



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 526 OF 2017

TWIGA CONSTRUCTION

COMPANY LIMITED.....APPELLANT

VERSUS

VINCENT MURULI.....RESPONDENT

(Being an appeal against the Judgment and Decree of Hon.D.W. Mburu

Principal Magistrate delivered on 22nd September, 2017

in Milimani CMCC No. 5010 of 2015)

JUDGMENT

The respondent was involved in an industrial accident on 2nd April, 2015 while working for the appellant as a general worker. He filed Civil Suit Number 5010 of 2015 before the Chief Magistrate's Court, Milimani Commercial Courts. In its judgment delivered on 22nd September, 2017, the trial court awarded the respondent Kshs. 600,000 as general damages for pain and suffering and Kshs. 2,000 special damages. The appellant was held 100% liable. The appellant preferred this appeal vide Memorandum of Appeal dated 3rd October, 2017 and filed on the same date on the following grounds: -

- 1. The Learned Magistrate erred in law and fact in entering judgment against the appellant and finding that the appellant 100% liable when considering the evidence on record and trial, the respondent had failed to prove any negligence.**
- 2. The Learned Magistrate erred in law and in fact as the evidence adduced did not support any negligence on the part of the appellant.**
- 3. The Learned Magistrate erred in law in shifting the burden of proof to the appellant when the same was never discharged by the respondent.**
- 4. The Learned Magistrate erred in law and in fact in reaching a conclusion that was contrary to the evidence placed before him and therefore finding the appellant liable.**
- 5. The Learned Magistrate's award of General damages in particular considering the injuries sustained by the plaintiff was inordinately high in that it was an erroneous estimate of damages without due regard being made to the injuries sustained and comparable cases.**
- 6. The Learned Magistrate erred in law and in fact in holding that the plaintiff's injuries were sustained at the appellant's work place contrary to evidence adduced to prove the same and awarding a sum which was inordinately high.**
- 7. The Learned Magistrate erred in law and fact by failing to take into account and fully consider the various authorities submitted by the appellant before arriving at the sum of Kenya Shillings Six Hundred and Thousand (Kshs. 600,000) which award was not founded on any outlined legal principle or precedent and was inordinately high.**
- 8. The Learned Magistrate erred in law and in fact by basing the award on extraneous considerations and factors.**

On 27th July, 2021, the court directed that the appeal be disposed off by way of written submissions. Miss Olunga appeared for the appellant and filed written submissions dated 31st August, 2021 while Mr. Mwaura appeared for the respondent and filed Written submissions dated 13th September, 2021.

Submissions on the appeal:

Counsel for the appellant reduced the eight grounds of appeal to three and submitted on liability and quantum. On liability, counsel submit that the lower court erred in shifting the burden of proof to the appellant and holding the appellant 100% liable for the accident. The respondent testimony was that he was employed by the appellant company from the end of March, 2015 at its Riverside work site. He confirmed that he was neither issued with an employee card or a letter of appointment. According to him, he was demolishing a shutter on the first floor of a building when the crow he was using broke causing him to lose balance and fall off the building sustaining severe injuries. The appellant on the other hand did not tender any evidence to rebut the respondent's testimony or the particulars of contributory negligence pleaded.

The appellant argue that the respondent did not prove his case pursuant to the principle laid down under Sections 107 and 108 of the Evidence Act as he did not produce any evidence of showing he was employed by the appellant and was injured in the course of employment. Counsel further cited the case of **DANIEL TOROITICH ARAP MOI VS MWANGI STEPHEN MURIITHI & ANOTHER (2014) eKLR** where the Court of Appeal emphasized that proof in civil claims is by way of evidence and whenever a party went to court, he was bound by law and practice to lay evidence to support existence of facts pleaded. Further reference was made to the case of **KENYA POWER AND LIGHTING COMPANY LIMITED VS NATHAN KARANJA GACHOKA & ANOTHER (2016) eKLR** where Mulwa J. held at par.15 that, **'...uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence in unchallenged or not.'**

The appellant further argues that the respondent failed to link his injuries to the appellant's negligence and or breach of contractual duty. To support this, counsel referred to the case of **STATPACK INDUSTRIES VS JAMES MBITHI MUNYAO (2005) eKLR** where the court observed that there must be a causal link between someone's negligence or breach of obligation and injury sustained. The appellant further contends that the respondent was an author of his own misfortunes through deliberate negligence because he willingly undertook to do the job knowing the dangers involved and in disregard to Section 14 (1) of the Occupational Safety and Health Act.

