



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CIVIL APPEAL NO. 51 OF 2016**

**INTEX CONSTRUCTION CO. LTD.....APPELLANT**

**VERSUS**

**DENNIS MUTUKU KASUNI.....RESPONDENT**

**JUDGMENT**

**A. Introduction**

1. The appellant herein was the defendant in the trial and the respondent was the plaintiff therein. The respondent filed the suit before the trial court vide a plaint dated 29/01/2014 against the appellant in which he sought general damages against the appellant for injuries suffered when he was attacked and assaulted while in the course of employment working as a headman. The respondent pleaded negligence, breach of duty and/or breach of contract of employment on the part of the Appellant as his employer. He thus prayed for general damages, Kshs. 2,000/- being the special damages, costs of the suit and interest on both general and special damages.

2. The appellant herein entered appearance and subsequently filed its defence wherein it denied the averments in the plaint and in particular, the existence of employment between it and the respondent; the fact that the respondent was attacked and assaulted in the course of his employment or he sustained severe personal injuries or suffered pain and loss as a result; denied negligence, breach of duty and breach of contract and proceeded to plead contributory negligence on the part of the respondent and *volenti non fit injuria*. The respondent filed a reply to defence wherein he reiterated the contents of his plaint and denied the particulars of negligence on his part as was pleaded by the appellant.

3. At the hearing of the suit before the trial court, the respondent testified as PW1. He stated that on the material date (16/03/2013) he was working for the appellant as headman when he saw men who wanted to damage the machine. That he screamed and the men beat him up and he was injured on the ribs, chest and jaw. He blamed the appellant for the injuries on the basis that it (appellant) had no security as a result of which he was injured. The appellant called one witness whose testimony was to the effect that the respondent was injured by fellow workers who attacked him on believe that he was the one who had told on them as a result of which they were declared redundant.

4. The parties proceeded to file their submissions and upon consideration of the pleadings, evidence and the said submissions, the trial court found the appellant 100% liable for the injuries sustained by the respondent. The court awarded Kshs. 450,000/- as general damages and Kshs. 2,000/- as special damages.

5. It is this judgment which provoked the appeal herein.

6. The appeal was instituted vide a memorandum of appeal dated 26/09/2016 and filed in court on 5/10/2016. The appellant framed eight (8) grounds of appeal to the effect that the Learned Magistrate erred in both law and fact; -

- 1) *In holding the appellant 100% liable to settle the claim*
- 2) *In failing to appreciate that the respondent's injuries were as a result of criminal acts and thus the appellant was not liable at all*
- 3) *In failing to appreciate that the injuries sustained by the respondent were not reasonably foreseeable nor sustained in the ordinary course of employment by the respondent hence no liability could attach to the appellant*
- 4) *When he awarded a sum of Kshs. 450,000/- as general damages which amount was excessive in the circumstances and thus erroneous estimate.*
- 5) *In failing to consider or even adequately adopt and appreciate the appellant's written submissions on record and the authorities attached therein in support of its case*

6) *By failing to follow the rule of precedents in awarding damages*

7) *In considering irrelevant matters in arriving at the decision in favour of the respondent*

8) *In failing to find that the respondent's pleadings and evidence tendered were incapable of sustaining any award of damages.*

The appellant thus prayed that the appeal be allowed and that it be awarded the costs of the Appeal.

7. At the hearing of the appeal, directions were taken that the appeal be canvassed by way of written submissions and the parties herein filed their rival submissions

#### **B. Submission by the parties**

8. The appellant submitted that the respondent had been employed as a headman and thus his duties were that of a foreman and not that of providing security. It was submitted that as such, he was on his own frolic and no blame ought to be attached on the appellant. Further that, his conduct brought into play the maxim of *volenti non fit injuria* and reliance was made on the case of **Rashid Ali Faki -vs- A.O. Said Transporters (2016) eKLR** and **United Millers Ltd & Another -vs- John MangoroNjogu (2016) eKLR**. The court was invited to take judicial notice that the duties of a foreman are not inherently dangerous so as to obligate the appellant the duty of availing necessary arms or necessary safety gadgets to enable him conduct his duties. It was further submitted that it was not known or foreseeable that he would suffer attack by his colleagues and that his recklessness and disregard for his safety when confronting the four able men took him out of protection accorded to workers as he was acting outside his employment and it was not possible for the appellant to provide each of its employees with a personal bodyguard. Lastly, the appellant submitted that it could not be vicariously liable for the acts of the employees who attacked the respondent as their acts were criminal and which could not give rise to a civil claim. Reliance was made on **United Millers Ltd & Another -vs- John MangoroNjogu (supra)**.

