



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 332 OF 2018

SINOHYDRO TIANJIN ENGINEERING

CO. LIMITED.....APPELLANT

-VERSUS-

MICHAEL ONYAGO ASOWA.....RESPONDENT

(Being an appeal from the judgment and decree of Honourable K. Usui (Mrs.)

(Senior Resident Magistrate) delivered on 4th July, 2018 in CMCC no. 5226 of 2016)

JUDGEMENT

1. The respondent in this instance lodged a suit against the appellant vide the plaint dated 28th April, 2016 and sought for general and special damages in the sum of Kshs.132,000/ together with costs of the suit and interest on the same.
2. The respondent pleaded in his plaint that he was at all material times an employee of the appellant and that sometime on or about the 7th day of July, 2015 while in the lawful course of his employment at the appellant's Embakasi factory, the respondent was entrapped by a concrete mixing machine and sustained severe injuries as a result, as particularized in the plaint.
3. The respondent attributed his injuries to negligence and/or breach of the appellant's contractual and/or statutory duty of care by setting out their particulars in paragraph 6 of the plaint.
4. The appellant entered appearance on being served with summons and filed its statement of defence to deny the respondent's claim.
5. At the hearing of the suit, the respondent testified and called a medical doctor as a witness, while the appellant closed the defence case without relying on any witness testimony.
6. Upon filing of written submissions by the parties, the trial court entered judgment in favour of the respondent and against the appellant in the following manner:

Liability	100%
a) General damages for pain, suffering and loss of amenities	Kshs.2,800,000/
b) Cost of prosthesis	Kshs.1,800,000/
c) Diminished earnings	Kshs.2,750,202/
d) Special damages	Kshs.132,000/
Total	Kshs.7,482,202/

7. Being aggrieved by the trial court's finding on both liability and quantum, the appellant has now lodged an appeal against the same by filing the memorandum of appeal dated 12th July, 2018 featuring the following grounds:

- i. THAT the learned trial magistrate erred in law and fact in granting general damages that were excessive in the circumstances.*
- ii. THAT the learned trial magistrate erred in law and fact in awarding an excessive award on the loss of diminished capacity using 75% and at the same time awarding the cost of the prosthesis.*
- iii. THAT the plaintiff having been awarded cost of prosthesis will lower the permanent disability from 75% as it will aid him in doing his normal duties while walking without support.*
- iv. THAT the learned trial magistrate erred in law and in fact in holding the appellant 100% liable for causing the accident while indeed the plaintiff was also negligent in his manner of doing the job he was assigned.*

8. Following the directions of this court, the parties filed and exchanged written submissions on the appeal. In its submissions on liability, the appellant argues that the trial court did not appreciate that the respondent had not proved the particulars of negligence against it.

9. On quantum, the appellant argues that the award made on general damages for pain, suffering and loss of amenities is manifestly excessive given the injuries sustained by the respondent. The appellant suggests that the award made under this head be substituted with a more reasonable award of Kshs.2,500,000/ and has cited among others, the case of **Kipkoskei Tangus Tesot v Julius Kiprono Tanui [2018] eKLR** in which a plaintiff with crash injury of left leg which resulted in amputation at the level of above the knee and fractures of the right tibia and fibula was awarded a sum of Kshs.2,500,000/; and the case of **Akwaba Olubuliera Nicodemus v Dickson Shikuku [2020] eKLR** where the court upheld an award of Kshs.2,000,000/ at the instance of a plaintiff with fracture of the right clavicle leading to internal fixation of the clavicular fracture, crush injury to the right leg leading to below knee amputation of the right leg and sprained left elbow joint.

10. On damages for diminished capacity, the appellant is of the view that the trial court ought to have applied a multiplicand of Kshs.12,263/ being the net salary for the respondent as opposed to his gross salary of Kshs.13,286/; a multiplier of 20 years given that the respondent was aged 29 years as at the time of the accident; and a degree of permanent disability of 50% instead of one of 75% given that the prosthetic leg had reduced the permanent disability of the respondent, to be tabulated as follows:

$$12,263 \times 20 \times 12 \times 50/100 = \text{Kshs.1,471,560/}$$

11. In support of the assessment of permanent disability above, the appellant has relied upon the case of **David Kigotho Iribe v John Wambugu Ndungu & another [2008] eKLR** in which the court adopted a permanent disability of 50% even though the same had been assessed at 75% by the doctor.

12. The respondent retorted by submitting that the trial court correctly analyzed the evidence presented before it and arrived at a proper finding on liability, which ought not to be interfered with.

13. On quantum, the respondent has urged this court not to interfere with the awards being challenged and to instead dismiss the appeal while upholding the decision of the trial court.

14. I have considered the rival submissions and authorities cited on appeal. This being a first appeal, I am required to re-evaluate the evidence placed before the trial court.

