REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 713 OF 2016

TWIGA STATIONERS AND

PRINTERS LIMITED.....APPELLANT

VERSUS

FRANCIS MANASI RODGERS.....1ST RESPONDENT

ESSENTIAL MANAGEMENT

CONSULTANCY SERVICES LTD.....2ND RESPONDENT

(being an appeal from the Judgment of Honourable Chief Magistrate Ms. R. Ng'etich delivered n 3rd November, 2016 in CMCC case No. 2062 of 2014 at Milimani Law Courts)

J U D G M E N T

The appellant herein was the first defendant in civil suit number 2062 of 2014 at the Chief Magistrate's Court at Milimani which was filed by the first respondent herein against the appellant and the 2nd respondent. In the said suit, the 1st respondent claimed general damages, loss of earning capacity, cost of artificial prosthesis and replacement at a cost of Kshs. 250,000/=, special damages of Kshs. 3,000 plus costs of the suit and interest.

In the plaint, the 1st respondent claimed that on or about 30th day of December, 2012 whilst he was lawfully engaged in the cause of his duties with the appellant, an accident occurred as a consequence of which, he was injured and he suffered loss and damages.

He averred that the said accident was caused by negligence and/or breach of statutory duty on the part of the appellant and the 2nd respondent, the particulars whereof were set out in paragraph 8 of the plaint whereas those of injuries and special damages were set out in paragraph 9 of the plaint. He prayed for judgment against the appellant and the 2nd respondent, jointly and severally.

The appellant filed a defence to the first respondent's claim on the 4th day of July, 2014, in which it denied the 1st respondent's claim. In the alternative but without prejudice, it averred that if the accident occurred but which was denied, the same was wholly caused or materially contributed to, by negligence on the part of the 1st respondent. The particulars of negligence were set out in paragraph 8(C) of the defence. It was further averred that the 1st respondent with full knowledge and understanding of the danger, (if any but which is not admitted) from the risk of injury resulting from each and every one of the acts and omissions complained of (all of which are denied) consented to carrying out the said duties.

Further and/or alternatively, if the 1st respondent was injured (which is denied), he was at all material times on a frolic of his own. The particulars of loss, damage and injuries were all denied and so were the particulars of negligence.

Similarly, the 2nd respondent filed its defence on the 24th October, 2014 in which it denied the 1st respondent's claim. It averred that it is not liable for the accident on the grounds that it recommended the recruitment of the 1st respondent by the appellant. It denied the occurrence of the accident, loss and damage alleged by the 1st respondent, particulars of negligence and those of injures as alleged by the 1st respondent. It contended that if an accident occurred, but which was denied, the same was solely due to and/or substantially contributed to, by the negligence and/or recklessness on the part of the 1st respondent. The particulars of negligence were set out in paragraph 10 of the defence.

The 1st respondent filed a reply to the appellant's defence on the 14th July, 2014, in which, he averred that the appellant and the 2nd respondents are jointly and severally liable to meet his claim on account of strict and/or statutory liability.

At the hearing, the 1st respondent testified in support of his case and called one witness. The appellant called one witness but the 2nd respondent closed its case without calling any witness.

Upon analyzing the evidence on record and the submissions of the parties, the learned Magistrate in her judgment delivered on the 3rd day of November, 2016, found the appellant and the 2nd respondent liable for the accident and awarded the 1st respondent damages in the total sum of Kshs 3,505,120/- plus costs of the suit.

The said judgment is the subject of the appeal herein, in which, the appellant has listed nine grounds of appeal in its memorandum of appeal dated the 25th day of November, 2016 and filed on even date.

In my view, the grounds of appeal can be collapsed into the following grounds;

> *1. Whether the learned Magistrate erred in finding the appellant liable.*
>
> *2. Whether the learned Magistrate erred in holding both the appellant and the 2nd respondent liable to the extent of 90% and in failing to apportion liability between them.*
>
> *3. Whether the awards of general damages and loss of earning capacity were inordinately high.*
>
> *4. Whether the learned Magistrate erred in awarding special damages of kshs. 250,000/= when the same was not pleaded or proven.*
>
> *5. Whether the learned Magistrate erred by failing to find that the 1st respondent was employed by the 2nd respondent.*

The appeal was disposed of by way of written submissions. It is worth noting that the 2nd respondent supported the 1st respondent's case and urged the court to dismiss the appeal. In fact, as at the time of hearing the appeal, the 2nd respondent had already satisfied its part of the Decree.

