REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

Civil Appeal 121 of 2002

TRIDEV CONSTRUCTION…….....……APPELLANT

=VERSUS=

CHARLES WEKESA KASEMBELI…….....…….RESPONDENT

(Being an Appeal from the Decision of the Principal Magistrate at Kapsabet – Mr. F.A MABELE in Kapsabet Principal Magistrate's Civil Case No. 10 of 2001)

JUDGMENT

This is an appeal from the decision of the Principal Magistrate at Kapsabet Mr. F.A Mabele in Kapsabet Principal Magistrate's Civil Case No. 10 of 2001. The learned magistrate delivered his judgment on 24th October,2002. He found the appellant (who was the defendant in the subordinate court) liable to the tune of 90%. He awarded general damages for Kshs 210,000/= and special damages of Kshs 2,000/= together with costs and interest. The appellant, being aggrieved by the decision of the learned magistrate, has appealed to this court on four grounds that :-

1. The learned Principal Magistrate erred in law and in fact in finding the appellant wholly liable for the damages suffered by the respondent.

2. The learned Principal Magistrate erred in law and fact in making an award in general damages that was so excessive as to amount to an erroneous estimate of the damages suffered.

3. The learned Principal Magistrate erred in law and in fact in misapprehending the injuries suffered by the respondent and therefore took into account irrelevant facts in assessing damages.

4. The learned principal magistrate erred in law and fact in failing to address the evidence and submissions tendered by the appellant and therefore failed to take into account relevant facts while deciding the case.

At the hearing of the appeal, Mr. Nyaundi for the appellant submitted that from the plaint it was the plaintiff's (respondent's) contention that there was a contract of employment. The learned magistrate found that the respondent fell from a roof. Though the particulars of negligence were that the appellant failed to provide protective wear, the learned magistrate went ahead to find that the appellant did not provide a belt, while there was no evidence on how a belt would have prevented the accident or reduce the injury.

He submitted that it was in fact the respondent who carried out his work negligently. The respondent had experience and had worked on roof repairs for 15 years. The learned magistrate erred in not finding any negligence on the part of the respondent. The fact that there was an accident, per se, did not amount to negligence on the part of the appellant.

On quantum of damages, he submitted that the particulars of injuries were listed in the plaint. The injuries suffered were soft tissue injuries and an alleged facture. However, the second medical report confirmed that there was no fracture suffered. The amount of Kshs 200,000/= as general damages for the injuries suffered was excessive. He submitted that the learned magistrate erred in being influenced by the case of **Stanely Mukumu –vs- Kariuki - Nairobi HCCC No. 393 of 1989** in which the injuries suffered were more serious. He submitted that, if the appeal is not dismissed, then this court should make its own assessment of the quantum of damages.

Mr. Katwa for the respondent opposed the appeal. He submitted that the respondent was not provided with a safety belt by the appellant. Also the environment was not safe as the iron sheets were loosened and the appellant was not informed. The house on which the appellant was working was very high and the appellant needed a belt. D.W.1 who was a witness for the appellant confirmed that the respondent was not provided with a belt.

On apportionment of liability, the learned magistrate found the respondent 10% negligent. In his view, the appellant did not take reasonable care for the safety of the respondent. Therefore the appellant breached his common law duty towards the respondent who was an employee of the appellant. The fact that the respondent had long experience did not exonerate the appellant from his duty of care.

On the damages, he submitted that the injuries suffered were soft tissue injuries as well as a fracture. The trial court was justified in the award of Kshs 230,000/= as general damages. The fracture suffered was confirmed by the fact that Eldoret Hospital assessed permanent disability as 2%. In his view, the award of general damages was not based on any wrong principle.

This is a first appeal and this court is bound to review the evidence on record and come to its own conclusions.

In brief the facts of the case were that on 26th November, 2000, the respondent and four other workers including D.W.1, were working for the appellant. The respondent was a carpenter of 15 years experience. On that material day, he was working at Kipchomo Tea Estate with the other three workers. They were removing old iron sheets from the roof of a building. The roof was approximately 10 metres high. They used screws and hammers to remove the iron sheets. When the respondent cut one of the bolds that held an iron sheet, he slipped fell down to the floor and got injured. He was taken to Nandi Hills District Hospital and then, on the same day, to Eldoret Memorial Hospital where he was admitted and treated. A medical report was subsequently prepared for him by Dr. Aluda. Later he was examined by Dr. Lodhia of the appellant, who also prepared a medical report. Both medical reports and the Eldoret Memorial Hospital treatment card were produced in court as exhibits. The respondent claimed in his plaint that his injuries were caused due to the negligence of the appellant who was his employer. The appellant denied negligence. The learned magistrate found the appellant negligent and awarded the respondent general damages. The appellant has appealed to this court.

The appellant filed four grounds of appeal. However, Counsel for the appellant did not argue the fourth ground of appeal that the learned magistrate failed to consider the evidence and submissions . I therefore take that ground to have been abandoned.

