



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL NO. 158 A OF 2016**

**CHINA WU YI COMPANY LTD.....APPELLANT**

**VERSUS**

**STEPHEN MUNIU KINYANJUL.....RESPONDENT**

*(Being an Appeal from the Judgment of Honourable Cherere. CM Eldoret*

*in CMCC No.414 of 2015 delivered on 7<sup>th</sup> November 2016)*

**JUDGMENT**

1. The Appellant lodged an appeal challenging the decision of Hon. Cherere delivered on 7<sup>th</sup> November, 2016 in Eldoret CMCC No. 414 of 2015.
2. The Respondent had sued the Appellant for injuries he sustained in the working environment. The Appellant was held 100% liable and amount of Kshs.800, 000/= was awarded as general damages.
3. The Appellant being aggrieved with the judgment of the Hon. Cherere appealed entirely against the said decision. The appellant filed the Memorandum of Appeal dated 25th November, 2016. The grounds of appeal as enumerated in the memorandum of appeal can be consolidated into two grounds;
  - a) **Whether the trial court erred in holding the Appellant 100% liable.**
  - b) **Whether the trial court used the correct principles in assessing quantum.**

**APPELLANT'S CASE**

4. The Appellant filed submissions on 6<sup>th</sup> May 2021. It submitted that the duty of a first appellate court was well settled in the case of **Suluenta Kennedy Sita & another v Jeremiah Ruto (suing as legal representative of the Estate of Joyce Jepkemboi)** [2017] Eklr.
5. As a general rule, an appellate court should not interfere with the findings or decision of a lower court unless it is demonstrated that in reaching its decision, the lower court made an error of law or took into account irrelevant considerations or that the court based its decision on no evidence or a misrepresentation of the evidence.
6. The grounds of appeal as far as liability is concerned are listed from 1-5 on the Record of Appeal at page 1. The Appellant employed the respondent as a casual worker in its Timboroa- Maili Nne A/04 project in 2014. The trial court held the Appellant 100% liable. From the evidence adduced by the Respondent, none of the witnesses was an eye witness.
7. On the burden of proof, the Appellant cited **Halsbury's Laws of England, 4<sup>th</sup> Edition**, paragraph 662 at page 476. The Appellant further cited **Winfield and Jolowicz on Tort, Seventeenth Edition** on the nature of an employer's duty and submitted that as a general rule the employer is liable for any injury or loss that occurs to his employees while at the workplace as a result of the employer's failure to ensure their safety.
8. The Appellant submitted that this does not mean that the employer would always be liable in all circumstances regardless of what caused the accident in question and that it would be unfair to hold the employer liable even where an accident happens due to the employee's own negligence it would be unfair to hold the employer liable.

9. The Appellant cited **Section 13 (l) (a) of the Occupational Safety and Health Act** and submitted that the employee is also required to take reasonable precaution to ensure his/her safety at the workplace while performing his/her duties.
10. The Respondent had a duty to prove negligence on the part of the Appellant but the trial court shifted the burden of proof to the Appellant, this does not however meet the threshold of burden of prove which is on a balance of probability.
11. The Appellant cited the case of **Statpack Industries Limited -vs- James Mbithi Munyao - [2005] Eklr** and submitted that the Appellant as the (employer) cannot be expected to supervise the employees throughout the day.
12. The Appellant submitted that the learned trial magistrate did not judiciously apply the provisions of Section 107 (1) of the Evidence Act. The Respondent did not prove his case on a balance of probability and the case ought to have been dismissed. The best the honourable court should have done was to apportion liability equally. The Appellant cites the case of **Eastern Produce (K) Limited v Joseph Mamboleo Khamadi [2015] eKLR** and **Wilfred Okemwa Mwamba v Total Security Surveillance [2016] eKLR** and urge this court to apportion liability at 50:50.
13. On quantum, the Appellant submitted that an appellate court has jurisdiction and obligation to assess whether the lower court put into account relevant principles before rendering a determination with regard to quantum of damages. This is even when the suit is headed for dismissal.
14. One of the principles that ought to be considered by the trial court is whether the plaintiff has so far healed as well as the injuries sustained. In the present appeal, the Respondent sustained 10% permanent disability as confirmed by both medical reports prepared by Dr. J.C Sokobe and Dr. V.V Lodhia as at page 125 and 126 of the Record of Appeal. As per the two mentioned medical reports, the Respondent sustained the following injuries with permanent disability of 10%:

