a rule that should not be stretched so much. The rule should not be called upon to aid an indolent or uncaring litigant. It should be applied where, the Advocate alleged to have committed the mistake is blamed and given a chance to rebut or explain his actions.

16. In this case, there is nothing on record to show that the Advocate acted without instructions. The record shows that on the Respondent closing his case, the Advocate told the trial court straight away that he did not have evidence to call. That shows that the Advocate was all along aware that there was no evidence to be called. Simply put, the Appellant had not given the Advocate any instructions as to the existence of any evidence to be called.

17. Further, the trial court cannot be faulted as there was no application for adjournment that was made and denied. In any event, I do not think that it is a ground that can be argued on appeal. It could however, be considered if there was an application to arrest the judgment or set aside the judgment so as to call evidence whereupon the advocate on record would have been given an opportunity to explain his actions. Therefore, the cases relied on by the Appellant are not applicable to this case. I do not consider the ground to have any merit and I reject the same.

18. The last ground was that in the circumstances, of this case, considering the injuries suffered, the award of Ksh.400,000/- made in 2004 was excessive. This court's jurisdiction on the quantum of damages is well settled. In the case of **Butt Vs Khan (1981) KLR 349 at 356**, the Court of Appeal held: -

“An Appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which is either inordinately high or low”.

19. In this case, PW 1, Dr Washington Wokabi testified that the Respondent sustained a fracture of left forearm. When he examined the Respondent, he was complaining of deformity and weakness of forearm. There was a permanent disability of 12%. The trial court was referred to the case of **Margaret Ochieng Vs David N Njihia & Another HCC No. 57 of 1993 KSM(UR)** wherein an award of Ksh.250,000/- was awarded in 1995, and **Caleb Omunga Namboya Vs J. V Strabag - BAU – AG Lima Ltd. NBI HCCC No. 266 of 1994 ((UR)** wherein an award of Ksh.300,000/- was made in 1997 for 50% incapacity.
20. Before this court, the Appellant referred to the case of **Khilna Enterprises Ltd. Vs Charles Maina Migwi (Supra)** where an award of Ksh.100,000/- was made in 2006. It was also referred to the case of **Kimatu Mbuvi Vs Augustine Munyao Kioko (supra)** where an award of Ksh.300,000/- for almost similar injuries was awarded in 2006 in a 20% permanent deformity. On the basis of these two authorities, it was urged that the trial court's award of Ksh.400,000/- in 2004 for 12% deformity was excessive.
21. The case of **Khilna Enterprises Ltd (supra)** in my view is not applicable. The injuries therein were not comparable to the present case. I have examined the cases relied on by the Respondent before the trial court. Although they were very old, the injuries were more serious compared to the present case. I have considered the award by the Court of Appeal in the case of **Kimatu Mbuvi (supra)** whose injuries were slightly serious. The award was Ksh.300,000/- two years after the award of Ksh.400,000/- was made in this case. In my view, a difference of Ksh.100,000/- cannot be said to be so excessive as to permit this court to interfere with the award made in the trial court. I decline to interfere with the same.
22. Accordingly, the appeal is partially successful. The judgment of the trial court is hereby set aside. Judgment is entered for the Respondent against the Appellant as follows:-

- a. ***Liability is apportioned at 85% against the Appellant and 15% against the Respondent.***
- b. ***General damages Ksh.400,000/- plus costs and interest in the trial court is maintained.***
- c. ***Interest on the damages shall be at court rate from the date of judgment in the trial court until payment in full***
- d. ***Since the Appellant was partially successful each party shall bear his/its own costs of the appeal.***

It is so decreed.

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A. MABEYA

JUDGE

Dated, Signed and delivered at Nairobi this 26th day of November 2014.

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J. SERGON

JUDGE