REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Appeal 119 of 2007

MIRITINI BUILDING PRODUCTS LTD. ……..……APPELLANT

VERSUS

JUMAA BITSUMA BENGAO…….DEFENDANT

J U D G M E NT

Jumaa Bitsuma Bengao, the Respondent herein, was employed by Miritini Building Products Ltd, the appellant herein. On or about the 12th day of January 2004, the Respondent was injured while working in the appellant's factory situate at Miritini, Mombasa. The Respondent sued the appellant claiming damages for the injuries in a plaint dated 29th March 2004 and filed before the Resident Magistrate court, Mombasa. The appellant filed a defence to deny the Respondent's claim. The suit was finally heard by B.T. Jaden, the learned Senior Principal Magistrate. In the end, the learned Senior Principal Magistrate found the appellant 70% to blame. The Respondent was awarded Kshs.120,000/- and Kshs.2,000/- being general damages respectively. Being dissatisfied with the aforesaid the appellant preferred this appeal. The appeal put forward three main grounds in its memorandum of appeal as follows:

1. The learned Magistrate erred in law and in fact in failing to hold the plaintiff wholly and or substantially liable for the alleged accident.

2. The learned Magistrate erred in law and in fact in arriving at a decision against the weight of evidence adduced.

3. The learned Magistrate erred in law and fact in awarding general damages to the plaintiff under the heading of pain suffering and loss of amenities which (damages) were manifestly excessive and or inordinately high as to be oppressive.

On the first and second issues, the appellant submits that the trial magistrate erred in law and fact when he found the appellant liable for the accident. It is the submission of the appellant that the Respondent was not assigned the duties he was doing in the factory by the appellant's supervisor and that the appellant never asked for the protective garments. It is said the Respondent did not prove any breach of statutory or contractual duty on the part of the appellant. On his part the Respondent is of the view that the appellant's appeal should be dismissed on the ground that there are no exceptional circumstances to warrant the appellate court interfering with the trial court's decision on liability. I have considered the submissions made for land against this ground. It is not in dispute that the trial court found the appellant 70% liable for the accident. The law is quite settled that a finding of a trial court's decision on the degrees of liability can only be interfered with in exceptional circumstances. In **Zarria Akbarali Shariff and Another –vs- Noshir Priosesha Sethna and others [1963] E.A. P.240** the court of Appeal held interlia that the finding of a trial judge as to degrees of blame to be attributed to two or more tortfeasors involves an individual choice or discretion and will not be interfered with on appeal save in exceptional circumstances. I have examined the recorded proceedings and judgment of the trial court. It is apparent from the judgment that the learned Senior Principal Magistrate considered the circumstances of the case before her before apportioning liability. In fact she stated on the last page of the judgment as follows:

"**If there was a Supervisor at the place of Work then the supervisor could have spotted the plaintiff and thrown him out. To apportion liability in them on the facts of the case is reasonable in my**

view. Both parties contributed to the accident. I would apportion the plaintiff 30% liability and the defendant 70% liability."

After a careful consideration of the evidence and the case before the trial court and the submissions of both learned counsels I am convinced this ground has no merit. It is dismissed.

The third ground is that the award given on general damages is manifestly excessive hence inordinately high and oppressive. I have already stated that the Respondent was awarded Kshs.120,000/- on the head of general damages. The recorded evidence indicate that the Respondent produced in evidence medical evidence assessing his disability at 10%. It is said the trial magistrate failed to take into account the appellant's advocate's submission on quantum and that the authorities relied were in respect of serious injuries. On appeal the appellant is of the view that the Respondent's award should be reviewed downwards to Kshs.90,000/- from Kshs.120,000/-. The Respondent on the other hand is of the view that the appellant's submissions on quantum were taken into consideration. It is also the Respondent's view that the award is neither high nor low taking into account the passage of time and inflationary rates. It is well settled that an appellate court will not interfere with a trial court's award on damages unless it is shown that the same is so inordinately high or low as to represent an erroneous estimate. I have examined the proceedings and judgment of the trial court. It is obvious from the record that the learned Senior Principal Magistrate considered the submissions and the case law cited by learned advocates from both sides before making the award of damages. I have not been shown that the award on general damages is outrageous. Again the third ground is for dismissal.

In the final analysis and on the basis of the above reasons the appeal is dismissed in its entirety with costs to the Respondents.

Dated and delivered at Mombasa this 8th day of April 2009.

J. K. SERGON

J U D G E