a) **Fracture dislocation of tarsal-metatarsal joint right foot.**

b) **Degloving injury medical aspect right foot**

15. The Appellant cited the cases of **Hassan Farid & Another v Sataiya Ene Mepukori & 6 Others [2018] eKLR**, **Harun Muyoma Boge v Daniel Otieno Agulo [2015] eKLR**, and **Naomi Momanyi v G4s Security Services Kenya Limited & Another [2018] eKLR** as comparable decisions where the court awarded 300,000/- kshs for similar injuries and proposed the court award kshs. 350,000/- as damages. On special damages the appellant submitted that the same was proved and should be maintained.
16. The Appellant asks that the appeal be allowed and a reasonable award be made by the court.

## **RESPONDENT'S CASE**

17. The Respondent filed submissions on 14<sup>th</sup> June 2021. He submitted that the court did not err in holding the Appellant 100%. That according to Occupational Safety and Health Act No. 15 of 2017, particularly Section 6. It is the duty of the employer to ensure *"safety, health and welfare of all persons working in his work place"*
18. It is the Respondent's contention that the Appellant breached his contractual obligation of duty of care for the workman. He cited the case of **Faith Mutindi Kasyoka -vs- Safe Park Ltd (2019) eKLR** in support of this submission.
19. According to the treatise of Winfield and Jolowicz on Tort Seventeenth edition. It opined that it is the duty of the employer to *"take reasonable"* care so as to protect employees against *"unnecessary risk"* including a *"safe place of work etc"*.
20. The Respondent submitted that negligence is proved when the plaintiff establishes that he was owed duty of care which was breached and as a result of that breach, injuries were sustained.
21. The Respondent narrated how on 9th February, 2014 while working under the directions of the Appellant at Timboroa Maili nne A/104 Project Burn Forest, its agent/ employee caused a rubber roller machine to run over him thereby crushing its leg. The Appellant took the Respondent to the hospital for treatment. It was the Appellant's agent negligent act that caused the accident to occur. His evidence was unchallenged. The Appellant did not bring any evidence to rebut the respondent's evidence. The Appellant pleaded contributory negligence but no evidence was produced to prove negligence on the part of the Respondent. He also failed to demonstrate provision of safe working environment.
22. The Appellant has not demonstrated which evidence the trial court failed to consider in arriving at her decision. It is not in dispute that the Respondent was injured at the workplace. It is the Respondent's humble submission that he discharged the burden of proving negligence on the part of the Appellant.
23. The trial court used the correct principles in awarding Kshs.800, 000/ = as general damages for the injuries caused. The court in assessing damages, applies discretion based on the particular facts and circumstances of the case before it. He cited the case of **Coast Bus (MSA) Ltd -vs- Fatimabhai Suleiman and another** (suing as Legal Representatives of the Estate of Aslam Jeferali Juma [2020] eKLR in support of this submission.
24. The Appellant submitted that the court ought to have considered whether the Respondent had so far healed. It is evident from both doctors who examined Respondent 1 year 3 months and 1 year 5 months respectively after the accident that the respondent had not healed. Permanent disability was assessed at 10%. He had permanent scars and had developed early osteoarthritis on the right leg. His foot was

deformed and had to walk aided with a stick. He could also not walk for long distance or carry heavy load.

25. The injuries listed in the authorities relied upon by the Appellant do not compare to the instant case. The injuries were less severe for instance incapacity was not assessed in all the cases.

26. In **Abdi Haji Gulleid -vs- Auto Selection (K) Ltd [2015]** eKLR, the Honourable Judge took note of the permanent incapacity suffered by the Respondent and enhanced award of Kshs. 300,000/= given by the trial court to Kshs. 750,000/=. The Respondent had suffered compression fracture of the back at LI and complained of occasional pain in the lumber spine. Two doctors gave their permanent Incapacity at 10% and 25% percent.

27. The Respondent did prove his case on liability on a balance of probability pursuant to Sec 107 (1) of the Evidence Act and that the court rightly affirmed in its judgment. Further, the trial court did not err in awarding the respondent Kshs.800, 000/ = as general damages. It is on this premise that the respondent prays for the appeal to be dismissed in its entirety.

