REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

HIGH COURT CIVIL APPEAL CASE NO. 143 OF 2007

JOSEPH BORO NGERA

T/A NGERA FANCY FARM.....APPELLANT

-VERSUS-

SAMUEL NDEGWA KIRUNGUMI.....RESPONDENT

Being an appeal from the judgment and decree of Hon. Nicholas Opele Ateya, Senior Principal Magistrate, in Nakuru CMCC No.361 of 1996 delivered on 19th December, 2003.

JUDGMENT

1. The respondent/plaintiff filed suit in the lower court seeking general and special damages for the injuries he sustained while in the appellant's/defendant's employment. After hearing the parties, the trial magistrate found the appellant 100% liable and awarded kshs. 300,000 for pain and suffering and special damages of kshs.2000 making total award kshs. 302,000 plus costs and interest.

2. Being aggrieved by the determination of the trial magistrate the appellant filed this appeal on the following grounds: -

i. That the learned magistrate erred in law in writing and delivering the aforesaid judgment when there were already, two other judgments on record dated and delivered on 19th September, 1996 and 14th June, 2002 respectively.

ii. That the learned magistrate erred in law in failing to evaluate and/or make specific findings on the competing but contradictory evidence adduced by and on behalf of the plaintiff and the defendant respectively.

iii. That the learned magistrate erred in law in awarding an excessive and clearly arbitrary sum as general damages to the plaintiff.

iv. That the learned magistrate erred in law and in fact, in finding that, the plaintiff had established his claim to the required standard.

v. That the learned magistrate erred in law in taking into considerations evidence that had already been set aside by consent and which was, therefore, not available for the court's consideration.

vi. That the learned magistrate erred in law in relying upon evidence that had not been tested by cross-examination.

vii. *That the learned magistrate's judgement is a nullity in law.*

APPELLANT'S SUBMISSIONS

3. In submissions filed on 9th August 2019, the appellant restated grounds of appeal and sought to set aside the judgment and decree dated 19th December, 2003 and an order do issue for fresh trial of the plaintiff's suit in the lower court.

4. The appellant submitted that this being the first appellate court, it should reevaluate evidence adduced in the trial court and make its own findings. He cited the case of **Selle & Another Vs Associated Motor Boat Co. Ltd & Others (1968) EA 123** where the court stated as follows:-

"…An appeal to this court from the trial court is by way of retrial and the principles upon which the court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own

conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect…"

5. The appellant prayed that this court reevaluate evidence and make its own findings.

6. Appellant submitted that the evidence adduced by PW1 was totally in contradiction to the evidence by DW1 and DW2; however, the magistrate only considered the version given by PW1 and failed to consider the testimony of DW1 and DW2.

7. Further, that parties visited the scene and PW1 was examined on that but the trial magistrate left out evidence from the cross-examination. That failure to consider the evidence adduced and apportioning liability at 10:90 is erroneous.

8. In respective to damages, appellant submitted that the damages awarded to the plaintiff/respondent is inordinately high and urged this court to find that the trial magistrate relied on wrong principles to arrive at the award; he urged court to set aside the award.

9. Appellant further submitted that the respondent failed to discharge its burden of proving the case on a balance of probabilities; that the case was founded on alleged negligence and by law they were require to establish on a balance of probabilities.

10. Appellant submitted that PW2 was not cross examined since after consent to set aside exparte judgment, the plaintiff failed to avail PW2 again.

11. On special damages, the appellant submitted that the respondent had indicated to the court that he was not pursuing it, as it was not pleaded; that the court issued an order that the claim for special damages is dismissed but went ahead to award thus being erroneous.

12. Appellant submitted that the trial court's judgment has many errors which ought to be varied or set aside; Appellant submitted that the duty of first appellate court is grounded in **Section 78 of Civil Procedure Act** which is to reevaluate and consider evidence and the law and exercise as nearly as may be powers and duties of the original jurisdiction and come to its own conclusion.

RESPONDENT'S SUBMISSIONS

13. Respondent submitted that the lower court judgment dated 19th September, 1996 was set aside by consent of parties on 7th February, 1997 and thereafter the plaintiff's case proceeded interparties on 22nd March 2002 when after cross examination of plaintiff by appellants counsel, the appellant's counsel applied for the court to visit the scene and the right for further cross examination was reserved until after the visit; that when the respondent's/plaintiff's case came up on 13th March 2002, the appellant's counsel was absent and the case proceeded exparte; respondent further submitted that **Dr. Kiamba** testified the same day and both cases were closed; next was judgment delivered on 14th June 2002; and further the plaintiff/respondent was ready to compromise the judgment and it was set aside by consent of parties on 3rd February, 2003.