9. On quantum, it was submitted that the respondent would have been entitled to Kshs. 150,000/- as the injuries sustained were soft tissue injuries. In support of this submission, reliance was placed on the case of **Odinga Jactone Ouma Vs Moureen Achieng Odera [2016] eKLR** and **Dr. Harish Cunilal Shah Vs Richard Kipkoeh Sang & Another [2004] EKLR**.

10. The respondent on his part submitted that had there been enough security, the former workers would not have come to steal and further that the security officers would have rescued the respondent from the beating. As such, the respondent was exposed to danger due to unsafe systems of work which exposed him to the hazard of the fired employees after he thwarted their looting spree. Further that, the respondent did not act *ultra vires* but as a headman, he had to act in the manner he did in absence of security details and the said actions were for the interests of the Appellant. That the trial court was right in finding the appellant 100% liable as it had not provided the respondent with safe working environment in terms of enough security detail to thwart the theft and/ or beating. Reliance was made on **Clifford -vs- Charles Callen & Sons Ltd (1957) 1 KB 495**. The respondent urged the appellate court not to disturb the decision of the lower court unless there are compelling reasons and which good reasons were not present in the instant appeal and neither did the appellant prove that the trial court acted on the wrong principles in awarding damages. Reliance to that effect was made on the case of **Bashir Ahmed Butt -vs- Uwais Ahmed Khan (1982-88) KAR** and **Loice Wanjiku Kagunda -vs- Julius GachauMwangi CA 142/ 2003**. The respondent further submitted that the quantum was justified and ought not to be interfered with as it was commensurate to the injuries suffered and relied on **Kemfro Africa Limited T/A Meru express Services, GathogoKanini -vs- A.M Lubia& Olive Lubia (1982-88) 1 KAR**.

#### **C. Issues for determination**

11. The role of the first appellate Court is now settled that it is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of **Selle & An. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). The first appellate court ought not to ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. (See **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga& Another (1988) KLR 348**). **Further there is no set format which the first appellate court ought to conform to in its re-evaluation of the trial court's evidence but the evaluation should be done depending on the circumstances of each case and the style used by the first Appellate Court and that what matters in the analysis is the substance and not its length.** (See Supreme Court of Uganda's decision in **Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634** and **Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR)**).

12. I have considered the memorandum of appeal and the submissions of both counsels. I have also considered the authorities referred to by each counsel to support their legal propositions in the matter. Further, I have read and evaluated the record and evidence adduced thereto by the parties. It is not disputed that the respondent herein was injured on the material date when at the appellant's place of work. Further, it is not disputed that the respondent was an employee of the appellant herein. It is also not disputed that the injuries suffered by the respondent were suffered when he was attacked by former employees of the appellant.

13. Under the common law, an employer has a duty to take reasonable care so as 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 (See **Winfield and Jolowicz on Tort, Seventeenth Edition**). **This duty has been codified in the Occupational Safety and Health Act, 2007.** In **Van Daventer v Workmen's Compensation Commissioner [1962] 4 SA** (which decision was cited with approval in **Isinya Roses Limited v ZakayoNyongesa [2016] eKLR**), G Boshof J held as follows: -

*“An employer owes a common law duty to a workman to take reasonable care for his safety. The question arises in each particular case as to what reasonable care is required. This is a question of fact and depends upon the circumstances in each particular case. A master is in the first place under a duty to see that his servants do not suffer through his personal negligence, such as failure to provide a proper and safe system of working and a failure to provide proper and suitable plant.*

*If he knows or ought to have known of such failure, he is not bound to give personal superintendence to the conduct of his workings and there are so many in which it is in the interest of the workman that the employer should not personally undertake such superintendence. He may for instance be not sufficiently qualified to do so. In that event the master would be liable for the negligence of persons so acting on his behalf. If a servant is employed on work of a dangerous character, the employer is bound to take all reasonable precautions for the workman's safety. This may entail provision of a proper and safe system of work.....”*

14. The test for the employer to be held liable is whether the claimant was an employee of the employer and whether the claimant was injured in the course of employment. As I have opined above, there is no dispute that the respondent was employed by the appellant and as such it follows that the appellant owed a duty of care to the respondent. In my opinion therefore, the questions which need to be answered are; -

i. Whether the appellant was in breach of the duty of care owed to the respondent and thus liable for the injuries suffered by the respondent

ii. Whether there was contributory negligence on the part of the respondent and if so, to what extent.

iii. Whether the award of Kshs. 450,000/- as general damages to the respondent was merited.