The first issue for consideration in this appeal is whether the learned magistrate erred in finding the appellant wholly liable in negligence. On this issue, though Mr. Nyaundi has argued that the learned magistrate found the appellant wholly liable in negligence, the judgment of the learned magistrate does not support that contention. The learned magistrate found the respondent 10% contributoriry negligent. In effect the appellant was found to be 90% liable in negligence.

This is a case of negligence between an employer and employee. It is not in dispute that the respondent was injured on duty. Mr. Nyaundi has argued that the employer was not negligent as the respondent was an experienced worker and though he claimed that a belt was not provided, a belt would actually not be of any assistance in preventing or reducing injury. I have perused the evidence. Indeed D.W.1 Peter Nderitu Waweru, who was the appellant's witness testified that belts were there in the store but were not provided. He also testified that there was no place where a belt could be fitted. The respondent also testified that he was not provided with a belt. On the evidence, was the learned magistrate wrong in concluding that the appellant was negligent?

The common law duty of care of an employer towards an employee is clearly stated in the case **of Clifford –vs- Charles & Sons Ltd {1951} ALLER 72** . An employer is not merely required to provide a safe system of work but to ensure that employees complied with that system of work. In my view, the nature of work described by witnesses both for the respondent and appellant was potentially dangerous. Even if it is true that a belt would not be of assistance the duties of the employer to provide a safe system of work were not discharged. The work of removing iron sheets was potentially risky and an employer should foresee that. There is no evidence that the respondent did any foolish act. There is no evidence that the appellant as employer gave the respondent any instructions on how to perform his work and minimize or avoid such accident. There is no evidence that the appellant supervised the employees to ensure that they did not do careless things. The mere long experience of the respondent could be a mitigating factor but does not discharge the burden of care of the appellant. The learned magistrate found liability on the respondent of 10% which, in my view, covered the aspect of long experience. Having reviewed the evidence on record, I am of the view that the learned magistrate was justified in finding the appellant negligent for the accident to the tune of 90%.

The second issue is whether the learned magistrate awarded excessive damages. Mr. Nyaundi has argued that the magistrate erroneously found that the respondent suffered a fracture, while in fact he suffered superficial injuries. I have perused the two medical reports that were produced, and the treatment card that were produced as exhibits. The treatment card from Moi Memorial Hospital shows that an x-ray was taken. Dr. Aluda's report dated 4/11/2000 clearly shows that there was an ex-ray report which showed a fracture of the pelvis. Dr. Lodhia's report which was done later on 18/4/2001 did not consider the ex-ray report. Dr. Aluda testified in court and was cross examined on his report. Dr. Lodhia did not testify in court. I am afraid, I am of the view that the learned magistrate was perfectly entitled to believe that the respondent suffered a fracture, based on the evidence on record. I find no misdirection on his part on that finding. The finding on the injuries suffered was the basis for the amount of damages awarded.

The award of general damages is a discretion of the trial court. An appellate court will be slow to interfere with that exercise of discretion, unless on justifiable legal reasons. Several cases support this position. It will suffice if I cite the case of **Stanely Maore –vs- Geoffrey Mwenda – Nyeri Civil Appeal No. 147 of 2002 –** in which the Court of Appeal stated that the general method for assessment of general damages should be that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct awards in similar cases. The Court of Appeal went further to reiterate the principles to be observed by appellate courts for disturbing the quantum of damages as enunciated in the case of **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini – vs- A.M Lubia and Olive Lubia (1982-88) L KAR 727 at page 730** where Kneller J.A said –

"**The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the judge, in assessing damages, took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages".**

Considering this present case, I see no misdirection on the part of the learned magistrate on the way that he assessed the damages. The case **of Stanely Mukumu –vs- Kariuki – Nairobi HCCC No. 393 of 1989** was a case in which more severe injuries were suffered than in the present case. The plaintiff in

that case suffered two fractures of superior and inferior pubic ramil. The cases cited to the magistrate by Counsel for the appellant **Jadiel Mbutia -vs- Steven Miruri and Pauline** Wangari –vs- Valley Transporters were for minor superficial injuries. The respondent in our present case suffered a fracture of the pelvis as evidenced in Dr. Aluda's medical report. In the case of **Stanely Mukumu –vs- Kariuki – Justice Mbogholi Msagha** on 10/12/1991 awarded Kshs 250,000/= as general damages. In our present case the learned magistrate awarded Kshs 210,000/= on 24/10/2002. The previous decision was more than 10 years earlier and money had lost value due to inflation. I do not see any irrelevant factor that the learned magistrate took into account or any relevant factor that he did not take into account in assessing damages. I am of the view that the award was reasonable. This appeal therefore must fail.

For the above reasons, I dismiss this appeal and uphold the decision of the learned magistrate.

I award costs of the appeal to the respondent.

Dated and delivered at Eldoret this 7th day of December, 2005.

GEORGE DULU,

Ag. Judge.

In the presence of:-