



REPUBLIC OF KENYA

High Court at Eldoret

Civil Appeal 72 of 2006

ELDORET STEEL MILLS LIMITED APPELLANT

VERSUS

ELPHAS VICTOR ESIPILA RESPONDENT

(Being an appeal against the Judgment/Decree of M. K. Nyakundi (SRM) in Eldoret Chief Magistrate's Court Civil Case No. 1133 of 2003 delivered on 25th May, 2006)

JUDGMENT

The appeal is against general damages awarded to the Respondent at the **CHIEF MAGISTRATE'S COURT IN CHIEF MAGISTRATE'S CIVIL CASE NO. 1133 OF 2003 – ELPHAS VICTOR ESIPILA -VS- ELDORET STEEL MILLS LIMITED**. Before the trial court, the Respondent had sued for general damages, special damages, costs of the suit and interests thereon. He had sustained soft tissue injuries to the right arm, right hip, right thigh and right foot and a sub-trochanteric fracture of the right femur while in the cause of his employment to the Appellant Company.

He worked as an electrician with the Appellant Company and his duties included maintenance of machines. On the fateful day, he was instructed to repair a crane positioned thirty (30) feet from the ground. He accessed the crane by climbing through iron metal bars that formed the wall. At 30 feet above the ground, he stepped on grease spilled on the metal, slipped and fell down, thereby sustaining the injuries. He blamed the Appellant for the misfortune for failing to provide him with a ladder for use to climb up to the crane and for not providing him with protective gadgets to use while climbing up.

The learned Magistrate decided against the Appellant at 100% on liability and awarded general damages at Ksh. 300,000/= plus costs and interests from the date of judgment at court rates.

The Appellant was dissatisfied with the Magistrate's decision, and appealed on the following grounds:-

- 1. That the learned trial magistrate erred in law and fact by failing to consider the evidence and submissions of the Appellant on liability and quantum.**
- 2. That the learned trial magistrate erred in law and fact by failing to consider the Respondent's legal authorities relied on.**
- 3. That the learned trial magistrate erred in law and fact in awarding excessive general damages to the Appellants.**
- 4. That the learned trial magistrate erred in law and fact by overly relying upon the evidence of the Respondent which was not proved when awarding damages.**

5. **That the learned trial Magistrate erred in law and fact on liability and quantum for failure to apportion liability between the Plaintiff and the Defendant despite overwhelming evidence being adduced.**
6. **That the learned trial Magistrate erred in law and fact to follow principals of law applicable.**
7. **That irreparable loss and/or damage will be suffered by the Respondents if the award is executed.**

This being a first appellate court, its duty is to re-evaluate the evidence adduced in the subordinate court both on points of facts and law and come up with its findings and conclusions. The appeal is in the nature of a re-trial – see **SELLER -VS- ASSOCIATED MOTOR BOAT CO. LTD (1968) EA, 123 and NYERI CIVIL APPEAL NO. 147 OF 2002 KLR – STANLEY MAORE -VS- GEOFFREY MWENDA**. It is thus this court's onerous duty to re-look at the evidence adduced before the trial court and determine whether the learned Magistrate arrived at the decision that was informed on the evidence tendered him/her.

The gist of this appeal is three fold; Firstly, that the trial Court, based on evidence tendered before it failed to apportion liability against the Respondent; Secondly it awarded an inordinately too high damages and thirdly it failed to consider submissions (including authorities) tendered by Appellant.

I caution my self that an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely wrong estimate – **BHUTT -VS- KHAN (1982 – 88) 1 KAR 1**. Again “**a court of appeal will normally not interfere with a finding of a fact by the trial Court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle**” - see **EPHANTUS MWANGI AND GEOFFREY NGUYO NGATIA -VS- DUNCAN MWANGI WAMBUGU (1982 – 1988) 1 KAR, 278**.