15. Before I delve into determination of the above issues, I would wish to remind the parties in this appeal that the burden of proof in civil cases is well settled. The rule is that whoever asserts a fact is under an obligation to prove it in order to succeed. The standard of proof in civil cases (the degree of certainty with which a fact must be proved to satisfy the court of the fact) is on the balance of probabilities (See Miller v Minister of Pensions [1947] 2 All ER 372 and sections 107 of the Evidence Act). In Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR, the Court of Appeal held as thus; -

*“It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side.”*

#### **D. Determination of the issues**

16. **As to whether the appellant was in breach of the duty of care owed to the respondent and thus liable for the injuries suffered**, it was the respondent's case that he was not provided with safe working conditions and hence the injuries suffered. In my opinion, the question which ought to be determined so as to establish whether or not there was a breach of the duty of care owed to the Respondent is to establish what the appellant was employed to do?

17. In the course of hearing before the trial court, the appellant testified that he was employed as a headman and his duties were to arrange work and that his boss Richard Musembi- foreman was on leave. He produced employment card to that effect (PExt 5). He allocated work to the colleagues and thereafter he was injured when he screamed after he saw former employees come to damage the machines. In cross examination, he testified that he was in-charge of the company's property and there were no security men on the material day. This evidence as to what the respondent was employed to do was never controverted by the appellant. Indeed, DW1 statement which he adopted as his evidence in chief confirmed that the respondent was a headman of the section. The roles which he performed were never controverted. The appellant never called any evidence on the issue but only reiterated the issue in its submissions.

18. As I have pointed above, he who alleges must prove. It is my opinion therefore that the appellant had the burden to disprove the averments as to the work which the respondent was employed to do (evidential burden) but which was never discharged. The submissions on the issue were never sufficient as it is trite that submissions can never take the place of evidence. They are generally parties' "marketing language", each side endeavoring to convince the court that its case is the better one and cases can be decided in absence of submissions. {See Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another (supra)}. It is my opinion therefore that on the balance of probabilities, the Respondent was able to prove that he was executing duties within his course of employment when he was injured.

19. So, was the appellant negligent and in breach of its statutory and/ or common law duties to provide safe working environment to the respondent? In other words, did the appellant provide good and safe working environment for the respondent as a headman and the in-charge of the company's properties?

20. In Kiema Mutuku-vs- Kenya Cargo Handling Services Ltd [1991] 1kar 258 the court also held *inter-alia*; -

*“There is as yet no liability without fault in the legal system in Kenya and a plaintiff must prove negligence against the defendant where the claim is based on negligence.”*

The above was the principle in the cases of Mount Elgon Hardware -vs- Millers C.A. No. 19 of 1996 and Mwaura Mwalo -vs- Akamba Public Road Services Ltd HCC No 5 of 1989 where it was held that the burden of proving a claim anchored on torts of negligence or breach of statutory duty of care rests on the claimant throughout the trial on balance of probabilities.

21. Did the respondent prove negligence on the part of the appellant to the required standards? The particulars of negligence were pleaded in paragraph 6 of the plaint. In the witness statement adopted by the respondent as his evidence in chief and in his evidence in court, the respondent blamed the appellant for not providing security to him and/or not arming him to be able to conduct his duties and/or failing to

provide him with protective gear for use while engaged in his duties. His evidence at the hearing of the case was to the effect that the appellant herein had no security and that was why he was injured. He thus blamed the appellant for the failure to provide security to him. The Appellant's witness before the trial court testified to the effect that if there was security, the Respondent would not have been beaten.

22. From the testimony above, it is clear that there were no security guards at the gate and neither was there a fence. There is no evidence presented by the appellant to controvert this evidence. In my opinion, intrusion by persons with ill motives such as thieves was something which was foreseeable on the part of the Appellant. I appreciate that the appellant could not warrant the total continuous security of an employee in the place of work. However, as it was held by the Court of Appeal in the case of **Makala Mailu Mumende Vs Nyali Golf County Club [1991] KLR 13** an employer is expected to reasonably take steps in respect of the employment, to lessen danger or injury to the employee as it is his responsibility to ensure a safe working place for its employees. It is my opinion that it was the duty of the appellant herein to provide security at the entrance to the working site and/ or to fence the same. This in my opinion would have minimized the risks from being attacked by intruders.

