REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 647 OF 2016

CANNON ALUMINIUM FABRICATORS LTD.....APPELLANT

VERSUSA

ALEX JULIUS MATIVO.....1ST RESPONDENT

FREDRICK MUTUA.....2ND RESPONDENT

as consolidated with civil appeal no. 648 of 2016

J U D G M E N T

A. Introduction

1. This is an appeal from the judgement and decree of the Chief Magistrate Milimani CMCC No. 2477 of 2014 delivered on the 23rd September 2016. On 5/10/2018 this appeal no. 647 of 2016 was consolidated with HCA No. 648 of 2016 and file num,ber 647 of 2016 was retained.

2. The 1st respondent herein filed a suit for special and general damages plus costs of the suit. The appellants herein were co-defendants in the trial court. The case was determined in favour of the 1st respondent against the appellants at 100% on liability and the 1st respondent was awarded the following damages:-

i. General damages Kshs. 1,500,000

ii. Future surgery Kshs. 200,000

iii. Loss of earnings Kshs. 403,200

iv. Special damages Kshs. 2,000

3. The appellant's filed a memorandum of appeal dated 21st October 2016 based on 11 grounds of appeal which can be summarised as;

a) That the learned magistrate erred in law and in fact in apportioning liability against the appellant at 100% against the appellant only in exclusion to the 2nd respondent.

b) That the learned trial magistrate erred in law and fact in awarding the 1st respondent a grossly excessive general damages of Kshs. 1,500,000 and Kshs. 403,000 in loss of earnings contrary to law and evidence on record.

4. The parties disposed of the matter by way of written submissions.

B. Appellant's Submissions

5. The appellant submitted that 1st respondent failed to prove his employment to the appellant in contrast to the witness statement by the 2nd respondent that the 1st respondent was his employee, the 2nd respondent having been sub contracted by the appellant and as such no liability should arise to the appellant.

6. The appellant further submitted that the 1st respondent was not mindful of his own safety as he failed to take reasonable precaution to

ensure his safety and thus liability ought to have been shared between the 1st respondent and the 2nd respondent.

7. On quantum, the appellant submitted that the award in general damages of Kshs. 1,500,000/= was excessive in light of the injuries suffered by the 1st respondent.

C. 1st Respondents' Submissions

8. The 1st respondent submitted that the 2nd respondent corroborated his evidence that he was employed by the appellant and further that PW2 had in the corresponding file produced evidence of a list surrendered to PW2 by the appellant listing its employees of which the 1st respondent was one of them.

9. The 1st respondent further submitted that there was no plea in the appellant's defence that alleged the 2nd respondent was its sub-contractor but that the same was contained in a witness statement which was worthless as it was not a pleading. Further the 1st respondent submitted that a contractor and a sub-contractor are usually held liable jointly and severally. He relied on the case of **Michael Murigi Karanja v Mohammed Salim Kassam [2015] eKLR.**

10. On liability, the 1st respondent submitted that the appellant did not adduce any evidence as to how the accident occurred whereas the 1st respondent's evidence was corroborated by the 2nd respondent as well as the claimant in the corresponding suit and subsequently his evidence remained unchallenged. He relied on the case of **Isaac Katambani v Firestone E.A. [1969].**

11. On quantum of damages, the respondent submitted that the award by the trial court was proper and further that the award on future medical expenses was unchallenged by the appellant in trial. On loss of earnings, the 1st respondent submitted that he was not earning for 24 months after the accident and as such the award was justified.

12. The 1st respondent further submitted that the 2nd respondent had not appealed and so judgement against him must remain.

D. Analysis & Determination

13. As a first appellate Court, it is my duty to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the court in a first appeal was stated in ***Selle & another –vs- Associated Motor Boat Co. Ltd.& others [1968] EA 123*** in the following terms:

> ***"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this 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. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270*)."***

14. The issues for determination in this appeal are as follows:-

i. Whether the 1st respondent was an employee of the appellant or of the 2nd respondent.

ii. Whether the 2nd respondent was an agent of the appellant.

iii. Whether the appellant or the 2nd respondent was liable for the injuries sustained by the plaintiff.

iv. Whether the respondent is entitled to damages.

v. Who is to bear the costs of this suit.

15. As to whether the 1st respondent was an employee of the appellant or 2nd respondent, the uncontroverted testimony from the court record from PW1 that the appellant employed the 1st respondent and the 2nd respondent was a foreman further corroborated by the testimony of PW2 to the effect that the appellant paid the medical bills of the 1st respondent.

