REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Appeal 2 of 2006

JOSEPH WAHOME MUTURI ..... APPELLANT

VERSUS

MUNICIPAL COUNCIL OF NYERI ..... RESPONDENT

(Appeal from the original Judgment of the Chief Magistrate's Court at Nyeri in Civil

Case No. 573 of 2004 by Mr. R. Nyakundi – C.M.)

J U D G M E N T

This is an appeal against the judgment of the Chief Magistrate's Court at Nyeri (R. Nyakundi C.M. presiding) by which judgment the learned magistrate found the respondent negligent in failing to provide the appellant with safe system of work. He proceeded to award the appellant Kshs.120,000/= as general damages and special damages of Kshs.1000/=. The learned magistrate also found the appellant to have played a role in the accident. He found him guilty of contributory negligence to the extent of 10%.

The appellant then aged 31 at the time of the trial was an employee of the Respondent. He was tasked with refuse collection. He would collect refuse and load it in motor vehicle registration number KSM 482 owned by the respondent. On the fateful day whilst in the course of his employment as aforesaid he was overwhelmed by the refuse dust bin he was loading, slipped, tripped and fell off the lorry and was seriously injured. The appellant blames the accident on the respondent's failure to provide and maintain a proper system of work, failing to provide adequate precaution to enable the appellant to carry out his work in safety, failing to put in place any preventive measures to avoid injury and loss and finally failing to provide suitable ladders to enable the appellant to work in safety. According to Dr. Eliud Mwangi (PW2) the appellant sustained compound fracture of the middle finger of the left hand. Surgical toilet of the wound was done and it was stitched. The fracture was fixed with plaster of paris. The plaster was removed after one month. At the time of trial in 2005, the appellant still complained of pain in the middle finger. The left middle finder was deformed. According to the Doctor Recovery was not complete and further physiotherapy may be necessary.

The respondent denied responsibility for the appellant's injuries. It denied negligent and averred that it was indeed the appellant who was negligent. The particulars of negligence on the part of the appellant were given in the statement of defence.

It was the respondent's case that on the material day i.e. 30th March 2004, they were picking refuse at Raybells hotel. The dust bin was handed over to the appellant who upon receipt and in the process of pouring the refuse in to the lorry he slipped and fell. The sole witness, called by the respondent Joseph

Wanjohi Maiba (DW1) who was the appellant's supervisor denied that inside the lorry it was wet resulting in the appellant sliding because of the wetness. However it should be noted that at the time the accident occurred this witness was inside Raybells hotel and did not therefore observe the circumstances that led to the appellant falling.

In a thorough and well reasoned judgment, the learned magistrate found for the plaintiff and awarded him sums aforestated as general and special damages. The appellant was not happy with the judgment and in particular the award of general damages. Accordingly he preferred this appeal. In a memorandum of appeal drawn and filed through Messrs Nderi & Kiingati, the appellant faults the learned magistrate's findings on the following grounds:-

1. The learned Chief Magistrate erred in fact and in law in failing to appreciate that the defendant departed from its own pleadings.

2. The learned chief Magistrate erred in fact and in law in misdirecting himself on the evidence hence arrived at the wrong conclusion.

3. The learned Chief Magistrate erred in non-directing himself to the plaintiff's evidence on the injuries sustained and therefore arrived at an erroneous estimates in assessing general damages which was so inordinately low as to be an unfair estimate.

4. The learned Magistrate erred in law and fact-finding the plaintiff contributory negligence a finding not supported by law or facts.

When the appeal came up for hearing both Mr. Nderi and Mr. Wahome, learned counsels for the appellant and respondent respectively agreed to argue the appeal by way of written submissions. This court was not averse to the idea. Subsequent thereto, respective written submissions were filed and exchanged. I have carefully read and considered every aspect raised and covered in the written submissions.

This being a first appeal, this court is enjoined by statute to re-evaluate the evidence on record and arrive at its own conclusion. As regards damages, an appellate court is not entitled to review such awards merely because it is possible that had it been sitting in the first instance it would have awarded a lesser or higher sum. If it has to review, it must first be satisfied that the learned trial magistrate acted upon wrong principle of law or that the amount awarded as damages is so high or so low as to make it an entirely erroneous estimate of damages to which the respondent is entitled. Moreover, where an award of general damages differs significantly from awards given in comparable cases it might be right for an appellate court to interfere. See generally Biashara Master Saw Mills Ltd v/s Ernest Khaye Shipira, C.A. Civil appeal number 251 of 1997 (Nakuru) (unreported).

With these considerations in mind, I have considered the rival submissions of the parties to this appeal. On liability, there is the unchallenged evidence of the appellant. The appellant elaborated on what had transpired on being handed a dust bin containing refuse by his three co-workers and how he was overwhelmed, slipped and fell owing to the wet and slippery surface he was stepping on. He had not been given gumboots although the kind of work he was involved in required that he be given such gumboots.

