Lowsea International Agencies Limited v Nzyoka (Civil Appeal 262 of 2019) [2023] KEHC 6 (KLR) (3 January 2023) (Judgment)

Neutral citation: [2023] KEHC 6 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 262 OF 2019

OA SEWE, J

JANUARY 3, 2023

BETWEEN

LOWSEA INTERNATIONAL AGENCIES LIMITED ..... APPELLANT

AND

JOSEPH MWONGELA NZYOKA ..... RESPONDENT

(Being an appeal from the Judgment and Decree of the Hon. Muchoki, Resident Magistrate, delivered on 11th December 2019 in Mombasa CMCC No. 176 of 2018)

JUDGMENT

1. The appellant, Lowsea International Agencies Limited was sued by the respondent before the lower court in Mombasa CMCC No. 176 of 2018 for compensation in respect of injuries sustained in the course of the respondent's employment with the appellant. In the respondent's Plaint dated 18th January 2017, he had averred, inter alia, that on 16th December 2015, he was lawfully engaged in the course of his employment with the appellant when, while arranging electricity posts with the help of a crane, the same disengaged and pressed his hand against another post. He consequently sustained serious crush injuries of the right hand.

2. The respondent blamed the appellant for the accident and supplied particulars thereof at paragraph 5 of his Plaint. The respondent also asserted that, as at the time of the accident, he was an able bodied man aged 31 years and was earning Kshs. 15,000/= per month; which earning capacity diminished after the accident. Thus, in addition to compensation for his pain, suffering and loss of amenities, the respondent asked for damages for loss of earning capacity.

3. The appellant resisted the claim *vide* its Defence dated 27th April 2018. It averred that it had always taken all reasonable precautions for the safety of all its employees and maintained its premises in a safe working condition. The appellant further denied the occurrence of the accident complained of by the respondent as well as the particulars of injuries and of special damages enumerated under paragraph

5 of the respondent's Plaint. The appellant therefore contended, in the alternative, that if there was an accident as alleged then the same was solely caused and/or substantially contributed to by the negligence of the respondent.

4. The record of the lower court shows that, upon hearing the parties, the learned trial magistrate was convinced about the truthfulness of the respondent's case. He consequently entered judgment in favour of the respondent at 100% liability and awarded him Kshs. 1,000,000/= general damages for pain and suffering and Kshs. 500,000/= for loss of earning capacity. The respondent was also awarded special damages in the sum of Kshs. 2,000/= together with interest and costs.

5. Being dissatisfied with the judgment of the lower court in its entirety, the appellant filed this appeal on the following grounds:

   [a] That the learned magistrate erred in law and in fact in holding that the respondent had proved his case on a balance of probability.

   [b] That the learned magistrate erred in law and in fact in holding that the respondent did not in any way contribute to the accident if not wholly being the cause.

   [c] That the learned magistrate failed to evaluate the pleadings and the evidence and made findings of fact that were not supported by the pleadings and the evidence.

   [d] That the learned magistrate failed to appreciate the extent of the employer's duty of care to the employee.

   [e] That the learned magistrate misapprehended the evidence and misapplied, misunderstood and or overlooked the correct legal principles and judicial precedent and the submissions by parties that he made an award for pain suffering and loss of amenities that was erroneous and inordinately high.

   [f] That the trial magistrate erred in fact and in law in failing to appreciate that similar injuries should attract similar awards and in failing to apply the doctrine of stare decisis and take into account public interest. He thus made an award for pain, suffering and loss of amenities that was arbitrary, inordinately high and erroneous.

6. Consequently, the appellant prayed that the appeal be allowed and the following orders granted:

   [a] That the Court to hold that the respondent did not prove his case on a balance of probability, set aside the judgment and dismiss Mombasa CMCC No.176 of 2018: Joseph Mwongela Nzyoka v Lowsea International Agencies Limited with costs;

   Alternatively, the Court do set aside the judgment on negligence and replace it with an order apportioning liability against the plaintiff.

   [b] The assessment of damages for pain suffering and loss of amenities be set aside and the awards be reduced downwards.

   [c] The Court do re-assess the award for general damages for pain, suffering and loss of amenities.

   [d] Costs of the appeal and proceedings in the subordinate court be provided for.

7. Directions were thereafter given herein on 2nd November 2020 that the appeal be canvassed by way of written submissions. Accordingly, Mr. Jengo for the appellant filed his written submissions on 19th November 2020 while Mr. Nyabena for the respondent was yet to comply by 15th June 2022 when the matter was reserved for Judgment.

