REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 687 OF 2017

LUCY WANJIRU NJONJO.....APPELLANT

-VERSUS-

NEPHAT KURIA GITHAIGA.....RESPONDENT

(Being an appeal from the judgment and decree of Honourable D.O. Mbeja (Mr.) (Senior Resident Magistrate) delivered on 27th November, 2017 in CMCC NO. 3197 of 2016)

JUDGEMENT

1. Nephat Kuria Githaiga who is the respondent in this instance lodged a suit against the appellant vide the plaint dated 16th March, 2016 and sought for general and special damages in the sum of Kshs.3,000/ as well as damages for loss of future earning capacity in the sum of Kshs.2,310,000/ together with costs of the suit and interest on the same for breach of contractual/statutory duty of care.

2. The respondent pleaded in his plaint that he was at all material times an employee of the appellant working as a shamba boy and that sometime on or about the 13th day of July, 2015 while preparing cattle feed in the lawful course of his employment, the respondent sustained injuries caused by the grinding machine.

3. The respondent attributed his injuries to breach of the appellant's contractual and/or statutory duty of care by setting out their particulars in paragraph 5 of the plaint.

4. The appellant entered appearance on being served with summons and filed her statement of defence to deny the plaintiff's claim.

5. In her defence, the appellant admitted the respondent's employment and the occurrence of the accident on the material date but denied that the same was the consequence of any breach on her part. Instead, the appellant pleaded that the accident was caused by negligence on the part of the respondent and set out its particulars in her statement of defence.

6. The appellant further denied the particulars of injuries and special damages laid out in the plaint.

7. At the hearing of the suit, the respondent testified and called a medical doctor as a witness, while the appellant gave evidence as the sole witness for the defence.

8. Upon filing of written submissions by the parties, the trial court entered judgment in favour of the respondent in the following manner:

a) Liability	80%:20%
b) General damages	Kshs.700,000/
Less 20% contribution	(Kshs.140,000/)
	Kshs.560,000/
c) Special damages	Kshs.3,000/
d) Damages for diminished earning	

Capacity	Kshs.1,320,000/
Less 20% contribution	(Kshs.264,000/)
	Kshs.1,056,000/
Total	**Kshs.1,619,000/**

9. Being aggrieved by the trial court's finding on both liability and quantum, the appellant has now lodged an appeal against the same by filing the memorandum of appeal dated 6th December, 2017 featuring the following grounds:

> ***i. THAT the learned trial magistrate erred in law and fact by holding the appellant 80% liable which finding was against the weight of evidence tendered.***
>
> ***ii. THAT the learned trial magistrate erred in law and fact by failing to appreciate that the evidence tendered by the respondent failed to prove negligence as pleaded or at all.***
>
> ***iii. THAT the learned trial magistrate's award of general damages for pain and suffering and loss of amenities is so manifestly excessive as to amount to an erroneous estimate of the loss suffered by the respondent.***
>
> ***iv. THAT the learned trial magistrate's award of diminished future earning capacity does not reflect the diminished future earning capacity and is manifestly excessive.***

10. This court gave directions that the appeal be canvassed by written submissions. In her submissions dated 6th January, 2020 the appellant argued that the trial court did not appreciate that given the nature of work the respondent was performing at the time of his injuries, he ought to have been found fully liable in the absence of proof of negligence or breach of the part of the appellant. Reference was made *inter alia*, to the case of **Wilson Nyanyu Musigisi v Sasini Tea & Coffee Ltd [2006] EKLR** where the court in dismissing the appeal reasoned that in the instance of an employee performing duties of a manual nature at the time of his injuries, the only reasonable conclusion was to hold such employee liable for such injuries since the tool he was operating was within his control.

11. The appellant is of the view that the respondent was responsible for ensuring his own safety while in the course of his employment but did not do so. That in the circumstances, there was no basis for finding the appellant partly liable for the injuries suffered by the respondent. The appellant referred this court to **Section 13(1)** of **the Occupational Safety and Health Act No. 15 of 2007** which prescribes that:

> ***"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"***

12. It is the appellant's submission that in view of the evidence tendered before it, the trial court ought to have found the respondent fully liable for his injuries but did not, therefore committing an error.

