REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL NO. 15 OF 2018

ALEX MUTUGI KINYUA.....APPELLANT

VERSUS

MUNGANIA TEA FACTORY.....RESPONDENT

J U D G M E N T

A. Introduction

1. This is an appeal from the judgment of Embu Senior Resident Magistrate in CMCC No. 259 of 2017 delivered on 28th March 2018.

2. The appellant filed suit against the respondent in the trial court for compensation for general and special damages as well as costs of the suit as a result of injuries sustained in the course of his employment with the respondent. In dismissing the suit, the trial court held that the appellant was injured as a result of his own negligence.

3. Being dissatisfied with the trial court's decision, the appellant filed his memorandum of appeal dated 27th April 2018 that was based on four grounds that can be summarised as follows;

> *a) That the learned trial magistrate erred in law and fact in finding the appellant wholly liable for the accident despite the weight of evidence adduced.*
>
> *b) That the learned magistrate erred in failing to find that the respondent contributed to the accident.*

4. The appellant filed submissions in support of his arguments.

B. Appellant's Submissions

5. It is submitted that the appellant proved his case on negligence against the respondent given the provisions of section 6 (1) & (2) of the Occupational Safety and Health Act No. 15 of 2007 that provides interalia that the respondent ought to have provided information, instruction and training as well as maintain the workplace in a condition that is safe, provisions which according to the appellant were not complied with and no evidence was produced to prove otherwise by the respondent.

6. It was also submitted that the respondent contributed wholly or partially to the appellant's injuries in light of the mandatory provisions of the Occupational Safety and Health Act that require an employer to provide a safe working environment.

7. It is also submitted that the respondent failed to enter appearance or file its defence and as such the appellant's case proceeded uncontroverted and as thus based on the evidence produced by the appellant before the trial court, he proved his case on a balance of probabilities.

8. The appellant submits that since the trial court found that the appellant was injured in the course of his employment with the respondent, it ought to find the respondent 100% liable for the injuries he sustained and grant general damages of Kshs. 600,000/= and special damages of Kshs. 3,000/=.

9. Reliance is placed on the cases of **Nickson Muthoka Mutavi v Kenya Agricultural Research Institute; Machakos H.C.C.A No. 93 of 2012** and that of **Clement Gitau v Joseph Kamau Nyokabi; Nairobi H.C.C.A No. 522 of 2012.**

C. Analysis & Determination

10. The issues for determination in this appeal are firstly, whether or not the learned Trial Magistrate erred on matters of fact or law in finding that the Appellant had not proved any negligence on the part of the Respondent and was solely to blame for the accident, and in dismissing the Appellant's claim. Secondly if there was an error made in the said findings, what quantum of damages should be awarded to the Appellant. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions. Seein this regard the decisions in this respect**Jabane vs. Olenja,[1986] KLR 661,Selle vs Associated Motor Boat Company Limited [1968] EA 123**and**Petersvs.Sunday Post[1958] E.A. 424.**

11. The applicable law as regards this appeal has been stated in various legal treatises and judicial decisions. A regards an action in negligence it is stated in**Halsbury's Laws Of England, 4th Edition**at paragraph 662 at page 476 as follows with respect to the what is required to be proved in an action such as the Appellant's: -

> ***"The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal connection must be established."***

12. In addition, in**Winfield and Jolowicz on Tort,Seventeeth Edition**the nature of an employer's duty is explained in detail in paragraphs 8-10 to 8-14 at pages 376 to 382, which in summary is the duty to take reasonable care so to carry on operations as not to subject persons employed to unnecessary risk, and this includes the duty to provide competent staff, adequate plant and equipment, a safe place of work and a safe system of working.

13. Section 6(1)of theOccupational Safety and Health Act provides: -

> ***"Every occupier (employer) shall ensure the safety, health and welfare at work of all persons working in his workplace."***

14. It, therefore, follows 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. Does this mean that the employer would always be liable in all circumstances regardless of what caused the accident in question? I do not think so. I say so because where an accident happens due to the employees own negligence it would be unfair to hold the employer liable. Further***Section* 13(1)(a)of theOccupational Safety and *Health Act***provides: -

> ***"13(1) Every employee shall, while at the workplace –***
>
> **(a)** ***ensure his own safety and health and that of other persons who may be affected by his acts or omissions at the workplace."***

15. Therefore, the employee is also required to take reasonable precaution to ensure his/her safety at the workplace while performing his/her duties.

