REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL APPEAL NO. 232 OF 2001

IMCO ENGINEERING & BUILDING CONTRACTORS LTD…APPELLANT

VERSUS

JOSEPH MACHARIA KARANJA……...……...……RESPONDENT

JUDGMENT

The respondent, Joseph Macharia Karanja, filed suit against the appellant, IMCO Engineering & Building Contractors Ltd seeking to be paid damages on account of the injuries that he alleged to have sustained when he fell down from a wall as he was working for the appellant. He blamed the appellant for the said accident because he averred in his plaint that the appellant failed to provide him with a safe working environment and further failed to provide him with safety equipment that would have prevented him from falling and therefore sustaining the said injuries. The appellant filed a defence. It denied that the respondent was injured at its construction site on the day in question. The appellant put the respondent to strict proof on all the averments that he had made. The trial magistrate heard the case and entered judgment for the respondent against the appellant. He found the appellant to be 90% liable in damages whilst the respondent was ordered to bear 10% liability. The trial magistrate awarded the respondent Kshs 300,000/= general damages for pain suffering and loss of amenities. He also awarded the respondent Kshs 2,000/= special damages. The appellant was aggrieved by the said decision and appealed to this court against the said judgment in its entirety.

In its memorandum of appeal, the appellant raised five grounds of appeal which may be summarised as hereunder; that the trial magistrate erred in finding the appellant liable whereas the evidence adduced, especially that of the appellant's witnesses, did not support such a finding on liability; That the respondent had failed to prove that he was injured while working for the appellant; that the trial magistrate had erred in awarding the appellant general damages that was too high and grossly exaggerated putting into consideration the injuries that the appellant had allegedly sustained; and finally that the trial magistrate had erred in finding in favour of the respondent against the preponderance of the evidence adduced. At the hearing of the appeal Mr Kimatta, Learned Counsel made submissions in support of the appeal. He urged the court to allow the appeal with costs. On the other part, Mr Juma, Learned Counsel for the respondent urged this court to dismiss the appeal. I will consider the arguments made after briefly setting out the facts of this case.

The respondent in this case testified twice before two trial magistrate's court. His evidence was first taken by Miss E. Ominde, the then Resident Magistrate on the 13th of April 1999. He then closed his case on the 30th of August 2002 when the exhibits which had been marked were produced in court by consent. On the 24th of May 2001, when the case was listed before the then Senior Principal Magistrate, N. O. Ateya the case commenced de novo. No orders were made in respect of the evidence that had earlier been taken by Miss E. Ominde, Resident Magistrate. Be it as it may, this court will consider the evidence that

was adduced by the respondent when he testified before the Learned Senior Principal Magistrate. He testified that on the 12th of October 1996, he had been employed by the appellant to work at its construction site. The appellant had been contracted to build a petrol station at Nakuru. The respondent was employed as a carpenter. He testified that as he was removing shutters from a wall about twenty feet high, he slipped from the wall that he was standing on and fell down. He stated that as a result of the fall, he dislocated his ankle. He was taken to the Nakuru Provincial General Hospital, where he was treated and discharged.

He was later seen by Dr Kiamba who prepared a medical report and which was produced by Dr Kiamba himself when he testified as PW2. In his report, Dr Kiamba established that the respondent had sustained a fracture of the lateral malleolus of the right leg. He also sustained severe soft tissue injuries of the right ankle joint. Dr Kiamba noted that x-ray of the right ankle joint/leg were taken which established the injuries that the respondent had sustained. Plaster of paris was applied to the right leg upto the foot. At the time of examination (on the 28th of October 1996) the respondent had not recovered from the injuries that he had sustained. PW2 however opined that the respondent would heal with time. The respondent blamed the appellant's supervisor called Samuel Gathecha who ordered him to undertake the task without providing him with a step ladder. In his view, he could not have fallen down and injured himself if he had been given the ladder. He admitted that he knew that by climbing the wall it was dangerous. He however stated that he could not have disobeyed the instructions of his supervisor. He denied the insinuation that he was not at his place of work when he was injured. The respondent reiterated that he was injured while at the appellant's construction site. Although he marked the initial treatment chit with a view of producing it, at the close of the respondent's case, he had not produced it.

The appellant called two witnesses. DW1 Amos Nduka testified that he worked for the appellant as a foreman. He knew the respondent. The respondent worked for the appellant. He did not know the nature of the respondent's work. He testified that he was at the construction site in question on the 12th of October 1996. He stated that no accident took place. He denied that the respondent was injured on the material day. He admitted that he knew Samuel Gathecha as a fellow foreman working for the appellant.

DW2 Linus Okoth testified that he was employed by the appellant. He knew the respondent. He testified that the respondent had been employed as a mason and not as a carpenter. He stated that he was working in a different place from where the respondent worked. He did not hear or see any employee of the appellant get injured on the material day. He denied that anyone was injured while at work on the material day.

This is a first appeal. In **Abubakar Mohamed Al Amin –versus- Standard Chartered Bank Ltd C.A. Civil Appeal No. 293 of 2003 (Mombasa) (unreported**) it was held at page 15 that;

"This being a first appeal we are duty bound to re-evaluate the evidence, assess it and make our own conclusion remembering that we have not seen nor heard the witnesses and hence make due allowance for that – see Selle –versus- Associated Motor Boat Company Ltd [1968]E.A. 123 at page 126 and Williamson Diamond Ltd –versus- Brown 1970 EA 1."