Liability

The evidence of the Respondent (PW1) was that he was instructed by his superior supervisor (an Electrical Engineer) to do repairs on a crane that had developed a mechanical problem. To access the crane he climbed on metal bars that formed the wall. He stepped on grease that was on the metal as a result of which he slipped and fell and sustained the injuries. There was no ladder provided by which he would have climbed and accessed the crane. Nothing demonstrated that it was the duty of the Respondent to provide the ladder. He was neither responsible for pouring the grease on the metal that caused him to slip. On cross-examination, he stated that the grease had been poured by the mechanics who were earlier repairing the crane. Still nothing demonstrated that PW1 was alerted about the grease and he failed to take precautionary measures. He also acted on instructions of his superiors which he could not defy.

He was not provided with any protective gear, for example a helmet or boots that would protect him against major injuries such as fractures. Indeed, his evidence was that he wore his own shoes as he climbed. His further testimony was that it was the sole responsibility of the Appellant to provide protective gadgets such as gloves and boots but had failed.

The Appellant called one witness in its defence. He testified as Defence witness 1 (DW1). He was at all times the Administrator and Deputy Personnel Officer of the Appellant Company. DW1 confirmed that PW1 used what he referred to as struts as opposed to steps to climb the wall. He testified that there was safety warning on the walls alerting the workers to be careful to which PW1 failed to heed. His further testimony was that PW1 had been provided with gloves, boots and apron which he failed to wear as he worked.

On cross-examination, he (DW1) confirmed that indeed PW1 had used the metal steps because there was no ladder provided. It is difficult, though, to believe his evidence that protective equipment was provided to PW1. As an administrator and personnel officer, he ought to keep record of all items and equipment issued to the workers. It cannot escape his dutiful obligation to keep a register of equipment issued to

workers. And nothing was easier than to avail such a register for court's inspection. In the same manner, a sample script of the safety warning inscribed on the wall for the attention of the workers ought to have been produced in court. Against this backdrop, I overrule his evidence and uphold the fact that the Appellant failed to provide safety gadgets to the Respondent which would have prevented a major injury. Moreover, had the Respondent used a ladder to climb up, he would not have met his misfortune. He was not on personal errands but doing official duty. As such the Appellant ought to shoulder 100% liability on negligence. It is not true therefore to say that the learned Magistrate erred in law and fact and so misdirected herself in finding liability against the Appellant at 100% and failing to apportion any negligence on the part of the Respondent.

Award on damages and Cited Case Law

I have noted herein above that, an Appellate court will only interfere with court's award of damages only where it can be demonstrated that in assessing the same, the court took into account a matter that it ought not to have taken into and the vice versa, or that the award is inordinately so high or low as to amount to an erroneous estimate of the same.

In the plaint, the Respondent had particularized the injuries he suffered as follows:-

- (a) The right arm was swollen and tender with bruises.
- (b) Blunt trauma to the right hip which was tender.
- (c) The right thigh was swollen and tender.
- (d) The right foot was swollen and tender.
- (e) A sub-trochanteric fracture of the right femur.

In his testimony, the Respondent said that he was admitted at the Moi Teaching and Referral Hospital between 31/8/2002 and 23/10/2002 when he was discharged. A Discharge Summary from the hospital was produced as P.Ext.1. Two medical reports were also produced as follows:-

- (a) By Doctor S. I. Aluda dated 11th November, 2002 being the Plaintiff's doctor produced as P.Ext.3(a). He particularized the injuries as stated in the plaint.
- (b) By Dr. Z. Gaya dated 13th November, 2003, prepared at the request of the defence and produced as P.Ext.4. At the time, the doctor noted that the Respondent still walked with support of a walking stick. He particularize the injuries as:-
 - 1. Sub-trochanteric fracture of the right femur.
 - 2. Fracture of the metal-tarsal bones of the right foot.

Dr. S. I. Aluda noted that the injuries were severe and there was need of a future major surgery to remove the plate and screw. As for Dr. Z. Gaya he noted that the injury on the right limb had healed with a permanent shortening of the lower part of the limb by two (2) centimetres. He assessed the degree of permanent loss as 35%.