15. It is noted that the appeal lies against both liability and quantum, specifically the awards made under the heads of general damages for pain, suffering and loss of amenities, and diminished earning capacity. I will therefore address the grounds of appeal under the two (2) limbs.

16. On *liability*, the respondent in his oral evidence before the trial court adopted his signed witness statement and testified that he worked as a casual labourer at all material times whose duties entailed filling the mixer with cement and that on the material day, he was assigned the duty of cleaning the machine when the roll that lifts the concrete trapped him.

17. The respondent testified that on the material date, he was in the company of the machine operator, Jack.

18. In cross-examination, it was the evidence of the respondent that he was on cleaning the machine at the top while Jack had gone downstairs, during which time the machine started moving and suddenly hit him, causing him to fall.

19. The respondent stated that it is possible Jack turned on the machine when he went downstairs, but later stated that the machine was turned on from upstairs.

20. In re-examination, it was the testimony of the respondent that he could not reach the switch from where he was standing and that at the time of cleaning the machine, it was off.

21. The learned trial magistrate in making her decision reasoned that the evidence presented by the respondent regarding the circumstances of his injuries was not disputed by the appellant by way of evidence. The learned trial magistrate also reasoned that the appellant did not bring any evidence to show that it ensured the respondent's safety while assigning him with the task of cleaning the machine and hence the appellant was found to be fully liable.

22. Upon re-evaluating the evidence tendered before the trial court, I note as the learned trial magistrate did, that it is not in dispute that the respondent was at all material times an employee of the appellant and that he was in the course of his employment on the material day.

23. It is also not controverted that the respondent was injured while in the course of his employment and while performing his employment duties.

24. It is also noteworthy that the appellant did not bring any credible evidence to demonstrate that it provided the respondent with the necessary protective gear to ensure his safety while performing the assigned tasks.

25. Going by the evidence set out hereinabove, I am satisfied that the learned trial magistrate arrived at a proper finding that the respondent had proved his case on a balance of probabilities.

26. On the subject of apportionment of liability as raised on appeal, upon re-evaluating the evidence tendered before the trial court, I established that though the respondent had worked for the appellant for a short while, it is apparent that he worked with the mixer machines and therefore ought to have been aware of the risks involved while using the machine at any one point.

27. Furthermore, whereas the respondent stated in his testimony that he was not provided with protective gear while working, he made no mention of any such requests made to the appellant especially upon being assigned with the responsibility of cleaning the machine. I equally noted contradictory accounts from the respondent's testimony as to who could have turned on the machine at the time of cleaning.

28. In this manner, I find that the respondent voluntarily assumed any risks that would befall him in the course of his employment. I draw reference from the provisions of **Section 13(1) of the Occupational Safety and Health Act No. 15 of 2007** which place the responsibility upon an employee to ensure his or her safety while at the workplace.

29. Be that as it may, I am satisfied that the appellant ought to bear the substantial portion of blame for the reasons set out hereinabove.

30. In view of the foregoing, I respectfully disagree with the finding of the learned trial magistrate on liability and I deem it fit to interfere with the same. In my view, a finding in the ratio of 90%:10% in favour of the respondent would be reasonable in the circumstances.

31. On *quantum*, this court can only interfere with the award of a trial court in instances where an irrelevant factor was taken into account, a relevant factor was disregarded or the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages. These principles were laid out by the Court of Appeal in the case of **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] eKLR**.

32. On the subject of general damages for pain, suffering and loss of amenities, the respondent on the one hand suggested an award in the sum of Kshs.4,500,000/ and cited the case of **John Kinyua Murage & 2 others v Joseph Onyango Obura [2018] eKLR** where the court awarded a sum of Kshs.2,500,000/ for amputation of a leg, and the case of **Macharia Francis Mundui & another v Joel Wanje [2017] eKLR** in which the court upheld an award in the sum of Kshs.3,000,000/ for a similar amputation above the knee and fracture of the femur.

33. On the other hand, the appellant suggested an award of Kshs.2,500,000/ similar to that proposed on appeal, and quoted the case of **Kurawa Industries Limited v Dama Kiti & another [2017] eKLR** in which an award of Kshs.2,000,000/ was made at the instance of a plaintiff with crush injury left leg, fracture shaft left radius, compound comminuted fracture left femur, fracture left ribs 5th, 6th, 7th and 8th ribs and soft tissue injury abdomen.

34. In the end, the learned trial magistrate made an award in the sum of Kshs.2,800,000/.

35. From my re-evaluation of the pleadings, material and evidence tendered at the trial, I note that the injuries sustained by the respondent as pleaded and supported by the medical evidence are as follows:

i. Traumatic amputation of the right 4th and 5th fingers

ii. Severe crash injuries of the right leg which led to amputation at the upper part of the right thigh

36. In his medical report dated 24th February, 2016 Dr. W.M Wokabi who also testified as PW1 assessed permanent incapacity at 75%.