13. On quantum, it is the contention of the appellant that the sum of Kshs.700,000/ awarded to the respondent on general damages is excessive and urged that the same be substituted with a reasonable award of Kshs.500,000/ citing the case of **Hannah Nyawira Maina v Jemes Karanja [2016] eKLR** in which the court awarded a sum of Kshs.500,000/ to a plaintiff who had suffered 35% permanent incapacity arising from loss of four fingers through amputation.

14. In respect to the award made on diminished earning capacity, it is the suggestion of the appellant that the trial court should have applied an educated impressionistic award of Kshs.350,000/ by applying a multiplier of 15 years rather than that of 20 years, and subtracting the degree of permanent incapacity of 37%. The appellant quoted *inter alia*, the authority of **Peter Waka Tungani v Mathai Timber & Hardware Supplies Ltd [2006] eKLR** where the court subtracted the permanent incapacity of 40% from the award made under this head.

15. The respondent through her submissions dated 11th January, 2020 contended that going by the evidence adduced before the trial court, it is not in dispute that he was at all material times an employee of the appellant and that he was injured by a grinding machine while in the course of his employment on the material day.

16. According to the respondent, he indicated in his evidence that he was never supplied with any protective gear and that the appellant did not bring any evidence to counter this position, which goes to prove that there was a breach of statutory duty of care. The respondent relied on the following reasoning in the case of **Simba Posho Mills Ltd v Onguti [2005] eKLR** where the High Court sitting on appeal found the appellant fully liable:

> ***"The breach of statutory liability means that the Appellant was strictly liable for any injury that its employee sustains in the course of his employment. In the instant case, the Appellant instructed the Respondent to insert maize into a grinder that had parts which were moving. There was no protection or a fence installed to protect the Respondent. It is no defence that the Respondent was careless or reckless in undertaking the task that he was told to do."***

17. The respondent is of the view that the trial court did not err in apportioning liability as it did, and urged this court to uphold its finding.

18. On general damages, the respondent submits that the trial court considered the evidence tendered and submissions filed by the parties in

arriving at an award of Kshs.700,000/ and that in any event, the authorities cited by the appellant before the trial court were decided years before. The respondent is of the view that the sum awarded by the trial court is reasonable and comparable to awards previously made.

19. Concerning the award made on diminished earning capacity, it is the submission of the respondent that the trial court correctly applied the legal principles for awarding damages under such head and further applied a reasonable multiplier of 20 years in consideration of the respondent's age at the time of the injuries.

20. I considered the rival submissions and authorities cited on appeal. This being a first appeal, I am required to re-evaluate the evidence placed before the trial court.

21. It is noted that the appeal lies against both liability and quantum, specifically the awards made under the heads of general damages for pain, suffering and loss of amenities, and diminished earning capacity. I will therefore address the grounds of appeal under the two (2) limbs.

22. On liability, the respondent in his oral evidence before the trial court adopted his signed witness statement and testified that on the material day, he was assigned the duty of cutting grass using a machine but that he was not provided with protective gloves. The respondent therefore blamed the appellant for the injuries sustained.

23. In cross examination, he stated that he had worked in his capacity as a shamba boy cutting Napier grass for 8 months prior to the accident and that the machine he used on the material day was properly functional. The respondent stated that he would feed grass into the machine yet he was not provided with protective gear. He further stated that immediately following the accident, he turned off the machine using a switch.

24. In re-examination, it was the testimony of the respondent that protective gloves would have prevented the injuries sustained to his fingers.

25. The appellant similarly adopted her executed witness statement as part of her evidence in chief and testified that the respondent had worked for her for over one (1) year preceding the accident and that the machine used on the material day was in good condition. The appellant further testified that the respondent was provided with gloves but chose not to wear them, and that following the accident, she attended to the respondent.

26. In cross examination, the appellant restated that the respondent was on duty on the material day and that he was admitted in hospital following the accident, though she clarified that she was not at the scene when the accident took place hence she was not in a position to explain what transpired.