8. On the issue of negligence and/or breach of duty of care, Mr. Jengo was of the view that the learned magistrate dealt with the evidence so casually that he failed to determine whether the particulars of negligence alleged in the Plaint had been proved. He relied on *Isinya Rose Limited v Zakayo Nyongesa* [2016] eKLR and *Mbugu David & Another v Joyce Gathoni Wathena & Another* [2016] eKLR, among other authorities, to underscore his submission that the burden of proof was on the respondent to show that he was injured by a negligent act or omission for which the appellant was in law responsible. He thus urged the Court to find that the respondent had failed to prove his case; and that, the appellant provided a plausible account as to the proximate cause of the accident through DW1, which the lower court ought to have believed.

9. On quantum, Mr. Jengo faulted the lower court for awarding Kshs. 1,000,000/= for pain, suffering and loss of amenities without giving any reasons as to how it arrived at that figure. He observed that in *Victor Mutua Kamolo v Joseph M. Mbugua* [2018] eKLR which was relied on by the respondent, the plaintiff suffered 60% permanent incapacity after losing 4 fingers and was awarded Kshs. 800,000/=; while in *Sumaria Industries Limited v Stephen Muyumbu Mwaka*, Civil Appeal No. 892 of 2006, Nairobi, Kshs. 800,000/= was awarded for loss of all fingers including the thumb. Thus, counsel took the view that, since the respondent's injuries were assessed at 37% permanent disability, there was no justification for the higher award of Kshs. 1,000,000/=.

10. This being a first appeal, it is the duty of this Court to re-evaluate the evidence that was presented before the lower court and make its own conclusions thereon. (see *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123 and *Mwanasokoni v Kenya Bus Services Ltd* [1985] eKLR). The respondent testified on 7th December 2019 and narrated that he was employed by the appellant and assigned the duties of erecting concrete electric poles. That while on duty on 16th December 2015 at around 11.00 a.m. the pole he was handling got disengaged from the crane and fell on his right hand. As a result, he suffered crush injuries for which he was taken to hospital and was admitted at Bomu Hospital for 14 days. He was also attended to at Coast General Hospital before being examined by Dr. Ajoni Adede. The respondent produced Dr. Adede's medical report, among other documents, as an exhibit before the lower court. He testified that he lost three fingers of his right hand; and that the remaining two are now deformed; and therefore he cannot do the work he used to do or attend to his household chores as before. It was on that account that the respondent sought compensation before the lower court.

11. On behalf of the appellant, evidence was called from its crane operator, Paul Kituki Mutisya (DW1). He adopted his witness statement dated 30th April 2019 in which he stated that on 16th December 2015 he was on duty as an employee of the appellant; and that the appellant had been contracted by Kenya Power to erect concrete electricity poles in Malindi Town. DW1 further confirmed that the appellant had contracted the respondent as a casual labourer; that the respondent was working under his supervision; and that his work was to put a wooden block at the middle of the poles for safety purposes, before placing a rope around the pole in readiness for lifting by the crane. He added that on this particular occasion, everything started off well and that he confirmed with the respondent to ensure it was safe to lift the pole. He explained that before he could lift the pole, it slipped off the hole and crashed the respondent's hand. DW1 further testified that, on checking, he found that the respondent had not put the wooden block as a safety precaution. He posited that, had the respondent put the wooden block the accident would not have occurred.

12. In the light of the foregoing, there is no dispute that, at all times material to this appeal, the respondent was engaged in the employment of the appellant as a casual labourer. It is common ground that, on 16th December 2015, he was working under the charge of DW1; and was specifically assigned the duties

of ensuring that electricity poles were properly hooked to the crane that DW1 was operating. It is also not in dispute that, in that process, and before a pole could be lifted by the crane, it slipped and crushed the respondent's right hand. Thus, the broad issues for determination, as can be distilled from the Grounds of Appeal, the evidence and judgment of the lower court, as well as the written submissions filed by Mr. Jengo, revolve around liability and quantum.

13. As was correctly pointed out by Mr. Jengo, the burden of proof was on the respondent to demonstrate that either the appellant was negligent or it failed to adhere to its statutory duty of care. Hence, in *Isinya Rose Limited v Zakayo Nyongesa* [2016] eKLR, it was held thus:

> "...It is therefore trite that the burden of proof is on the claimant who must satisfy on a balance of probabilities; that the claim is based on statutory breach of duty and acts of negligence. How that duty is to be discharged and what are the key elements is crystal clear in the following case law and texts..."