As the first appellate court, the duty of this court is to approach the whole of the evidence on record from a fresh perspective and with an open mind. This principle was espoused in the case of ***Selle & Another vs. Associated Motor Boat Company Limited & Another 1968 EA 123*** in which the court held;

> ***My duty is to re-evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore make an allowance in that respect.***

In addition, this court will normally as an appellate court not interfere with the trial court's judgment on a finding of fact unless the same is founded on wrong principles of fact and/or law. In the same case, ie. ***Selle & Another*** (supra) the court of appeal held thus;

> *"A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion".*

As regards the quantum in ***Loice Wanjiku Kagunda vs. Julius Gachau Mwangi CA. 142/2003,*** the court of appeal held;

> *"we appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles."*

Similarly, in the case of ***Henry Hidaya Ilanga vs. Manyema Manyoka Civil Appeal No. 64 of 1961 EA 705;*** the court held thus

> *"The principles which apply in interfering with the award of damages are not in doubt. Whether the assessment of damages by a judge or jury the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at the first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some irrelevant one); or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be wholly erroneous.*

That said, I now turn to the grounds of appeal as set out hereinabove. On liability, the first respondent in his evidence stated that he was working at the appellant but was recruited by the 2nd respondent. He was working as a machine operator when it developed some mechanical problems. He opened the emergency door and in the process, due to lack of maintenance, the wire and the gears of the machine had already gone defective and the machine failed to function normally, thereby causing the press lamp to cut his right hand.

He stated that prior to this date, he had notified the appellant's management and officers of the need to carry out a routine general maintenance as the due date for maintenance was long overdue. That the due date for maintenance had fallen on 4th September, 2013 but nothing was done by the appellant. He stated that he made several requests for the maintenance but in vain and that he had even reported the

matter to the supervisor, one Mr. Kyalo about the defect but nothing was done.

In cross examination he stated that he had worked for the appellant for 4 ½ years and that he was transferred to the appellant to handle the machine but the 2nd respondent had employed him as a general laborer. It was his evidence that he was qualified to work on the machine but according to him, it was defective. He averred that though he switched off the machine at the main switch, it started to run again which ought not to have been the case, as opening of the emergency door signals an automatic disconnection of the entire machine from functioning. He stated that he was not provided with any protective gargets and blamed the appellant and the 2nd respondent for the accident.

DW1 who testified on behalf of the appellant admitted that the 1st respondent was injured within the appellant's premises, in the course of his duties and was injured by the appellant's machine. She stated that the appellant provides protective gear to its employees and further stated that the 1st respondent was not supposed to open any compartment of the machine.

Upon analyzing the evidence, DW1 did not deny that the machine that the 1st respondent was working with was defective. In fact, she said nothing about the state of that machine yet she is the only witness who testified on behalf of the appellant.

She admitted that the 1st respondent was working in their company and he was injured in the course of his employment but contended that it was the 2nd respondent who was supposed to insure him. According to her, the appellant's insurance paid the 1st respondent on humanitarian grounds. She produced an agreement dated 11th May, 2009 entered into between the appellant and the 2nd respondent.

In its submissions, the appellant has relied on the said agreement to a very great extent. In my view, the agreement is important because it has a bearing on the issue of both liability and who between the appellant and the 2nd respondent had employed the 1st respondent.

The court has perused the said agreement. The appellant in its submissions has referred on it in extensio to support its contention that the 1st respondent was an employee of the 2nd respondent.

The recitals of the said agreement "C" reads as follows;

> ***"The client (the appellant herein) does not wish to employ the personnel or assume any employer/employee liability in relation to such personnel".***

The agreement also provides for the obligations of both the 2nd respondent and the appellant.

The following were the obligations of the 2nd respondent;

Under clause 4.3, the 2nd respondent was to employ such number of personnel as the appellant requires from time to time **PROVIDED ALWAYS THAT** the seconded personnel shall not be deemed to be in the employment of the client(the appellant)

Under clause 4.4, with effect from the commencement date, enter into written employment contracts with the seconded personnel.

Clause 4.7; pay the salaries and wages of the seconded personnel and remit all the mandatory statutory deductions to the relevant authorities in a timely manner

Clause 4.8; Using its best endeavours, handle all labour issues relating to the seconded personnel without limitation.....

Clause 4.16; Maintain insurance for the seconded personnel in such amounts and provide protection against such risks as required under the Work Injury Benefits Act 2007 or any other law.

On the other hand, the appellant was under an obligation to pay the agreed fees between it and the 2nd respondent;

Clause 7.1 provides that ..... accordingly, the seconded personnel will neither have nor enjoy any rights whatsoever against the client as employees of the client under the employment Act and the regulations made thereunder or under any other legislation in force in Kenya relating to employment.

Under clause 7.2; ------- essential management undertakes that as the employer of the seconded personnel, it shall be responsible for such benefits and all the terminal dues of the seconded personnel.

Still on the issue of employment, clause 21 is clear that nothing in the agreement shall be deemed or construed to render either party a partner or agent of the other. The court has also perused the letter of appointment that was produced as exhibit 2. It is also very specific in its terms. From the aforegoing, it is clear and there can never be any doubt that the 1st respondent was an employee of the 2nd respondent and not that of the appellant.