27. The appellant through her testimony in re-examination stated that she filled the Dosh Form following the accident.

28. The learned trial magistrate in making his decision reasoned on the one hand that while the respondent had proved his case against the appellant to the required standard, on the other hand the respondent having worked in the same capacity for some time ought to have had knowledge of the risks involved in his work place and the need to exercise the necessary precautions but did not do so, thereby assuming the risk of injury. The learned trial magistrate consequently apportioned liability in the ratio 80:20 in favour of the respondent.

29. Upon re-evaluating the evidence tendered before the trial court, Inote as the learned trial magistrate did, that it is not in dispute that the respondent was at all material times an employee of the appellant and that he was in the course of his employment on the material day.

30. It is also not controverted that the respondent was injured while in the course of his employment and while performing his employment duties. Furthermore, the appellant in her evidence did not deny that part of the respondent's employment duties included feeding the Napier grass into the machine.

31. I note that while the appellant testified that she had availed the necessary protective equipment to the respondent, including gloves, she did not bring any credible evidence to support her testimony. In fact, during her oral testimony she admitted that she had no proof of this.

32. Going by the evidence set out hereinabove, I am satisfied that the learned trial magistrate arrived at a proper finding that the respondent had proved his case on a balance of probabilities. I am also guided by the case of **Simba Posho Mills Ltd v Onguti [2005] eKLR** cited in the respondent's submissions where the court held that breach of statutory duty is assumed where an employee is injured while in the course of employment and in the performance of his or her employment duties under the instruction of the employer.

33. On the subject of apportionment of liability, upon re-evaluating the evidence tendered before the trial court, I established that the respondent had performed the same employment duties for some time and therefore ought to have been aware of the risks involved while using the machine.

34. Furthermore, whereas the respondent stated in his testimony that he was not provided with protective gear while working, he made no mention of any such requests made to the appellant. I therefore agree with the learned trial magistrate's reasoning that he voluntarily assumed any risks that would befall him in the course of his employment duties. I draw reference from the provisions of **Section 13(1)** of **the Occupational Safety and Health Act No. 15 of 2007** which place the responsibility upon an employee to ensure his or her safety while at the workplace.

35. In the premises, I support the learned trial magistrate's decision to apportion liability as he did and I am satisfied that he considered the evidence placed before him. I therefore see no reason to interfere with the finding on liability.

36. On quantum, this court can only interfere with the award of a trial court in instances where an irrelevant factor was taken into account, a relevant factor was disregarded or the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages. These principles were laid out by the Court of Appeal in the case of **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] eKLR.**

37. On the subject of general damages for pain, suffering and loss of amenities, Dr. Cyprian Okoth Okere who was PW1 produced the medical report concerning the respondent and stated that he relied on treatment notes. The doctor also mentioned that he did not note any convulsion signs from the respondent.

38. The respondent suggested an award of Kshs.1,000,000/ citing the case of **Pyramid Packaging Limited v Humphrey W. Wanjala [2013] eKLR** where the court awarded a sum of Kshs.650,000/ under a similar head to a plaintiff who had suffered amputation to various fingers. The appellant on her part suggested an award in the sum of Kshs.500,000/ and quoted the cases of **Roynex Chumba v Sunny Autoparts (K) Ltd [2016] eKLR** and **Hannah Nyawira Maina v Jemes Karanja [2016] eKLR** where the courts awarded sums of Kshs.280,000/ and Kshs.500,000 respectively.

39. The learned trial magistrate being persuaded by the case of **Hannah Nyawira Maina v Jemes Karanja [2016] eKLR** awarded the sum of Kshs.700,000/.

40. The medical report dated 10th November, 2015 produced by Dr. Cyprian Okoth Okere indicated the respondent's injuries as being traumatic amputation of four left fingers with loss of two phalanges of the index finger, mid finger and ring finger, and loss of the distal phalanx of the left little finger; similar to the injuries pleaded in the plaint and those mentioned in the letter dated 1st October, 2015 by Consultant Surgeon Dr. J. Gathara. The doctor assessed permanent incapacity at 37%. The discharge summary also tendered before the trial court shows that the respondent was admitted in hospital for three (3) days.

