REPUBLIC OF KENYA

High Court at Kakamega

Civil Appeal 15 of 2006

ABSOLOM AGALA ……..…. APPELLANT

VERSUS
IMCO BUILDING & ENGINEERING CONSTRUCTION …....RESPONDENT

JUDGMENT

The appellant's case was dismissed by the lower court on 21.3.06. The appellant was aggrieved by the lower court's decision and appealed to this court on the following grounds:-

"1. That the learned trial magistrate failed to appreciate the fact that the matter before him was a claim for damages as a result of an accident in which the appellant suffered grievous bodily injuries legally entitling him to compensation thereof.

2. That the learned trial magistrate grossly erred in law by branding the suit herein as fluke and fictitious and dismissing the same with no orders as to costs.

3. That the learned trial magistrate erred in law by wholly dismissing the appellant's suit herein and not making at all an award in favour of the appellant herein.

4. That the learned trial magistrate erred in law by not properly considering the evidence adduced herein in order to make and or deliver a proper judgment thereafter.

5. That the learned trial magistrate completely failed to appreciate and considerthe circumstances surrounding the accident herein.

6. That the whole judgment herein is legally incompetent irregular and is not backed with any legal and or factual basis."

The appeal was opposed. Both parties filed written submissions which I have considered.

As an appellate court, I have borne in mind the Principles set out by the Court of Appeal in the case of **Selle&Another v. Associated Motor Boat Company Ltd. & Others** (1968) EA.

"An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a

witness is inconsistent with the evidence in the case generally."

In the case before the lower court, the appellant had sued the respondents for special and general damages for negligence, wrongful dismissal, job reinstatement, interests and costs.

On 24.1.06, the plaintiff abandoned, all the other prayers except the prayer for general damages, costs and interests. The plaintiff also conceded to the payment by the respondent of a total sum of Kshs.179,907/=.

It is the appellant's case that during the month of April, 1997, he was working for the defendant company as a mason. While the appellant was carrying out construction work, he fell from a ladder and injured his urethra. The appellant blamed the fall on the ladder which he termed as not properly made.

The appellant was admitted in hospital. Treatment included surgery and Blood transfusion. The appellant blamed the respondent for failure to provide a safe system of work and failure to provide adequate protective gear.

The respondent denied the claim by the appellant. According to the respondent, the incident was solely caused by the appellant's negligence. The appellant was blamed for failure to carry out the work with due care and attention, failure to carry out the work as instructed by the supervisor, failure to heed his own safety and exposing himself to risk of injury. There was no reply to the defence.

DW1, **EDWARD KAMAU** who testified on behalf of the respondent was the foreman who assigned work to the appellant to plaster the celling of a house. According to PW1, there were "benches" which the workers stood on while carrying out the work.

The evidence of the said foreman is that he just saw the appellant hanging on a window with one leg inside and one leg outside the building.

The trial magistrate in the judgment apportioned liability on a 50-50 basis. I agree with the trial magistrate on that score. The plaintiff's evidence is that he fell from the ladder "because it had not been properly made". According to the appellant, the 7ft ladder collapsed while he was plastering the outside of the building. The evidence of the foreman did not dispute the occurrence of the accident. Although the foreman blamed the accident on the appellant's negligence, no details of the accident were given in court by the foreman. The appellant did not also expound on what he meant by saying the ladder was not properly made nor state why the ladder collapsed.

Having apportioned liability on 50-50 basis, it was then incumbent upon the trial magistrate to assess the quantum of damages. The trial magistrate could not turn round to state that the documents produced did not support the claim for the injuries sustained.

I have scrutinized the treatment notes, the discharge summary, the sick sheet, the workmen's compensation form, the medical report and the receipt for the same which were produced as exhibits. There are discrepancies on the date of admission and the date of discharge. The two documents reflect the 29.4.98 as the date of admission and also the date of discharge. The workmen's compensation form and the medical report reflect the date of injury and admission as 20.6.98. All the documents however reflect an injury to the urethra. The foreman (DW1) who testified on behalf of the respondent conceded that there was an accident.

The uncontroverted evidence by PW2, **DR. CHARLES M. ANDAI** is that the appellant was treated for a torn urethra with excessive blood loss. The injury developed complications. The appellant developed a urethra stricture and required surgical intervention. The doctor assessed the degree of permanent incapacity suffered as 10% with a possibility of recurrence of the urethra structure. The appellants side had submitted for an award of Kshs.450,000/= as general damages. The case of **MAGGERY WAMBUGU NAMU VS MR./MRS. NYAGA, NRI HCCC. NO. 821** was relied on. In the said decision, ***MWERA J.***, awarded Kshs.300,000/= in the year 1993 to the plaintiff therein who had suffered a head injury, bruises on the abdomen and a raptured bladder and urethra plus a fracture of the

pelvis. Although there has been passage of time and inflation has set in, the injuries in the said authority are undoubtedly more severe than the injuries in the case at hand.

The respondents side on the other hand cited the case of **NJUGUNA WAWERU VS HASSAN FONDO & ANO. – MSAHCCC 510/87** wherein an award of Kshs.300,000/= was made for injuries to the pelvis, urethra with a perineal wound and skin loss to the right side of the abdomen and groin.

Also cited was the case of **SHAUKA ABDUL RAZAK VS SALIM MOHAMMED C.A MSA 6/90** where in a 1992 decision an award of Kshs.20,000/= was made for an injury to the urethra including the cost of future operations. No details of the injury to the urethra were given in the said authority but the Kshs.20,000/= was an itemized award of general damages for injury to the urethra amongst other injuries with the total award coming to Kshs.540,000/=. The said decision is about 20 years old.

Taking the aforestated authorities into account, an award of Kshs.350,000/= to the appellant as general damages to the appellant is reasonable. The said sum when subjected to apportionment of liability on a 50-50 basis comes to Kshs.175,000/=. The appellant conceded to having been paid a total of Kshs.179,907/= by the Respondent.

In the premises therefore, I agree with counsel for the respondent that the payment already made to the appellant is sufficient.

The appeal is partly successful. Each party to meet own costs.

Delivered, dated and signed at Kakamega this 24th day of September, 2012

B. THURANIRA JADEN

J U D G E