



REPUBLIC OF KENYA
IN THE HIGH OF KENYA AT MOMBASA

Civil Appeal 177 of 2010

MOTALENT CONSTRUCTION CO. LIMITED.....APPELLANT

VERSUS

MRINZI CHIMAIRA MBETSYA.....RESPONDENT

RULING

Background

1. This is an appeal by the Defendant in the lower court from the judgment and decree of Hon. H.B. Yator, Resident Magistrate, in CMCC 1221 of 2009, made on 21st July, 2010.
2. Briefly, the Plaintiff claimed special and general damages for injuries sustained whilst working as a casual for the Defendant at a construction site. He slipped and fell down on a wet floor, as he was carrying gravel to a mason, and dislocated his left shoulder. The trial Magistrate apportioned liability at 10% against Plaintiff/Appellant and 90% against Defendant/Respondent. He awarded the Plaintiff general damages of Kshs. 190,000, subject to contributory negligence, special damages of Kshs. 5000/=, costs of surgical intervention at Kshs. 90,000/= and costs of the suit plus interest.

Grounds of appeal

3. The appeal impugns the lower court's judgment on liability, quantum and costs. In grounds 1-7, the Appellant argues, essentially that the Magistrate erred in holding the Plaintiff/Respondent 10% and Defendant Appellant 90% liable. This was contrary to the evidence which showed that the Plaintiff had conceded that he was working whilst sleepy, had poured water on to the floor and was not careful, and generally, that the magistrate found liability for the Plaintiff against the weight of the evidence.
4. Grounds 8 and 9 of the Memorandum of Appeal allege that the general damages awarded of Kshs. 190,000/- was excessive and amounted to an erroneous estimate of damages. Appellant submitted that if any negligence were found at all, it should not exceed Kshs. 180,000/- on a 100% basis, and at maximum the Appellant could only have been 80% liable. In essence, in such event, that the Plaintiff could have been liable only to pay a maximum of Kshs. 180,000/- less 20% i.e Kshs. 144,000/-, instead of the Kshs. 190,000/- less 10% i.e 171,000/= as found.
5. As for special damages, the Appellant impugns the Kshs. 90,000/= awarded as costs for future surgical intervention. Appellant argues that the report of Dr. Udayan Sheth produced for the defence, clearly showed that the Plaintiff would fully recover with no deformity or permanent incapacity.

6. In grounds 10 and 11 the Appellant argues that the lower court failed to adequately consider the Defendant's evidence prepared by Dr. Udayan Sheth, or the Defendant's written submissions.

7. The parties filed written submissions in respect of the appeal. I have carefully considered the grounds of appeal, the record of appeal, and the parties' submissions. The role of this court includes the power to perform as nearly as may be the same duties as are conferred and imposed on the court of original jurisdiction. In so doing, this court must be careful to keep in mind that it did not have the opportunity to see and observe the witnesses.

8. In this case, after perusal of the record of appeal and the lower court's file, I found that the Defendant's exhibits 1 and 2 were missing from the court file. They are recorded in the record of proceedings as having been produced by consent on 13th May, 2010. Accordingly, on 20th September, 2011, I called upon the parties to provide a complete record, to include the Defence exhibits. Parties complied.

Liability

9. On this issue, Paragraph 4 of the Plaintiff asserted that the Defendant, as employer, was liable to provide and maintain adequate and suitable machine, tackle apparel and application to enable the Plaintiff carry out his work in safety. At Paragraph 5, the Plaintiff averred that he was carefully and lawfully in the exercise of his work of carrying building materials when he slipped and fell down.

10. In his evidence in chief, the Plaintiff, in his most significant evidence on his work conditions, facilities and environment, said *inter alia*

“I was carrying gravel to the mason.. was sleepy and was told to hurry up and slipped on where there was water. I was provided with shoes that were old. I told them but they refused to supply new ones... I blame the items I was given as not fit.”

In the Plaintiff's written submission he said:

“The Plaintiff was never provided with safety apparel such as boots and gloves and that the wet floor was never dried up by any of the other employee and these factors exposed the Plaintiff to danger...the Defendant permitting the failed to take adequate precautions permitting the Plaintiff to work in dangerous circumstances and failing to provide a safe system of work and safety apparels.”

11. The Plaintiff in cross examination said:

“There were two fundis and myself ... It was me who was drawing the water. It was me who dropped the water. I knew there was water on the ground. It was me who chose the number of the shoes that fit me. I was forced to put on the shoes. There was nowhere I told him the shoes were faulty... I was not careful.