41. From my re-evaluation, I agree with the learned trial magistrate that the case of **Hannah Nyawira Maina v Jemes Karanja [2016] eKLR** entailed the most comparable injuries and degree of incapacity of 35% and was decided most recently. I also considered the case of **City Engineering Works (K) Ltd v Venatsio Mutua Wambua [2016] eKLR** where a plaintiff with comparable injuries and permanent incapacity was awarded general damages in the amount of Kshs.600,000/.

42. In view of the foregoing, I am of the view that the award of the learned trial magistrate falls close to the range of comparable awards and is not so inordinate as to warrant interference.

43. In respect to diminished earning capacity, it was the testimony of PW1 that the respondent was aged 25 years at the time of the accident. Both parties indicated that the respondent was at the time earning a monthly salary of Kshs.5,500/.

44. The respondent proposed a multiplier of 35 years and the multiplicand of Kshs.5,500/ to be tabulated as follows: Kshs.5,500 x 35 x 12 = Kshs.2,310,000/

45. The appellant suggested a multiplier of 15 years and reduction of the degree of incapacity from the total amount, to be tabulated as follows: Kshs.5,500 x 15 x 12 x 37/100 = Kshs.366,300/

46. The learned trial magistrate in applying a multiplier of 20 yearstabulated the award as: Kshs.5,500 x 20 x 12 = Kshs.1,320,000/

47. From my re-evaluation of the evidence, I established that the respondent was at all material times a general labourer hence the normal retirement age for civil servants or persons in formal employment would not necessarily have applied to him.

48. On the issue of the multiplier, there is no dispute as to the age of the respondent at the time of the injuries. I note that the learned trial magistrate did not state what informed his decision to apply a multiplier of 20 years. Suffice it to say that I considered the case of **City Engineering Works (K) Ltd v Venatsio Mutua Wambua [2016] eKLR** where a multiplier of 15 years was applied in the instance of a plaintiff aged 24 years. I therefore find the multiplier of 15 years which was proposed by the appellant before the trial court to be more reasonable. I will therefore interfere with the multiplier used by the trial court.

49. As concerns whether to reduce the degree of permanent incapacity from the award under this head, I am of the view that the case of **Peter Waka Tungani V Mathai Timber & Hardware Supplies Ltd [2006] eKLR** relied upon by the appellant and in which the award was less the degree of incapacity is merely persuasive and I am not bound to apply it. To my mind, there is no basis on which to reduce the award in this instance by the 35% degree of permanent incapacity. In so finding, I associate myself with the reasoning in the case of **SBI International Holdings (AG) Kenya v William Ambuga Ongeri [2018] eKLR** where the High Court on appeal declined to reduce degree of permanent incapacity from the award under a similar head.

50. Resultantly, the award under this head is tabulated as:Kshs.5,500 x 15 x 12 = Kshs.990,000/

51. The upshot is that the appeal succeeds to the extent of the award for diminished earning capacity. Consequently, the trial court's award of Kshs.1,320,000/ under that head is hereby set aside and is substituted with an award of Kshs.990,000/.

52. For the avoidance of doubt, the awards made on appeal is as follows:

a) General damages **Kshs. 700,000/**

b) **Special damages** **Kshs. 3,000/**

c) **Diminished earning capacity** **Kshs. 990,000/**

Gross total **Kshs.1,693,000/**

Less 20% contribution **(Kshs. 338,600)**

Net Total **Kshs.1,354,400/**

The respondent shall have interest on special damages at court rates from the date of filing suit and interest on general damages at court rates from the date of judgment until payment in full.

Parties to bear their respective costs of the appeal.

Dated, signed and delivered virtually via Microsoft Teams at **Nairobi this 3rd day of July, 2020.**

J. K. SERGON

JUDGE

In the presence of:

……. for the Appellant

……. for the Respondent