On the issue of liability between the appellant and the 2nd respondent, according to the agreement, it was the duty of the 2nd respondent to ensure that the seconded personnel possess the requisite qualifications, skills and appropriate competencies required of the client. See clause 4.5.

It was also the obligation of the 2nd respondent to appoint specified persons as supervisors who were to be based at the client's premises; supervise the seconded personnel and ensure that they discharge their responsibilities in accordance with the client's instructions using the necessary standard of care, appropriate skills and diligence.

On the other hand, the appellant was under an obligation to provide basic first aid kits within its premises and to undertake induction of newly seconded personnel and provide such "*on the job training*" to the seconded personnel placed on general duties to enable them perform their duties.

The court has perused the letter of appointment produced by the 1st respondent as exhibit 2. It clearly sets out the duties for which he was employed. It states that his duties would be but not limited to the following;

a) General work.

b) Any other duties as may be assigned by the client, Twiga stationers and printers limited.

In his evidence, he clearly stated that the 2nd respondent had employed him as a general laborer but the appellant transferred him to handling of the machine. He further stated that he had not been provided with any protective gears.

In its submissions, the appellant has argued that it was the duty of the 2nd respondent to provide qualified and skilled personnel and that the 1st respondent was also under duty to take care of himself while so engaged in his work. They have relied on the case of ***Makale Mailu Mumende vs. Nyali Golf Country Club (1991) KLR 13*** where the court stated that;

> "*No employer in the position of the defendant would warrant the total continuous security of an "employee" engaged in the kind of work the plaintiff was engaged in, but inherently, dangerous. An employer is expected to reasonably take steps in respect of the employment, to lessen danger or injury to the employee*".

The appellant also relied on Section 3 of the Occupational Liability Act, 2007 that defines the scope of duty of care that an occupier owes a visitor in any premises, to be the common duty of care which is stated under sub-section 2 as the duty to take such care as in all the circumstances of the case is reasonable to see that the visitor is reasonably safe. The case of ***Kenya Breweries Ltd vs. Meshack Momanyi (2018) eKLR*** was relied on, in that regard.

The court has considered the submissions made by the appellant, the evidence on record and the agreement referred to hereinabove.

The letter of appointment is very clear that the 1st respondent was employed as a general worker. Under clause 2.6 of the same, the appellant was supposed to provide him with protective equipment/clothing.

The 1st respondent stated that he was not provided with the protective clothing/equipment.

On her part, DW1 testified that they provide their workers with such equipment but no evidence was produced to show that the 1st respondent had been provided with the same.

The court notes that under clause 4.5 of the agreement, it was the duty of the 2nd respondent to ensure that the seconded personnel are skilled, qualified and competent. However, in the letter of appointment it is clear that the 1st respondent was a general worker. Under clause 5.3, the appellant was under an obligation to provide training to the seconded personnel placed on general duties to enable them perform their duties. There is no evidence that was placed before the court to show that the appellant offered training to the 1st respondent before assigning him the duty of working with the machine. Evidence of this training was very critical and material to the case as this would mean that they gave him duties for which they had not trained him and thus exposing him to the injury. It was also the 1st respondent's evidence that the machine was defective; DW1 did not controvert this evidence in any way but instead blamed the 1st respondent for opening the machine. It is on record that he switched off the machine before opening the door and being an automatic one, it ought to have gone off but that was not the case. In my view, this confirms the 1st respondent's evidence that the machine was defective.

Under clause 4.13, the 2nd respondent was supposed to appoint supervisors who were to be based in the appellant's premises whose duty was to supervise the seconded personnel and to ensure that they discharged their responsibilities in accordance with the client's instructions. The court was not told whether the 2nd respondent had complied with this requirement and if so, whether there was a supervisor on duty at the material time.

In my view, the learned magistrate properly analyzed the issue of liability in relation to all the parties and I have no reason to fault her.

On the apportionment of liability as between the appellant and the 2nd respondent, the judgment by the learned Magistrate is clear that the appellant and the 2nd respondent should shoulder the 90% liability equally and therefore, the appellant's contention that there was no apportionment does not hold any water. On the part of the 1st respondent, it's also my view that the 10% apportioned to him was fair.

On damages, I have already stated the principles that should guide an appellate court in interfering with an award of damages. On general damages the injury sustained by the 1st respondent was amputation of the right hand. This was confirmed by Dr. Cyprianus Okoth Okere and also Dr. Wokabi. I note that there are two medical reports by Dr. Wokabi one dated 22nd May, 2014 and the other dated 15th January, 2014.

The two reports are at variance with each other in that, the permanent incapacity in the report dated 22nd May, 2014 is given as 60% while in the one dated 15th January, 2014 the incapacity is given at 68%.