14. Respondent submitted that the scene visit was done on 4th September, 2003 a period of 8 years after occurrence of the accident. Thereafter the defendant/appellant and DW2 testified and judgment was delivered on 19th December 2003.

15. Respondent submitted that the two judgments of 19th September 1996 and 14th June 2002 were set aside but their proceedings were not set aside and that is why after setting aside judgment of 14th June 2002, the case proceeded from where it had reached.

16. As to whether the court relied on evidence which had not been tested by cross examination, the respondent submitted that the appellant's counsel then cross examined the respondent on 22nd March 2002 and was further cross examined on 4th September 2003 when parties visited scene of the accident.

17. The respondent further submitted that the appellant never applied to recall **PW2, Dr. Kiamba** who testified on 13th May 2002 when the appellant failed to attend court. Respondent submitted that the court relied on proceedings, which were not set aside, and the appellant had a chance to cross-examine plaintiff's evidence.

18. In respect to evidence adduced the respondent submitted that he was not provided with protective gadgets while working for the appellant and PW2 who was co-worker corroborated his evidence; the respondent further submitted that there was no record to confirm that the respondent was provided with protective gear.

19. Respondent submitted that the appellant admitted that he never witnessed the accident and DW1 who was respondent's co-worker, said he was walking out when the accident occurred and he therefore never witnessed the accident.

20. Respondent further submitted that DW1 and DW2 adduced contradictory evidence and urged court to disregard the evidence; further from the evidence adduced, the appellant never attributed any negligence to the respondent.

21. On damages, the respondent submitted that the trial magistrate did not apply wrong principles; that the award of kshs. 380,000.00 was appropriate for injuries suffered being amputation of right finger, amputation of distal phalanx of the right 4th finger and a deep cut wound on the right index finger; and further the doctor indicated that the respondent sustained temporary disability of 2 months and permanent disability of 10% and classified the degree of injury as grievous harm.

22. The respondent further submitted that the appellant failed to highlight respondent's oral submissions in which he relied on the case **of**

Patrick Odhiambo Obiro Vs Catholic Diocese of Nakuru (Nakuru HCC No.177 of 1995) where the plaintiff who sustained injuries close to respondent's was awarded kshs.400,000; respondent added that the appellant never called a doctor to dispute the injuries.

23. Respondent cited the case of **Rahima Tayab & Another Vs Annaa Mary Kimuru [1982-1988] KAR 90** where the court held that comparable injuries should attract comparative award; and submitted that the trial court did not err in awarding damages of kshs. 380,000.

ANALYSIS AND DETERMINATION

24. I Have considered submissions herein and record of appeal and consider the following to be issues for determination: -

(i) Whether the trial magistrate erred in writing judgment herein when there were 2 judgments already.

25. Record show that on 7th February 1997 the court set aside exparte judgment of 19th November 1996. Hearing started again on 18th May 1998 when after the plaintiff testified the case was adjourned for the doctor to testify. On 30th July 1998 the doctor testified and plaintiff's case was closed. The matter was adjourned to 17th August 1998 for defence hearing on 16th July 2001, the court ordered that the case start *denovo* due to change of judicial officer. Hearing proceeded on 22nd March 2002. Plaintiff was stood down for further cross examination at the request by defence counsel to do further cross examination at the scene. The court scheduled scene visit for 17th April 2002 at 2.00 pm. The defence counsel failed to attend scene visit and plaintiff's counsel requested for scene visit to be dispensed with which request was granted. On 13th May 2002 the defence counsel failed to attend court and the doctor adduced evidence at 12. 30p.m. Plaintiff's case was closed. Plaintiff's counsel demonstrated that defence counsel was served by filing affidavit of service. Judgment was delivered on 14th June 2002.

26. The exparte judgment of 14th June 2002 was set aside on 3rd March 2003 and court ordered defence case to proceed on 24th February 2003. It is evident therefore that the two judgments earlier delivered on 19th September 1996 and 14th June 2002 were set aside. The first ground of appeal therefore cannot stand.

(ii) Whether the trial magistrate failed to properly evaluate evidence adduced.

27. In answering this issue, I will reevaluate evidence adduced before the trial court and make an independent determination. This position was held in the case of **Selle & Another Vs Associated Motor Boat Co. Ltd & Others (1968) EA 123** where the court stated as follows:-

> **"…An appeal to this court from the trial court is by way of retrial and the principles upon which the court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions thought it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect…"**

28. I am however minded of the fact that unlike the trial court I had not had opportunity to take evidence first hand and observe demeanor of witnesses. For this I give due allowance.