On the part of the respondent, his supervisor testified to the fact that he was actually in Raybells hotel when the accident occurred. He confessed that he did not know what transpired except that he saw the appellant after he had fallen off the lorry. In the absence of any other evidence to the contrary, the learned magistrate was right in believing the evidence of the appellant as to how the accident occurred. He testified thus: "..... In the course of my work the tank was heavy to lift to offload. I had stepped on vehicle metal where I slipped from. The skid occurred as a result of the slipperiness of the metal where I slipped from. The skid occurred as a result of the slipperiness of the metal I stepped on resulting in a fall. I was not issued with boots or any safety equipments ....."

Essentially what the appellant is saying is that he was not provided with a safe working environment as

expected under common law. It is the duty of the employer to take all reasonable precaution for the safety of this employees and not to expose them to a risk of damage or injury of which he knows or ought to know and he is expected to take all reasonable measures to ensure that the place the employees work is safe. What were the respondent's failings in the circumstances of this case? First, he failed to provide the appellant with the gumboots or other protective gear that could have taken care of the wet slippery surface. Second, it would appear that the appellant required a ladder if he was to work effectively. As it is, and in the absence of a ladder, he was left to improvise on how best he could deliver the service tricky and dangerous as it was. Thirdly, he was left to lift the dust bin and empty the refuse therein into the lorry alone. However the said dust bin had required three people to lift it from the ground before handing it over to the appellant.

The respondent takes the view that the evidence on record actually justified the dismissal of the suit in the trial court. I do not agree with this submission. I think that there was sufficient evidence on record that led to the learned magistrate finding on a balance of probability that the appellant had proved his case. Much as the Defence had raised issues of contributory negligence on the part of the appellant, no evidence was led by the respondent on that aspect of the matter. The respondent's only witness conceded that he did not witness the accident. He only saw the appellant after he had fallen and was injured. None of the particulars of negligence attributed to the appellant were proved by the respondent. On the evidence on record, I think that the appellant is right in complaining that there was no basis for apportionment of liability. There was no evidence led by the respondent to show that the appellant was negligent, contributory or otherwise. There was therefore no basis to apportion to the appellant 10% of the blame and the rest to be born by the respondent. This was not a finding based on any fact or evidence. Indeed the learned magistrate did not at all attempt to justify the apportionment. In my view therefore the learned magistrate erred in apportioning liability. He should have held the respondent 100% liable and I so hold.

The appellant has also invited me to interfere with the award of damages. As already stated, the jurisdiction of this court to interfere with awards made by trial court is well settled. The award must be such as to constitute an erroneous estimate of the damages to which the appellant was entitled to.

I note that during the trial, the appellant had asked for an award of Kshs.230,000/=. In support of this figure the appellant cited the following authorities:-

1. Abdulkadir Mohamed v/s Tana Express & Another

HCCC No. 351 of 1989 (unreported).

2. Biashara Master Saw Mills Ltd (supra).

3. Samuel Kariuki Kinyua v/s Machenzie & Another

HCCC No. 520 of 1987 (unreported).

Although the injuries in those cases are comparable to the ones sustained by the appellant, those awards were made well over 10 years to the day of the trial. There is no indication in the judgment of the learned magistrate that he ever reverted to these authorities as he ought to have. From the record, it is also apparent that the respondent did not submit on both liability and quantum. Mr. Nderi submits and rightly so in my view that the trial magistrate just glossed over the authorities cited and without distinguishing them or even comparing them with other relevant awards plucked a figure from the air and awarded an amount which in view of cited authorities was manifestly low as not to represent a fair award. As already stated the authorities cited by the appellant in support of quantum were delivered well over 14 years ago now. An award of Kshs.120,000/= was suddenly too low. Had the appellant merely suffered soft tissue injuries, I would have had no quarrel with the award. However in the circumstances of this case the appellant sustained a compound fracture of the middle finger and has difficulty in bending and straightening it. The finger was found to be deformed at the second interphalangeal joint and half of the tip of left index finger was missing. In the opinion of the Doctor the finger will need corrective surgery.

These injuries cannot be said to be slight. Based on the authorities cited, taking into account the period since the awards were made and the incidence and or ravages of inflation I think that and award of Kshs.180,000/= as general damages would suit the justice of this case.

In the end I have come to the conclusion that the appeal is merited. Accordingly, I allow it and set aside the judgment and decree of the learned magistrate on liability and quantum and substitute therefore a finding that the respondent was 100% liable for the accident. I also review upwards damages awarded. That is to say that the appellant is entitled to Kshs.180,000/= and not Kshs.120,000/= as previously awarded.

The appellant conceded that he was paid Kshs.7,660/= as workman compensation for the same injuries. That has to be set off against the award I have made as aforesaid lest he be a beneficiary of double compensation. Accordingly the appellant shall be paid Kshs.172,340/= as general damages. I would also award him special damages of Kshs.1000/= and costs of this appeal and the suit in the subordinate court.

Dated and delivered at Nyeri this 9th day of October 2008

M. S. A. MAKHANDIA

JUDGE