However, I note that the one dated 15th January, 2014 was not produced as an exhibit though it forms part of the bundle filed in the record of appeal. In the circumstances, the court will restrict itself to the medical report dated 22nd May, 2014 which forms part of the original record. On the degree of incapacity, I note that the degree given by Dr. Cyprianus Okoth Okere at 68% is the same as the one given by the Director of Occupational Safety and Health Services in exhibit 5 and in the medical report dated 16th October, 2014 prepared by Kenyatta National Hospital.

Going by those three opinions, I am persuaded that the correct degree of incapacity is 68%.

On the prosthesis, all the doctors are in agreement that the 1st respondent will require the same but what they do not agree on is the cost. Dr. Wokabi has put it at Kshs. 50,000/= while Dr. Okere has put the cost at Kshs. 250,000/=. The 1st respondent called Dr. Okere as a witness. In his evidence he stated that the 1st respondent needed prosthesis which is replaceable every two years. The figure he gave is based on the cost at Kenyatta National Hospital and not a private hospital. According to him, some of them are more expensive and can cost kshs. 1 million and the sum of Kshs. 250,000/= is the minimum. Dr. Okere was able to justify how he arrived at the figure of kshs. 250,000/=. On the other hand, Dr. Wokabi did not testify to justify how he arrived at the figure of kshs. 50,000/= and therefore this court is persuaded more to go by Dr. Okere's estimate.

On general damages, the learned Magistrate awarded Kshs. 2,000,000/=. The appellant submits that, the figure is on the higher side and has suggested between kshs. 500,000/= - 1,000,000/= and have relied on the case of ***Grace Beldina Adhiambo vs Bowers Okelo & Another 2017 eKLR*** where kshs. 1,500,000/= was awarded and the case of ***Charles Oriwo Odeyo vs. Apollo Justus Andabwa & Another (2017) eKLR*** where kshs. 800,000/= was awarded.

On their part, the respondents have asked the court not to interfere with the award by the learned Magistrate. The 2nd respondent relied on the case of ***Apungu Arthur Kibira vs. Independent Electoral & Boundaries Commission & 3 others (2019) eKLR*** and that of ***Mbogoh & Another vs Shah (1968) EA 93*** to support their submission that an appellate should not unnecessarily interfere with a discretionary judgment unless it is based on the wrong principles or facts. I have perused the authorities cited by the appellant and I hold the view that the award of kshs. 2,000,000/= is fair.

On the cost of artificial prosthesis at Kshs. 250,000/=, the 1st respondent in paragraph 11 of the plaint has pleaded the same and has prayed for judgment for the said amount. Dr. Okere who testified as PW1 justified the amount and therefore, the learned Magistrate was right to award the same.

On loss of earning capacity, the evidence adduced is that he was aged 36 years at the time of the accident and he was earning Kshs. 9,866 per month. Due to the accident, he cannot be able to work as a machine operator and has claimed loss of earning capacity. The learned magistrate assessed damages under this head at kshs. 2,357,840/= applying a multiplier of 20 years and a multiplicand of kshs. 9,866/=.

The appellant has submitted that the award is too high in the circumstances of this case. It cited the case of ***Mary Gathoni Njoroge vs. Hanif Mohammd Limited (2017) eKLR*** in which the court relied on the case of ***Butler v. Butler (1984)KLR 225*** in which the court explained the meaning of loss of earning capacity and the factors to be taken into account in awarding damages under that head. As explained in that case, a person's loss of earning capacity occurs where as a result of the injury, his chances in the future of any work in the labour market, as well paid as before the accident are lessened by his injury. The court further stated that loss of earning capacity can be a claim on its own, as where the claimant has not worked before the accident giving rise to the incapacity, or a claim in addition to another, as where the claimant was in employment then and/or at the date of the trial.

It is not in dispute that the 1st respondent was in employment at the time of the accident. The 1st respondent sought damages under that head in addition to general damages. The multiplicand adopted by the learned magistrate was obtained from the Dosh form produced in court. The 1st respondent testified that he was earning kshs. 9,866/= at the material time. There is no doubt that the 1st respondent was entitled to an award under this head but what the learned Magistrate awarded was on the higher side because he can still earn a living. In my view kshs. 1, 183,920/= is reasonable applying a multiplicand of Kshs. 9,866/= and a multiplier of 10 years.

In the end, the appeal partly succeeds to the extent shown hereinabove.

Special damages to earn interest from the date of filing of the plaint while general damages will attract interest from the date of this judgment.

Due to the fact that the appeal has partially succeeded, each party shall bear its own costs of the Appeal.

It is so ordered.

Dated, signed and delivered at NAIROBI this 7TH day of MAY, 2020.

L. NJUGUNA

JUDGE

In the presence of:

……. for the Appellants

……. for the Respondents