16. In this caseit was the appellant's case that he was employed as a firewood loader and that on the material date he was on duty and was trying to disconnect the tractor from the trailer when he fell down and the tractor fell on him injuring his left leg. The appellant sustained a fracture on his left leg. The appellant claimed negligence on the part of the respondent on the grounds that he failed to provided him with safety gear, that the respondent instructed the appellant to work under hazardous circumstances, that he was exposed to known risks that ought to have been reasonably foreseen and that he was not provided with adequate training.

17. The appellant's employment with the respondent is not in doubt, neither is the fact that he was injured in the course of duty, what is left for determination is whether the respondent breached his duty of care to the appellant.

18. Lord Reid expressed himself in **Stapley –vs- Gypsum Mines Ltd,(2) (1953) A.C. 663**as follows: -

> ***"To determine what caused the accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it…….***
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> ***The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident."***

19. From the record and from the appellant's testimony, I do note that the respondent did not provide and safety tools to the appellant in the form of gloves, gumboots, overalls and all the safety tools an employer is required to supply his worker. It is the duty of the employer to provide the employee with protective gear. The respondent in this case failed to fulfil this obligation. If the appellant had worn protective clothing, the injury he suffered would have been less severe. It is my considered view that the respondent was liable for the said accident and the trial court ought to have so held.

20. It is my considered view that the appellant failed to exercise circumspection while disengaging the tractor from its trailer and he fell down thus contributing to the occurrence of the accident. The appellant ought to have taken reasonable care whilst disengaging the tractor from the trailer.

21. Having found tht both contributed to the accident, I am of the considered view that liability ought to be apportioned between the parties. I hereby apportion liability at 50:50.

22. I note that the magistrate failed to carry out his important duty of assessing damages even as he dismissed the case. I will therefore proceed to assess the same damages.

23. On quantum, the appellant had submitted that an award of Kshs. 600,000/= would suffice for the injury of a fractured left leg. Reliance is placed on the cases of **Nickson Muthoka Mutavi (supra)** and that of **Clement Gitau (supra).**

24. In the recent case of ***Naom Momanyi v G4S Security Services Kenya Limited*****[2018] eKLR**, the appellant sustained a fracture of the left-right condylar tibia, blunt injuries on the back and multiple bruises on the left arm and was awarded Kshs. 300,000/=. In***Wakim Sodas Limited vs. Sammy Aritos*****[2017] eKLR**, the respondent had sustained a fracture of the fourth rib and a compound fracture of the left tibia/fibula. The trial court awarded Kshs. 400,000/=, which was upheld on appeal.In**Vincent**

Mbogholi vs. Harrison Tunje Chilyalya[2017] eKLR, the appellate court declined to disturb an award of Kshs. 500,000/= for a fracture of the left tibia leg bone (medial malleolus), blunt injury to the chest and left lower limb and bruises on the left forearm, right foot and right big toe.

25. It is trite law that special damages ought to be strictly proven. I have perused the record and find receipts to support the appellants claim for special damages of Kshs. 3,000/=. I hereby award Kshs. 3,000/= in that item.

26. From the review of the foregoing decisions on the comparable injuries, it would appear to me that the trend is to award general damages in the range of Kshs 300, 000/= to Kshs. 500,000/=.Accordingly, it is my considered view that an award of Kshs. 400,000/= would be sufficient as compensation to the appellant.

27. The upshot of the above is that the trial court's judgement dated and delivered on the 28th March 2018 is hereby set aside. I find that the appellant has proved his case on the balance of probabilities and find in his favour at the rate of 50:50 contribution.

28. I hereby award damages as follows: -

a) General Damages Kshs. 400,000/=

b) Special Damages Kshs. 3,000/=

Total Kshs. 403,000/=

Less 50% contribution Kshs. 201,500/=

29. The appellant is awarded costs of this appeal and those of the court below.

30. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 20TH DAY OF JANUARY, 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Appellant present in person