The Respondent's counsel had urged the court to make an award of Ksh. 300,000/= in general damages and Ksh. 1,500/= in special damages. On general damages he relied on the case of **AGNES OKOTH & 30 OTHERS -VS- NYABICHUKU FARM & ANOTHER NRB HCCC. NO. 1540 OF 1988** – in which general damages for pain suffering and loss amenities were awarded at Kshs. 220,000/= for fracture of right femur, contusion to the forehead, contusion to the chest with swelling and hematoma and contusion to the left shoulder and bruises over the knee.

The Appellant's Counsel on the other hand, while urging the court to dismiss the Respondent's case, submitted on an award of Ksh. 200,000/= general damages, in the event the Appellant is found liable. The following case law was cited:-

1. **ALEX NJAGI -VS- KENYA BUS SERVICES LIMITED NBI HCCC. NO. 2614/88** general damages of Ksh. 200,000/= were awarded for a fracture of the right femur, multiple lacerations and severe pain in the chest.
2. **AGNES AKOTH & 3 OTHERS -VS- NYAKICHUKU FARM & ANOTHER NBI HCCC. NO. 1540 OF 1999 (Supra)**
3. **KASANGA MUSUMBA -VS- ARUS LUTTUNYO – MOMBASA HCCC. NO. 259 OF 1994** – Court awarded general damages of Kshs. 120,000/= for a fracture of the shaft of the femur.

Both parties cited case law that was relevant and comparable to the case at hand. It is noted the Respondent suffered the injuries on 31/8/2002 and the cited authorities related to accidents of over ten years before the year 2002. The learned Magistrate was keen to note the difference of time in arriving at the figure of Ksh. 300,000/=. She applied the relevant principle of law and considered all the facts laid before her. Nothing has changed since the delivery of the Judgment that should necessitate this court to disturb or interfere with the award of that court.

May add that I have equally considered the submissions made by the respective Counsel on record and the case law cited by counsel for the Appellant. On liability counsel for the Appellant cited the case of **STRATPACK INDUSTRIES -VS- JAMES MBITHI MUNYA – NBI HCCC. NBI 152 OF 2002** in stating that the Respondent did not demonstrate the causal link between the Appellant's negligence and the injuries he suffered. The opposite is factual. The Respondent was clearly able to prove that the accident occurred as a result of the Appellant's failure to provide a ladder for use to reach to the crane. Moreso the metal steps available for use had grease which caused him to slip and fall.

I have referred to the above cited case only for purposes of demonstrating that the proper principle of law and fact was followed by the learned Magistrate in holding the Appellant liable at 100%. It is important to note that this was not a case cited during the hearing before the court but is relevant in determining liability. Indeed, the appellant has introduced other case law touching on quantum of damages, which this court is not obligated to consider as they were not referred to before the Magistrate. But for record purposes I have looked at them and are not comparable with the instant case in terms of the nature of the injuries suffered.

Suffice it to say, the Respondent herein was admitted to hospital for close to two months which demonstrates he sustained serious injuries – and so the learned Magistrate did not misdirect herself in arriving at the figure she did. The figure she awarded was not inordinately so high in the circumstances and I do not intend to disturb it.

On special damages the learned Magistrate stated:-

“On the issue of special damages I do not award any as the same was not proved though pleaded.”

However, the Respondent while producing the medical report of Dr. Aluda as P.Ext.3 (a), also produced a receipt as P.Ext.3(b), for the fees he paid for preparation of the medical report. There was no objection of its production by the Appellant's counsel. The receipt also forms part of the record of appeal on page 48 thereof. This was an error on the part of the court as the special damages pleaded were specifically proved. The Respondent is thus entitled to this sum.

In view of the foregoing, this appeal is dismissed with costs. Damages are awarded as follows:-

- (a) Damages for pain, suffering and loss of amenities

Ksh. 300,000/=

(b) Special damages

Kshs. 1,500/=

T O T A L

Kshs. 301,500/=

The Appellant shall, in addition pay costs of the lower court suit plus interests thereon at court rates.

DATED, SIGNED and DELIVERED at **ELDORET** this 13th day of March, 2013.

**G. W. NGENYE – MACHARIA
JUDGE**

Mr. Buluma holding brief for Nyaundi Tuiyot for Appellant

No appearance for Respondent