The appellant urged this court to find the respondent wholly liable for the accident if not then partly and apportion liability equally at 50%. Counsel made reference to the case of **PYRAMID PACKAGING LTD VS PATRICK NAMASAKA (2010) eKLR** where Mwilu J. (as she then was) stated that; **"the Respondent stated that he was not wearing any protective gear as non was provided. He did not state what evasive action he took or keenness of care of self that he exercised to avoid injury to himself once he had accepted to undertake work without protective gear. The Respondent alleged that the accident occurred on 27/4/2001 while he was at work. It was his onus to prove that. I do not find that he discharged his onus 100%. This coupled with the fact that he did not name the persons he reported to after the accident and further that he did not state what he did to avoid the accident or why he performed his duties without whatever protective gear he should have been provided for would lead me to apportion blame at 50/50 basis. I so do."**

On damages, the appellant has submitted that the award of Kshs. 600,000 is inordinately high and erroneous for want of any legal backing or comparable awards as was held in **ARROW CAR LTD VS BIMOMO & 2 OTHERS (2004) 2KLR 101**. The appellant has highlighted the guiding principles for the assessment of quantum for personal injury as laid down in the case of **MOHAMED MAHMOUD JABANE VS HIGHSTONE BUTTY TONGOI OLENJA (1986) eKLR** and the case of **KEMFRO AFRICA LIMITED T/A MERU EXPRESS SERVICES (1976) & ANOTHER VS AM LUBIA & ANOTHER NO. 2 (1985) eKLR** where Kneller JA stated that, **'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 that the Judge, in assessing the 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 damage'.**

Counsel for the appellant contends that an award of Kshs. 350,000 is sufficient compensation for pain and suffering. Counsel has made reference to the case of **HARUN MUYOMA BOGE VS DANIEL OTIENO AGULO (2015) eKLR** where Majanja J. enhanced an award of Kshs. 150,000 to Kshs. 300,000 where the appellant had sustained Chest injuries, cut wound right wrist, deep cut wound on the right foot, fracture of the right tibia and fibula and soft tissue injuries with two contradicting incapacity assessment of 25% and 5%. Further, reliance is made to the case of **ZACHARIA MWANGI NJERU V JOSEPH WACHIRA KANOGA (2014) eKLR** where an award of Kshs. 800,000 was reduced to Kshs. 400,000 on appeal for fracture of the left tibia and fibula.

The respondent opposed the appeal and stated that he was a casual worker who signed into work with his identity card and was paid on a weekly basis after signing a salary voucher which remained with the appellant. According to counsel, it was the responsibility of the appellant under Section 74 of the Employment Act to keep a record of its employees. Counsel for the respondent was of the opinion that with regards to the nature of the respondent's casual work engagement, getting hold of documentary evidence would be impossible however, he maintains that the appellant failure to tender oral or documentary evidence confirmed that the respondent indeed worked at its site at Riverside.

On liability, counsel submitted that the appellant failed to provide suitable protective gear and appliances to the respondent as required under Section 10(1) of the Occupational Safety and Health Act No. 15 of 2007 thus the 100% liability should not be disturbed. The respondent further maintains that the accident occurred after the crowbar he was given by the appellant broke leading to the fall and sustained an injury to the left ankle which would have been avoided had he been wearing safety boots.

On the issue of quantum, the respondent submit that he sustained a fracture of the tibia and fibula malleolus of the right leg. The Medical Report of Dr. Mwaura placed permanent disability at 25% with osteoarthritis as at the time he was being examined. Mr. Mwaura submitted that the respondent testified that his leg is deformed and he is no longer able to do construction work, accordingly, the award of Kshs.

600,000 is not inordinate as the trial court considered the injuries properly. Relying on the case of **MUGAMBI AND SILAS VS ISIAIAH GITIRU CIVIL APPEAL NO. 130 OF 2002** the respondent has urged this court not to disturb the award. The respondent has made reference to the case of **FRANKLINE CHILABASI SPII VS KARANGI LISTONE MALINDI HCC NO. 30 OF 2015** where the court awarded Kshs. 1,800,000 for a fracture of the right distal tibia and fibula.

Analysis and Determination:

This being a first appeal the court has to evaluate the evidence adduced before the trial court afresh before drawing its own conclusion. The respondent testified on 19th October, 2016 that he was working at the appellant's construction site as a general worker. In his further testimony, the respondent stated that on 2nd April, 2015 he was at his place of work on the 1st floor removing timber from a shutter using a crow bar. That the crow bar broke and he fell to the ground floor of the building sustaining injury on the right ankle joint. He was taken to Mama Lucy Hospital where an X ray confirmed a fracture and plaster of paris was applied on his leg for seven weeks. The respondent called Dr. Mwaura as PW1 who confirmed the injuries and produced a medical report dated 12th June, 2015. The respondent blamed the appellant for the accident for giving him a faulty crow bar and failure to provide him with necessary protective gears. He pleaded for general and special damages together with costs and interests. The appellant produced a 2nd medical report from Dr. Wambugu dated 19th October, 2016 by consent and closed its case without calling any witnesses.

The appeal raises twin issues of liability and quantum. On the issue of liability, the appellant contend that the respondent did not prove his case to the required standard. According to the appellant, the respondent failed to link his injuries to its negligence and or breach of statutory obligations as there was no proof that he worked for the appellant and that the injuries were sustained in the course of his employment. On his part, counsel for the respondent maintain that the plaintiff 's evidence is not controverted by any defence evidence.