23. The appellant pleaded the defence of *volenti non fit injuria*. However, it was not shown that the respondent was solely responsible for the injury that he sustained. In **Garton Limited v Nancy Njeri Nyoike [2016] eKLR** and which authority is persuasive, R.E Aburili J (paragraph 46) held thus:-

*“In Halsbury’s Laws of England 3<sup>rd</sup> Edition VOL 28 Paragraph 28 it is stated thus:-*

*“where the relationship of master and servant exists, the defence of volenti non fit injuria is theoretically available but is unlikely to succeed. If. The servant was acting under the compulsion of his duty to his employer, acceptance of the risk will rarely be inferred. Owing to his contract of service, a servant is not generally in a position to choose freely between acceptance and rejection of the risk and so the defence does not apply in an action against the employee.”*

24. It is my opinion that the respondent, being the overall in-charge of the working site on the material day, conducted himself within the limits of what a reasonable person in his capacity would have done or would have been reasonably expected to do. conducted himself. (The evidence that he was standing in for the site manager was never controverted). It would have been unreasonable for him to run away whereas he was in-charge of the appellant's property. I opine that the Respondent was acting in the best interest of the appellant and could not be said to have consented to the risk.

25. In the circumstances above, the appellant was in breach of its duties to provide safe working environment. That being the case, it ought to be held liable for the injuries suffered by the respondent. The respondent discharged his burden of proof in that respect as per the required standards as provided for under sections 109 and 112 of the Evidence Act. (See **Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**).

26. The appellant raised a defence of contributory negligence on the part of the respondent. However, there was no evidence tendered to prove the same. It is trite law that negligence must be proved. Failure by the appellant to tender evidence in support of its case for contributory negligence means that the claim in that respect fails. As such, the appellant ought to be held 100% liable.

27. It is my opinion that the trial court was right in finding and holding the appellant 100% liable.

28. As to whether the award of Kshs. 450,000/- as general damages to the respondent was merited, it is now settled law that 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. That, it must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low. (**Butt v Khan 1982 -1988 1 KAR, A. Okelo & M.M. Nsereko T/A Kaburu Okelo & Partners -vs- Stella Karimi Kobia & 2 others [2012] eKLR**). Interference with an award of general damages is a discretionary power and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. (See **Catholic Diocese of Kisumu -vs- Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55**).

29. From the medical report which was produced before the trial court, the respondent herein sustained fractured 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> ribs on the right side, injuries to the chest and injury to the jaw leading to bleeding. The report further indicates that he was treated and discharged. The doctor gave his professional opinion that the respondent suffered fractures, soft tissue injuries, pain and loss of blood and caused by blunt and sharp object. The respondent was injured on 16/03/2013 and was discharged on the same day though he was put on bed rest for two weeks (as per the hospital card which was produced as Pexbt 1).

30. I have considered the award of damages and the relevant authorities. As was held in **Ali Ahmed Naji vs. Lutheran World Federation Civil Appeal No. 18 of 2003**, similar injuries ought to receive similar awards. The appellants cited the case of **Odinga Jactone Ouma -vs- Moureen Achieng Odera (supra)** and **Dr. Harish Cunilal Shah -vs- Ricahrd Kipkoech Sang & another (supra)** and urged this court to find an award of Kshs. 150,000/- as general damages to be reasonable. However, I have perused the said authorities and in my opinion, the injuries therein are not similar with the ones suffered by the respondent herein. However, in **Francis Shamalla -vs- Kerenga Bus Service (1999) eKLR** the court (M.A Ang'awa J- as she then was) awarded Kshs. 150,000/- in 1999. Taking into the rate of inflation as at the date of delivering the judgment by the trial court, it is my opinion that in the circumstances an award of Kshs. 350,000/- would be sufficient in the circumstances. It is my opinion that the award by the trial court was inordinately high as to represent an entirely erroneous estimate. The same ought to be interfered with.

31. The award of Kshs. 2,000/- as special damages was not challenged in the instant appeal.

32. In my opinion, the trial court erred in awarding general damages which were inordinately high as to represent an entirely erroneous estimate. However, the court correctly found the appellant liable. The appeal ought to be allowed and the finding of the trial court on general

damages ought to be substituted with Kshs. 350,000/-.

33. The appeal is allowed. The appellant is awarded half of the costs of the appeal.

**Delivered, dated and signed at Embu this 2<sup>nd</sup> day of November 2020.**

**L. NJUGUNA**

**JUDGE**

.....for the Appellant

.....for the Respondent