14. The learned judge then proceeded to quote from several precedents and texts, including the following excerpt from Clerk and Lindsell on Torts 18th Edition pg 600 paragraph 4 on the essentials on an action for breach of statutory duty:

> "(1) The claimant must show that the damage he suffered falls within the ambit of the statute mainly that it was of the type that the legislation was intended to prevent and that the claimant belonged to the category of persons that the statute was intended to protect. It is not sufficient simply that the loss could not have occurred if the defendant had complied with the terms of the statute. This rule performs a function similar to that of remoteness of damages.
>
> (2) It must be proved that the statutory duty was breached. The standard of liability varies considerably with the wording of the statute, ranging from liability in negligence to strict liability.
>
> (3) As with other torts, the claimant must prove that the breach of statutory duty caused his loss, which he will fail to do if the damage caused would have occurred in any event.
>
> (4) Finally there is the question whether there are any defences available to the action."

15. Accordingly, in paragraph 5 of the Plaint dated 18th January 2017, the respondent set out the particulars of breach of statutory duty of care on the part of the appellant thus:

[a] Failing to take any or adequate precautions for the safety of the plaintiff while he was engaged upon the said work;

[b] Exposing the plaintiff to a risk of injury or danger, which they knew or ought to have known;

[c] Failing to provide a safe and proper system of working;

[d] Failing to provide safety apparels like gloves and implements to do the work;

[e] Working in a dangerous environment.

16. It is significant therefore that the respondent did not make specific reference to the statute that was allegedly breached by the appellant. But even assuming that he had in mind the *Occupational Safety and Health Act*, Chapter 514 of the Laws of Kenya, the respondent was still expected to demonstrate

the exact manner in which the statute was breached for the simple reason that liability attaches only where there is fault. This was aptly stated by Hon. Visram, J. (as he then was) in *Statpack Industries v James Mbithi Munyao* [2005] eKLR

> "...it is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily a result of someone's negligence. An injury per se is not sufficient to hold someone liable for the same."

17. Counsel for the appellant addressed the issue of causation at length in his submissions and cited several authorities, including *Mbugu Davit & Another v Joyce Gathoni Wathena & Another* [2016] eKLR and *Anastassios Thomos v Occidental Insurance Company Limited* [2017] eKLR which all go to reaffirm the position that it was not enough for the respondent to prove that he was injured in the cause of work. He was under obligation to demonstrate that, were it not for breach of statutory duty on the part of the appellant, the accident would not have happened.

18. In his witness statement dated 18th January 2018, the respondent simply stated:

> "...on 16th December 2015 he was lawfully in the course of his employment with the defendant when arranging electricity posts in a crane when the same disengaged and pressed the plaintiff's hand against another post and as a consequence he sustained serious crush injuries..."

19. In his evidence in chief before the lower court, the respondent restated that:

> "...We were erecting an electric pole using a crane. It was a concrete pole...because the concrete pole is heavy. The pole has a hole at the bottom which we use to hook it to the crane. We put a metal rod on the pole to hook it to the crane...then use a rope. The pole got disengaged from the crane. The pole fell on my hand..."

20. As against that evidence, DW1 explained that he had worked with the respondent for about two years without any hitch; and that although the respondent had been provided with protective apparel and equipment, including gloves, helmet, overall and safety boots, the respondent opted not to wear gloves on the fateful day. In particular, DW1 explained that, because their employer had anticipated that an accident of this nature could occur, the lifting process included the placement of a wooden plank at the middle section of the pole before tying a rope on the pole. According to DW1, after the accident occurred, he checked and noted that the respondent had skipped this important precautionary measure. Thus, the evidence of DW1 was that, had the respondent put the wooden block on the concrete pole, the accident would not have occurred.

21. A perusal of the judgment of the lower court reveals that this aspect of the appellant's case was not given sufficient attention; and yet it goes to negate the assertion by the respondent that he was not provided with a safe work environment. Indeed, as pointed out in *Statpack Industries v James Mbithi Munyao* (*supra*), a trial court must ask itself what it is that the employer failed to do that led to the accident. Here is what the learned judge had to say in this regard:

> "...in this case, the Respondent did not lead any evidence to connect his injuries or accident to an act or omission on the part of the Appellant. The real cause of the accident was not established. The learned Magistrate ought to have asked herself, as I have repeatedly tried to

ask myself, "so what exactly did the employer do or did not do that caused this accident"" And I cannot find the answer in the testimony adduced before the lower court."