The trial court in its judgment made the following finding: -

“The defendant did not tender any evidence to rebut that of the plaintiff. The defendant pleaded contributory negligence as against the plaintiff which was however never proved as the defence did not give any evidence. In Edward Muringa vs Nathaniel D Schuller Civil Appeal No. 23 of 1997 the court observed as follows; “In this matter, apart from filing its statement of defence, the defendant did not adduce any evidence in support of assertions made therein. The evidence of the first plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains allegations... sections 107 & 108 of the Evidence Act are clear that he who asserts or pleads must support by way of evidence.”. The liability of an employer towards his employee attaches once an employee is injured in the course of employment as a result of failure to ensure the duty of care expected from the employer. The plaintiffs evidence has not been controverted by the defendant. In the premises, I find and hold the defendant liable at 100%.”

In **CMC AVIATION LTD. VS. CRUISAIR LTD. (NO. 1) [1978] KLR 103; [1976-80] 1 KLR 835**, Madan, J (as he then was) expressed himself as hereunder:

“Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of “evidence” as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.”

It is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the respondent against them is uncontroverted and therefore unchallenged. In the present case there is no evidence on record that the respondent was employed by the appellant save for his testimony in court. The statement of defence dated 15th October, 2015 states that the respondent was not the appellant's employee however the uncontroverted evidence of the respondent does confirm that there did exist an employee/employer relationship.

The respondent's evidence is that he was inside the appellant's construction site on the 1st floor when the crow bar he was using broke and as a result he fell to the ground floor. The question then is, given that set of facts, can the respondent be held to have either caused or contributed to the occurrence of the accident? The facts of the case are that the respondent was injured at his place of work. The respondent cannot be blamed for the occurrence of the accident. The breaking of the crowbar used in the site initiated the events leading to the respondent's injuries. The respondent neither had a helmet nor work boots. Further, there is no evidence on record to suggest that the respondent might have contributed to the accident.

It is true that the mere occurrence of an accident does not automatically make an employer liable. However, an employer has the duty of ensuring that the working environment is quite conducive and does not expose any employee to the risk of injury. Any accident which occurs during the course of employment and which cannot be attributed to the employee's own negligence will normally call into question the employer's working environment. I do find that the appellant is entirely to blame for the occurrence of the accident. The appellant ought to have ensured that all the working equipment were in good shape and that the employees had adequate protective gears. I am in agreement with the findings of the trial court on liability.

On quantum, the respondent in his plaint dated 17th August 2015 pleaded for general damages and Kshs. 2,000 as special damages. The respondent was examined by two medical doctors. The first report by Dr. Mwaura dated 12th June 2015 placed the permanent disability at 25% and observed developing osteoarthritis of the tibia and fibula and arthritis of the joints, limping right leg and pain when walking on the right leg. He particularized the injuries as follows:

- Fracture of tibia and fibula malleolus right leg
- Traumatic injuries of the surrounding soft tissue fracture site

The second medical report by Dr. Wambugu dated 19th October 2016 places permanent disability at 12 % and observed that the respondent walks with a right sided limping gait and osteoarthritis across his ankle joint. The report describes the injuries sustained as Bimalleolar fractures right ankle joint.

The appellant has proposed a sum of Kshs. 350,000 as adequate compensation for the injuries sustained by the appellant. Reference was made to the cases of **HARUN MUYOMA BOGE VS DANIEL OTIENO AGULO (supra)** **ZACHARIA MWANGI NJERU V JOSEPH WACHIRA KANOGA (supra)** where an award of Kshs. 350,000 and 400,000 respectively were awarded for similar injuries. The trial court awarded the respondent Kshs. 600,000 for general damages and relied on the case of **JOSEPH KITHEKA V STEPHEN MATUKA PIUS HCCC NO. 1750 OF 1999** where the court awarded Kshs. 700,000 for fracture of the tibia and fibula in 2000 and the case of **ATHUMANI SIMIYU V LUDOVICA MWANDOE & 2 OTHERS (1999) eKLR** where the court awarded Kshs. 480,000 for fracture of the right ankle.

The appellant has urged this court to interfere with the award as the same is inordinately high. The respondent on the other hand has submitted that the award should not be disturbed as the trial court took into consideration the nature of the injuries sustained. The Court of Appeal in **BASHIR AHMED BUTT VS. UWAIS AHMED KHAN (1982-88) KAR** set out the parameters under which an appellate court will interfere with an award in general damages when it held:

‘An appellate court will not disturb an award for general 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...’

From the above authorities, it is my considered view that the award of Kshs. 600,000/= was based on comparable decisions and similar injuries and is not excessive or inordinately high. As for special damages of Kshs. 2,000/=, the same was pleaded and proved. The upshot is that the appeal lacks merit and is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF NOVEMBER, 2021.

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S. CHITEMBWE

JUDGE