29. From record the plaintiff's testified that on 27th December 1995, while he was operating a milling machine, when pulley belt cut and hit his finger injuring three fingers of the right hand. He said his middle finger was amputated; he said he did not expect the belt to cut. He said he had no protection garments like gloves, overall and gumboots. He said he was not warned that the belt was defective. He was treated at Pine Breeze Hospital. He produced treatment chit and medical report by **Doctor Kiamba.** He said he paid the doctor kshs.2000 and produced receipt in court as exhibit.

30. On cross examination, he said they were 3 people in the machine and he was putting grass in the machine to make cattle feed and when the belt cut, the mortar moved fast. He denied stopping the belt by touching and said the machine was on.

31. On further cross examination at the scene on 4th September, 2003, he said the machine which injured him is not the one which was at the scene at the time of visit. He said he was pushing hay to the machine when the belt hit him; he denied touching the fan belt as it rotated. He blamed the defendant for failing to protect the fan belt with guards or wire mess to prevent it from flying off if it got cut. He reiterated that the belt got cut and flew off.

32. The defendant in his testimony confirmed that on 27th December, 1995 the plaintiff/respondent was injured by grass grinding machine. He said the machine which the court found at the scene was the same one which injured the respondent/plaintiff and that he had only one hay machine which the court saw at the scene. He stated that he was told the plaintiff held the belt to stop the machine after an argument with his colleague and denied that the belt got cut and prayed that the suit be dismissed.

33. On cross examination the appellant said he did not witness the accident neither was his manager present. He confirmed that he had three machines in the store with on and off switches and the plaintiff had worked on the machine for a long time. He said the machine was guarded but confirmed that the plaintiff did not have helmet, boots but the manger had given him gloves but he does not remember if he signed for them.

34. DW2, plaintiff's workmate confirmed that plaintiff was injured. He said the mechanic had just left when the plaintiff held the belt of the machine to stop it then he suddenly heard something from behind. When he turned, he saw the plaintiff holding his hand which was bleeding.

35. On cross examination, he said he was with plaintiff and mechanic in the store but he did not see how the accident occurred. He said he

was not given helmet, boots nor gloves. He stated that the plaintiff was not also given the protective gadgets. He confirmed that one of plaintiff's fingers was cut off and the other was hanging. He said that there was no argument between him, mechanic and plaintiff. He said the belt has guards.

36. There is no dispute that the plaintiff was the appellant's employee and that he was injured on 27th December, 1995 while grinding cattle feed. DW2 who testified for the appellant confirmed that the plaintiff/respondent was not given protective gear. The respondent/defendant also never availed any record to confirm that the plaintiff/respondent was given any protective gear. The protective gear would have either prevented or reduced the extent of the injury. On the other hand, the respondent was not working on the machine for the first time; he therefore knew how to operate it and had responsibility to be cautious while working on the machine. I note that the trial magistrate apportioned liability at 10:90. However in view of evidence captured above I am inclined to enhance contribution on part of the respondent to 20%. Plaintiff/respondent to shoulder 20% liability and defendant/appellant 80% liability.

(iii) Whether the trial magistrate applied wrong principles in assessing damages

37. In so far as quantum is concerned, on injuries sustained, **Dr. Kiamba** testified that the plaintiff sustained amputation of the third right finger, amputation of distal phalanx of the right 4th finger and a deep cut on the right index finger and his examination confirmed the amputations and a soar on the right index finger and all the fingers on the hand were tender. He said the amputation was a permanent disability; he classified the degree of injury as grievous harm and assessed temporary disability as 2 months and permanent disability of 10%. He confirmed that he charged kshs.2000 for the report and kshs.5000 for attending court and produced 2 receipts to confirm that.

38. On perusal of submissions dated 20th May 2002, the plaintiff cited two authorities. I have compared the injuries sustained and note that the respondent's injuries are comparable to injuries sustained in **Mombasa HCCC No. 528 of 1991 Sevile Mwayalo Vs Abeid M.K & Another** where the plaintiff had two finger of the right hand amputated and kshs.320,000 was awarded. I note that the said case was decided about 10 years before determination of this matter in the lower court. Having compared the injuries suffered and taking note of the lapse of time and incident of inflation, I find that the trial magistrate did not therefore apply wrong principles or misapprehended evidence adduced in assessing damages. Award of kshs. 300,000 as general damages for pain and suffering for the respondents herein was reasonable. I will not therefore interfere with quantum.

39. FINAL ORDER

1. **Finding on liability is set aside.**
2. **Liability apportioned at 20:80.**
3. **Damages assessed by the trial court upheld.**
4. **Each party to bear own costs of appeal.**

Judgment dated, signed and delivered via zoom at Nakuru

This 21st day of May 2020.

RACHEL NGETICH

JUDGE

In the presence of:

Court Assistant- Schola

M/s Oganga Advocates for Appellant

Ms. Kinuthia for Respondent