REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CORAM: A.K NDUNG'U J

CIVIL APPEAL NO 428 OF 2017

EPCO BUILDERS LIMITED.....APPELLANT

VERSUS

NICHOLAS KIOKO MWANGANGI.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. E.K Usui – SPM dated 27th July 2017 in Nairobi CMCC No. 2353 of 2014)

JUDGEMENT

1. The respondent herein filed a suit in the Chief Magistrate's Court at Nairobi claiming that while employed by the appellant on 2nd February 2013 the Appellant's directors or supervisors assigned him duties of offloading door frames from a canter. The respondent avers that while offloading he was hit by a door frame on the right thumb and sustained injuries. The respondent claimed for general damages, special damages and cost of the suit.

2. The appellant denied that the respondent sustained any injury as a result of the accident and averred that it took reasonable precautions for the safety of its employees while engaged in their work and maintained a suitable working environment to their workers. In the alternative it pleaded that the accident was caused and/or substantially contributed to by the negligence of the plaintiff in the manner in which he carried out its work. At the close of trial the lower court considered the injuries sustained by the respondent, parties' proposals, cited awards plus incident of inflation and found that an award of Kshs 110,000/- was adequate compensation for pain, suffering and loss of amenities. It is the said judgment that precipitated the appeal filed on 18th August 2017. The appellant raised 6 grounds of appeal;

> *1. THAT the learned trial Magistrate erred in holding the appellant liable in negligence in the ratio of 100% to the Respondent and awarding damages of Kshs 110,000/- to the Respondent.*
>
> *2. THAT the Learned Trial Magistrate erred in law and fact in failing to make a finding that the appellant's defence raised serious triable issues and the plaintiff suit should have been dismissed as opposed to the awarding general damages.*
>
> *3. THAT the Learned Trial Magistrate erred in Las and fact by finding that the Respondent had proved his case against the appellant on a balance of probabilities.*
>
> *4. THAT the Learned Trial Magistrate erred in law and fact and as a result arrived at a wrong decision to the prejudice of the appellant.*
>
> *5. THAT the Learned Trial Magistrate erred in law and in fact in failing to take into consideration that an amount f Kshs 60,000/- would have been applicable in damages as submitted by the appellant.*
>
> *6. THAT the Learned Trial Magistrate erred in law and fact and as a result arrived at a wrong decision to the prejudice of the Appellant.*

3. The appeal was canvassed by way of written submissions. I have had occasion to consider the record of appeal and the original record of the court below.

4. As this is a first appeal, I am alive to the principle that the first appellate court is required to reconsider the evidence, evaluate it and draw its own conclusions making an allowance for the fact that it neither heard nor saw the witnesses testify (see **Selle v Associated Motor Boat Company Ltd [1968] E.A. 123, 126**).

5. The issues for determination are:

1) Whether the appellant should be held 100% liable.

2) Whether the award of Kshs. 110,000/= was inordinately high.

3) Who bears the cost.

6. On issue 1, the record shows that the plaintiff in the primary suit testified on the 7/8/2014 and called no witness. It was his testimony that on the 2/2/2013 he was working for the defendant as a mason. He was directed by his supervisor to offload heavy timber from a motor vehicle. It required two persons to undertake the task yet he was directed to do so alone. Timber fell on him. He was injured on right thumb.

7. He produced treatment notes from Bongo healthcare, a medical report by Dr. Okere, a receipt for Sh 2000 and a Casual Labour Card. He added that he was not issued with gloves.

8. On their part the defence called no evidence indicating to the court that the defendant's witness was unwilling to testify.

9. The evidence by the respondent that he was assigned a task for two to undertake alone and which led to timber falling on him injuring him is not controverted. His evidence that he was not provided with gloves for his safety is also not controverted by any other evidence. He produced evidence that he was employed by the defendant. The respondent thus discharged the burden of proof that lay squarely on him.

10. The defence filed remains a mere statement of fact since it is not substantiated by evidence. In **Trust Bank Ltd –vs- Paramount Universal Bank Ltd & 2 Others [2009]eKLR** the court held;

> *"The 2nd defendant and 3rd defendant closed their cases without calling a witness, it is trite law that where a party fails to call evidence in support of its case, that party's pleading remain mere statement of fact since in so doing the party fails to substantiate its pleadings. In the same view the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged."*

11. The pleading that the plaintiff was not employed by the defendant and the denial of negligence remain a mere statement and leave the plaintiff's evidence unchallenged.

12. I find no grounds upon which to fault the trial court's finding on liability.

13. As regards the quantum of damages, the principles upon which an appellate court would interfere with the quantum of damages awarded is well settled. In **Butt –vs- Khan [1981]eKLR 349** it was stated;

> *"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 on a figure which was either inordinately high or low."*

14. It is submitted for the appellant that the trial magistrate erred in law and fact in applying wrong principles in the assessment of damages which resulted in the award of damages that were excessive amounting to an erroneous estimate to loss.

15. The trial magistrate at page 12 of the judgment pronounced herself as follows;

> *"I have considered the nature of injuries sustained by the plaintiff, parties proposal, cited awards plus the incident of inflation. I find an award of Kshs. 110,000/= is adequate compensation for pain, suffering and loss of amenities. Claim for special damages is proved."*

16. In the defendant's submissions at the lower court, it was submitted;

"Had the plaintiff proved his case to the required standard an amount of Kshs. 100,000 would have been sufficient compensation for general damages due to the current high cost of living and inflation rates. Our opinion is supported by the case of ***SOKORO SAW MILLERS –VS- JOSEPH THUO NG'ANG'A (2012)*** *where the respondent suffered more or less similar injuries and was awarded Kshs. 60,000/=."*

17. The cases cited by the plaintiff in submissions on quantum being **Lei Masaku –vs- Kalpana Builders Ltd HCCC No. 40 of 2007 (Nbi)** and **George Karungaru –vs- Tibi Githora HCCC No. 968 of 1988(Nbi)** had damages assessed at 100,000.

18. In view of the above, I do not find the award of damages herein inordinately high or low as to represent an entirely erroneous estimate. Neither is it shown that the trial magistrate proceeded on wrong principles nor that he misapprehended the evidence in some material respect. I find no ground upon which to disturb the award.

19. With the result that the appeal herein lacks merit. The same is dismissed with costs to the respondent.

Dated, Signed *and* ***Delivered*** *at* ***Nairobi*** *this* ***20th*** *day of* ***January, 2020.***

A. K NDUNG'U

JUDGE