22. Thus, I agree entirely with the position taken in *Statpack Industries vs. James Mbithi Munya*o that:

> " An employer's duty at common law is to take all reasonable steps to ensure the employee's safety. But he cannot baby-sit an employee. He is not expected to watch over the employee constantly." (see also Isinya Roses Limited v Zakayo Nyongesa, supra)

23. In the light of the foregoing, I am not satisfied that there was sufficient basis for the lower court to hold the appellant wholly liable for the respondent's injuries. The appellant was only liable to the extent that DW1 admitted his role in ensuring the respondent's safety by ensuring that the plank was in place. In cross-examination, DW1 conceded that he was the supervisor when it came to lifting and carrying the poles; and that he could not operate the crane without the piece of wood being put in place as the concrete poles could easily slip. DW1 also mentioned that they worked in a team of three, and that the third person in this case was one Wambua, whose duty it was to assist the respondent and ensure his safety by giving appropriate instructions to DW1.

24. The fact that the crane was put in motion before the wooden plank was positioned is in itself an indictment on both Wambua and DW1 for which the appellant was correctly held liable. Thus, as between the appellant and the respondent, I would apportion liability at 60:40 in the circumstances.

25. On quantum, needless to say that assessment of damages is at the discretion of the trial court and that an appellate court can only interfere if it is demonstrated that the lower court acted on wrong principles, or that it awarded damages that were so excessive or so low as to represent an erroneous estimate; or that the court took into consideration matters that it ought not to have taken into consideration or failed to consider matters that it ought to have considered, and as a result arrived at the wrong decision. In *Butt v Khan* [1981] KLR 349 it was held that:

> " An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low..."

26. The same principle had been discussed in *Henry Hidaya Ilanga v Manyema Manyoka* [1961] 1 EA 705 at page 713 thus:

> " Whether the assessment of damages be by a judge or by a jury the appellate Court is not justified in substituting a figure of its own for what was awarded below simply because it would have awarded a different figure if it had tried the case in the first instance...before the appellate court can properly intervene it must be satisfied either that the judge, in assessing damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one), or short of this that the amount awarded is so inordinately low or inordinately high that must be wholly erroneous estimate of damage..."

27. Indeed, in *H. West and Son Ltd v Shepherd* (1964) AC.326 it was acknowledged that:

> " ...money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must

be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional..."

28. In his judgment, the learned trial magistrate mentioned that he had perused and considered the authorities that counsel for the parties brought to his attention. Given the awards made in the authorities cited by the respondent, there is no valid ground for interfering with the award of the lower court under the head of general damages for pain, suffering and loss of amenities; bearing in mind the nature and extent of the respondent's injuries, the age of those authorities and the inflationary trends. It is also instructive that in one of the authorities, namely, *Thermopack Limited v Joshua Bernard Awino* [2019] eKLR in which the plaintiff suffered injuries leading to the amputation of the 2nd, 3rd, 4th and 5th fingers of the right hand, an award of Kshs. 1,000,000/= was made. I therefore have no basis for interfering with that award.

29. There appears to be no complaint about the lower court's award under the heads of loss of earning capacity and special damages; no submissions having been made in this regard. I likewise find no reason to disturb the judgment of the lower court in that regard.

30. In the result, having found merit in the appellant's appeal with regard to liability, this appeal is hereby allowed and the judgment and decree of the lower court in Mombasa CMCC No.176 of 2018: Joseph Mwongela Nzyoka v Lowsea International Agencies Limited is hereby set aside and substituted with judgment in favour of the respondent in the following terms:

    [a] Liability apportioned at 40:60 in favour of the respondent;

    [b] General damages for pain suffering and loss of amenities is reduced by 40% to Kshs. 600,000/= taking into account the respondent's contribution;

    [c] The award for loss of earning capacity of Kshs. 500,000/= is likewise reduced by 40% to Kshs. 300,000/= only.

    [d] Costs of the lower court suit shall be borne by the appellant.

    [e] Each party shall bear own costs of the appeal.

    It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL AT MOMBASA THIS 3RD DAY OF JANUARY 2023.

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OLGA SEWE

JUDGE