16. The appellant failed to produce any contract between itself and the 2nd respondent to prove the alleged sub-contract. The testimony by the 2nd respondent was clear and uncontroverted that he was an employee of the appellant. I am in agreement with the finding of the trial magistrate that the 2nd respondent was an agent of the appellant for it is supported by uncontroverted evidene of PW1 and PW2 and I hereby so find.

17. In **Limpus V London General Ominibus Company [1862] 1 H & C 526, 32 LJ EX 34, 7LT 641:** that

"The law casts upon the master a liability for act of the servant in the cause of his employment; and the law is not so futile as to allow a master, by giving secret instructions to his servant, to discharge himself from liability."

18. Further it was the testimony of DW1, a human resource manager at the appellant that the site of the accident belonged to the appellant and another party not before court.

19. It has been established that the 2nd respondent was an agent of the appellant;It is also clear from the testimony of PW1 which was uncontroverted that it was the duty of the appellant to provide safe working conditions for its employees. In common law the employer owes a duty of care to his employees.

20. Relying on the uncontroverted evidence of the 1st respondent, I find that the magistrate correctly held the appellant fully liable for the damage suffered by the 1st respondent.

21. The 2nd respondent was the contractor who was engaged to carry out work for the appellant in his (appellant's) premises. There was no employment contract between the 1st respondent and 2nd respondent. I therefore find that the magistrate did not err in absolving the 2nd respondent of liability. This finding was correct and it is hereby upheld.

22. On the general damages awarded to the 1st respondent, I am guided by the principles on which an appellate court will disturb an award of damages which were enunciated in **Butt v. Khan Civil Appeal No. 40 of 1997** thus: -

"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 arrive at a figure which was either inordinately high or low." See also **Kemfro Africa Ltd and Another vs A.M. Lubia & Another (1982-1988)**

23. And **Kemfro Africa Ltd t/a Meru Express Services Gathogo Kanini v. A.M. Lubia C.A. 21 of 1984 (1882-1988)1 KAR 727** where the said principles were also established.

24. The 1st respondent sustained the following injuries;

i. Dislocation of right elbow

ii. Compound fracture right radius

iii. Compound fracture right ulna

iv. Disruption and widening of the pelvis

v. Fracture of the ulna styloid process

25. I have perused the authorities relied on by the appellants as well as the 1st respondent and find that of **Anthony Mwondu Maina v Samuel Gitau Njenga [2006] eKLR** relevant. In this case, the court awarded Kshs. 1,200,000 for similar injuries. The 1st respondent relied on this case which I find most comparable. In the case of **Samuel Makumi Githambo vs South Firms Ltd. & others Nkr. HCCC No. 9 of 2008** the court awarded general damages of Kshs. 1,500,000/= in 2009 for comparable injuries of fracture distal end of the right femur, fracture distal end of the left femur, fracture inferior pubic remus of the right pelvis, fracture right scapular, multiple cut wounds on the face, closed fracture medial malioleus of the leg, dislocation of the right shoulder, loss of one upper incisor tooth, and loss of lower incisor.

26. The 1st respondent herein was found to have suffered 12% disability as a result of the following injuries;

i. Dislocation of left ankle joint

ii. Fracture of left tibia malleolus

iii. Fracture of talus

iv. Multiple blunt chest and back injuries

27. In this appeal I find the award of Kshs. 1,500,000 for general damages reasonable and comparable with the foregoing decisions and I hereby uphold it.

28. It is my considered opinion that the appellant has failed to establish the grounds of appeal and the appeal must fail.

29. On the issue of costs, the court is guided by the decision in **Orix Oil (Kenya) Limited V Paul Kabeu & 2 Other [2014] eKLR** where the court stated:

> **‘’…the court should have been guided by the law that costs follow the event, and the Plaintiff being the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied the costs or the successful issue was not attracting costs. None of those deviant factors are present in this case and the court would still have awarded costs to the Plaintiff, which I do.**

30. I find no merit in this appeal and dismiss it with costs to the 1st respondent. The appellant will meet the costs of the lower court suit.

31. The upshot of the above is that I find no reason to interfere with the trial court’s decision on award of general damages.

32. I find no merit in this consolidated appeal and I dismiss it with costs to the respondents.

33. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 5TH DAY OF FEBRUARY, 2019.

F. MUCHEMI

JUDGE