#### **ISSUES FOR DETERMINATION**

28. The grounds of appeal can be consolidated into two main issues;

a) **Whether the trial court erred in holding the appellant 100% liable for the accident.**

b) **Whether the trial court used the correct principles in assessing quantum of damages.**

#### **WHETHER THE TRIAL COURT ERRED IN HOLDING THE APPELLANT 100% LIABLE FOR THE ACCIDENT**

29. This being a first appeal, this court is obliged to abide by the provisions of **Section 78 of the Civil Procedure Act** which empowers the court to:

a) *Determine a case finally;*

b) *Remand a case;*

c) *Frame issues and refer them for trial;*

d) *Take additional evidence or require the evidence to be taken; or*

e) *Order a new trial*

30. In ***PIL Kenya Limited v Oppong* [2009] KLR 442**, it was held that:

*“It is the duty...of a first appellate court to analyze and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeking the witnesses and their demeanour and giving allowance for that”.*

31. The Appellant’s position is that the respondent was negligent and as a result he was injured thus the liability apportioned to the Appellant is unfair. However, it is trite law that he who alleges must prove. The Appellant did not tender any evidence to prove that the respondent’s negligence resulted in his injuries. The Respondent’s evidence was uncontroverted and was not rebutted.

32. The Appellant has not brought out which evidence or material facts that the trial court failed to consider. Further, it has not shown which principles the court failed to apply or wrongfully applied in apportioning liability.

33. In the premises, I opine that the trial court was right in its finding on liability.

#### **WHETHER THE TRIAL COURT USED THE CORRECT PRINCIPLES IN ASSESSING QUANTUM OF DAMAGES.**

34. The Court of Appeal in ***Odinga Jacktone Ouma V Moureen Achieng Odera* [2016] eKLR** stated that

*“comparable injuries should attract comparable awards”.*

35. It is trite law that the appellate court shall not disturb an award for quantum unless it is inordinately high or low or if it is shown that the award was arrived at by erroneous application of principles.

36. In the case of ***Butt vs Khan* (1977) 1 KAR**, the court therein also rendered itself on the same issue and held as follows: -

*“An Appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirety*

*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.”*

37. The injuries sustained by the respondent were as follows;

**a) Fracture dislocation of tarsal-metatarsal joint right foot.**

**b) Degloving injury medical aspect right foot**

This was also coupled with a 10% permanent disability.

38. In the case of **Florence Njoki Mwangi vs Chege Mbitiru [2014] eKLR**, on appeal, Wakiaga J allowed a sum of Kshs 700,000/= general damages where a plaintiff had sustained fractures of femurs bilaterally, two degloving injuries of the right knee and the right ankle and concluded that she will need money to remove k-nails and screwsor.

39. In **Kiambu HCCA NO. 25 OF 2013, FA (minor suing through next friend and father AFWK VS. Kariuki Jane & Another (2018) eKLR** the appellant suffered a degloving injury left ankle and fracture of the left distal femur. The learned trial magistrate assessed general damages at ksh. 500,000/= and the same was upheld on appeal

40. In **Kiru Tea Factory & another v Peterson Watheka Wanjohi [2008] eKLR** the court upheld the award of kshs. 800,000/- where the plaintiff had the following injuries;

**(i) A degloving injury on the right hand with extensive skin and muscle loss on the forearm. X-rays revealed fractures of the radius and ulna bones. Treatment involved surgical toilet of the wound and, later, skin grafting. The fractures were fixed by plating.**

**(ii) Fracture of the right iliac bone in the pelvis.**

**(iii) Generalized pains over most of the chest, but without any fractures, indicating soft-tissue injuries.**

41. The appellant has not proven that the trial court took into account immaterial facts and that the award was inordinately high. Given the comparable decisions cited and taking into account time and inflation, I opine that the award of kshs. 800,000/- was in order and thus shall not be overturned.

42. For the foregoing reasons the appeal is hereby dismissed with costs.

**DATED AND DELIVERED IN ELDORET THIS 9TH DAY OF NOVEMBER 2021.**

**E. K. OGOLA**

**JUDGE**