Then in Re-examination he said:

“I was to blame myself for slipping and also being sleepy. There was dew.”

12. My analysis of this evidence is as follows. In regard to work apparel, the Plaintiff was given shoes. He told the supervisor they were faulty. He chose the size for himself and they fit him. The nature of their faultiness was not described or investigated at trial. Thus, with regard to the Plaintiff's claim that adequate apparel was not provided, I do not think this point was demonstrated by the evidence.

13. When the Plaintiff fell, it was because, as he said, he slipped on the wet floor. He himself admits he had been fetching the water that poured on the floor making it wet and slippery. This created an unsafe working environment, and the supervisor should have seen to it that it was either properly mopped up or that less water was carried so that it did not pour on the floor, creating and heightening chances for an

accident. On this aspect, the Defendant was clearly negligent.

14. It is also clear that the Plaintiff's falling down was contributed to by the fact that he was working whilst sleepy. It is normal that a sleepy person is unalert and inattentive. So that, when he was told to hurry up, the likelihood of spilling water in that inattentive state was higher, as was the likelihood of slipping on the wet floor. On this aspect, both the Plaintiff and his supervisor were to blame. The Plaintiff for not reporting that he was sleepy and seeking time off, and the supervisor for not noticing the Plaintiff's sleepy or sloppy manner of working, and allowing him time off.

15. In the end, I am satisfied that the Magistrate's finding on liability, and in particular, his discretionary apportionment at 90:10 was on the higher side given the Plaintiff's role. I agree with the Defendant on an apportionment at 80:20 if liability was found at all. I will therefore award liability at 8:20, but on the *quantum* found by the Honourable Magistrate. The award will be Kshs. 190,000 - Kshs. 38,000 = Kshs. 152,000/=

Quantum

16. On quantum, I agree with the Appellant, that the Hon. Magistrate failed to consider the Defendant's medical report. If he did consider it, he did not only not give any indication of so doing in his judgment, but he also failed to evaluate the evidence against the medical report of the Plaintiff's doctor which he adopted in its entirety.

17. There was a medical report by Dr. Udayan Sheth for the Defendant. He is described in the report as a consultant Orthopaedic surgeon. He is a specialist in the branch of surgery which deals with bones and disorders of the joints and spine. This doctor's report is based on an examination and X-ray of the Plaintiff's shoulder. It states as follows:

"Opinion: Mr. Mbetsa sustained dislocation left shoulder on 1st December, 2007. He was admitted at Mombasa Hospital.

At present he has stiff left shoulder. He needs to do vigorous physiotherapy to get full movements. He will recover fully with no deformity and no permanent incapacity."

18. The report was produced by consent. The Plaintiff did not reserve any position in respect of its production, nor did he choose to demand cross-examination to test that evidence. It must therefore, be deemed to be legally unchallenged. This evidence must then be juxtaposed and compared to Dr. Ndegwa's evidence on future surgery and costs thereof. Dr. Ndegwa, who is not a specialist in matters orthopaedic, stated in his report that the Plaintiff:

"...needs surgical intervention to correct the recurrent dislocation of the left shoulder. The cost of the procedure plus future treatments will be 90,000 Kshs."

In cross examination he said that the (recurring) dislocation was:

"a weakness that should be corrected. The figure of Kshs. 90,000[is] found on (sic). guidelines given for practitioners."

19. The plaintiff did not, either in his submissions on appeal or in the lower court, comment on or deal with the kernel thrust of Dr. Udayan Sheth's report. Neither did the Magistrate. I therefore agree with the Appellant, and find that the Defendant's medical report was not adequately considered. Had the Magistrate taken that report into account, he would have inevitably found, as I hereby find, that when faced with two reports of experts in the same field but different specialisations, greater reliance should be placed on the report of the expert in respect of whose specific specialisation the issue under consideration relates.

20. Accordingly, I hereby set aside the judgment of the lower court on the award of damages, and

substitute the same with my award as follows:

(a) On General damages I award the Plaintiff/Respondent Kshs. 190,000/- apportioned at 80:20 i.e. Kshs. 190,000/= - Kshs. 38,000/- = Kshs. 152,000/-

(b) For future surgery and treatment in the amount Kshs. 90,000/=. Nil amount is awardable on that aspect.

The appeal is allowed to that extent only with costs to the Appellant.

Dated, signed and delivered this 27th day of September, 2012

R.M. MWONGO

JUDGE

Read in open court

Coram:

1. Judge: Hon. R.M. Mwongo

2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

a).....

b).....

c).....

d).....