This court is therefore mandated to reconsider the evidence re-evaluate it and reach its own independent decision. In the instant appeal, the issue for determination is whether the respondent established, on a balance of probabilities, that he was injured while in the employment of the appellant. The other issue for determination is whether the respondent established that he was injured as a result of the negligence and breach of contractual duty by the appellant. If the above issues are determined in favour of the respondent, what is the quantum as to damages to be paid to the respondent?

The respondent pleaded that he was employed by the appellant to work at its construction site. He averred that it was the duty of the appellant to provide him with a safe working environment and not expose him to a situation where he would be exposed to injury. In his testimony before the trial court, he testified that on the 12th of October 1996 he was instructed by a foreman, who was supervising him called Samuel Gathecha, to climb on a wall which was twenty feet high and remove shutters therefrom. The respondent stated that he was not provided with a ladder to climb on the said wall. He testified that while he was

removing the shutter, he slipped as a result of which he fell down and injured himself. His right leg sustained a fracture. He also sustained soft tissue injuries on his right knee joint. After the accident he was taken to the Nakuru Provincial General Hospital where he was treated. The respondent blames the appellant for the said accident that resulted in the injuries that he sustained. It was his testimony that if he had been given a ladder to use to climb on the wall, he could not have slipped and consequently fractured his leg. On its part, the appellants denied that the accident took place. Although it admitted that the respondent worked for it on the material day, they called two witnesses who denied that any employee was injured on the material day. The two defence witnesses denied that there had occurred an accident on the construction site on the material day that resulted in the injuries that the respondent claimed to have suffered from.

I have re-evaluated the evidence adduced before the trial magistrate. It is not denied that the respondent was employed by the appellant to work at its construction site at a petrol station in Nakuru. While the respondent testified that he was injured while at work, the appellants denied this fact. The respondent testified that he was instructed by a foreman called Samuel Gathecha to climb a wall and remove the shutters. The appellant called two witnesses. They however choose not to call the said foreman known as Samuel Gathecha. This foreman could have clarified whether or not the respondent was actually injured at work on the material day. In the absence of this crucial evidence, this court cannot be certain that the respondent was not injured at work. Faced with this conflicting evidence, the trial magistrate, after observing the demeanour of the witnesses, found that the respondent was telling the truth. Apart from the blanket denial offered by the appellant, there is no other evidence which this court can rely on to find in their favour. The appellant choose not to produce the records of employment on the particular day to prove that the respondent had not actually been injured at work. The appellants do not deny that the respondent was injured; the question they raise is the allegation that the appellant could have been injured elsewhere.

Having re-evaluated the evidence, it is my finding that the respondent established on a balance of probabilities that he was injured while working for the appellant. The appellant is liable for the injuries sustained by the respondent because they failed to provide him with a ladder to use to remove the shutters which were twenty feet high along the wall. The appellant therefore failed to provide a safe working environment for the respondent. The appellant instructed the respondent to carry out a task that was inherently dangerous.

The resultant fall and the injury suffered by the respondent cannot therefore be said to be a case of misadventure; The appellant ought to have known that when its workers are instructed to stand on a wall twenty feet high, without a safety net, there is a likelihood that they would be injured. That is the events that took place in this case. I therefore find the appellant to be solely liable for the injuries that the respondent sustained. I overturn the decision of the trial magistrate finding the appellant 90% liable in damages and substitute it with a finding of this court finding the appellant 100% liable.

On quantum, it was held in Samuel Kariuki –versus- Maitai Wang'ombe C. A. No. 260 of 2000 (Nyeri) (unreported) at page 7 that

> **"The appellate court will not interfere with the amount awarded as damages by the trial court unless it is satisfied that the trial court acted on the wrong principle of the law or that he has misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low as to represent an entirely erroneous estimate – See Butt –versus- Khan [1981]KLR 345."**

In Arkay Industries Limited –versus- Amani [1990] KLR 309 it was held that for a superior court to interfere with a lower court's assessment of damages, it must be shown that the sum awarded is demonstrably wrong or that the award was based on a wrong principle or is so manifestly excessive or inadequate that a wrong principle may be inferred.

In the instant case ,PW2 Dr Wellington Kiamba testified that the respondent sustained a fracture of the

lateral malleolus of the right leg. He also sustained soft tissue injuries. In his prognosis the respondent would heal completely from the injuries sustained. The trial magistrate awarded Kshs 300,000/= general damages to the respondent for pain suffering and loss of amenities. In my considered view, the assessment made by the trial magistrate was excessive putting into consideration the cases **of Abdi Mohammed Ali –versus- Kenya Posts Authority Mombasa HCCC No. 124 of 1989 (unreported) and John Okoth –versus- Diversey Wyandotte East & Central Africa Ltd Nairobi HCCC No. 703 of 1991 (unreported)** which was availed to him.

I therefore find merit with the ground of appeal by the appellant that the general damages awarded was excessive. I have also considered the fact that the said decision were made more than ten years ago. In the circumstances of this case, I will therefore set aside the general damages assessed by the trial court and substitute it with an award of this court. Doing the best that I can, I assess the general damages to be paid to the respondent for pain suffering and loss of amenities at Kshs 160,000/=. The respondent shall be paid the proven special damages of Kshs 2,000/=.

Since the appellant has been partially successful on his appeal, it is awarded half of the costs of this appeal. The respondent shall however have the costs of the suit in the lower court.

It is so ordered.

DATED at NAKURU this 3rd day of June 2005

L. KIMARU

JUDGE