37. Upon my re-examination of the material and perusal of the authorities, I find those cited by both parties to involve comparable injuries generally, though some of those cited by the respondent were decided a few years ago. I find the case of **Kipkoskei Tangu Tesot v Julius Kiprono Tanui (supra)** and the case of **Akhwaba Olubuliera Nicodemus v Dickson Shikuku (supra)** both cited in the appellant's submissions on appeal, to offer the most recent and comparable awards. In the aforesaid cases, respective awards of Kshs.2,500,000/ and Kshs.2,000,000/ were made. In the former case, permanent incapacity was assessed at 80% which is comparable to the assessment made in the present instance.

38. Upon considering the above, I am not convinced that the award made by the learned trial magistrate is so inordinately high as to warrant interference. In my view, the award falls within a reasonable range in comparison to awards made in respect to related injuries. I therefore see no need to interfere with the award made under this head.

39. In respect to damages for diminished earning capacity, the respondent proposed a multiplicand of Kshs.12,500/ together with a multiplier of 28 years to be tabulated as follows:

Kshs.12,500 x 28 x 12 = Kshs.4,200,000/

40. The appellant proposed a multiplicand of Kshs.12,263 and a multiplier of 20 years plus 75% permanent incapacity, less the sum of Kshs.6,500/ allegedly paid at the time of the accident, to be tabulated as follows:

$75\% \times 12,263 \times 20 \times 12 = \text{Kshs.}2,207,340/$ less Kshs.6,500= Kshs.2,200,840/

41. The learned trial magistrate applied a multiplier of 23 years together with a multiplicand of Kshs.13,286 and 75% permanent incapacity, tabulating the award as hereunder:

$75\% \times \text{Kshs.}13,286 \times 23 \times 12 = \text{Kshs.}2,750,202/$

42. From my re-evaluation of the evidence, I note that whereas the respondent testified that he earned a monthly salary of Kshs.13,000/ a copy of the pay slip shows a variance in the salaries paid to the respondent both in terms of the basic and net salaries per month during in the year 2016. In the circumstances, I turn to the Regulation of Wages (General) (Amendment) Order 2015 which were in force at the time of the accident.

43. It is not in dispute that the respondent at all material times worked as a casual labourer. Being guided by the Regulation Order, I will apply a multiplicand of Kshs.10,954.70 being the monthly salary for a general labourer such as the respondent.

44. On the multiplier, upon re-examining the evidence on record, it is apparent that the respondent was aged 29 years at the time of the accident. In the case of **Joseph Ndegwa & another v Japhet Ndungu Muboro the Legal Representative of the Estate of late Dishon Irungu Ndungu [2019] eKLR** and the case of **Timsales Limited v Peter Mbaluka & Kilau Peter (Both sued on their own behalf and as legal representatives of the estate of Geoffrey Mumi Peter-Deceased) & another [2020] eKLR** respective multipliers of 25 years was applied at the instance of a deceased persons bearing the same age as the respondent herein. I therefore find the multiplier of 23 years used by the learned trial magistrate to be reasonable.

45. Regarding the degree of permanent incapacity, the medical evidence shows that the same was assessed at 75% and there is nothing to indicate that the contents of the report are controverted. In that case, I am of the view that the learned trial magistrate had basis for applying the said degree of incapacity.

46. Resultantly, the award under this head is tabulated as:

$\text{Kshs.}10,954.70 \times 23 \times 12 \times 75\% = 2,267,622.90$

47. The upshot is that the appeal succeeds to the extent of the finding on liability and the award for diminished earning capacity. Consequently, the trial court's finding of 100% liability is hereby set aside and is substituted with a finding of 90%: 10% whereas the award of Kshs.2,750,202/ made under the head of diminished earning capacity is hereby set aside and is substituted with an award of 2,267,622.90.

48. For the avoidance of doubt, the judgment on appeal is as follows:

Liability 90%:10% in favour of the respondent

a) General damages for pain,

b) suffering and loss of amenities Kshs.2,800,000/

c) Cost of prosthesis Kshs.1,800,000/

d) Diminished earning

capacity Kshs.2,267,622.90

e) Special damages Kshs.132,000/

Gross total Kshs.6,999,622.90

Less 10% contribution (Kshs.699,962.29)

Net Total Kshs.6,299,660.61

The respondent shall have interest on special damages at court rates from the date of filing suit and interest on general damages at court rates from the date of judgment until payment in full.

Parties to bear their respective costs of the appeal.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 8TH DAY OF OCTOBER, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent