REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO.421 OF 2012

MAGNUM ENGINEERING LIMITED.....APPELLANT

VERSUS

JASON SOLOMON ANZAYA.....RESPONDENT

J U D G M E N T

A. Introduction

1. This appeal is against the judgement and decree of Senior Principal Magistrate, Milimani delivered in **CMCC No. 6666 of 2007** delivered on the 31st July 2012.

2. The respondent in the lower court sued the appellant vide plaint dated 9/07/2007 for failing to provide a safe working environment and thus sought compensation for special and general damages as well as costs of the suit. Judgement was delivered on the 31/07/2012 and the respondent awarded Kshs. 152,000/= being general and special damages plus interests. The respondent was also awarded costs of the suit.

3. The appellant being aggrieved by the decision lodged this appeal on several grounds that may be summarised thus: -

a) That the learned magistrate erred in finding that the appellant was liable and that the appellant's evidence was disregarded.

b) That the magistrate had no legal basis to award general damages to the respondent.

c) That the medical evidence was not conclusive.

d) That the award of damages was manifestly excessive.

e) That the decision was against the weight of evidence.

4. The parties argued the appeal by way of written submissions.

B. Appellant's Submissions

5. On grounds 1, 2 and 3, the appellant submitted that the magistrate erred by finding that the respondent was injured as a result of breach of statutory duty and/or negligence on the appellant's part. The appellant submitted that section 107 of the Evidence Act placed a burden on he who alleges breach of a legal right or liability to prove the same. The appellant further submitted that section 107 was to be read alongside sections 109 and 112 of the evidence act.

6. The appellant further submitted that the full liability on the appellant as apportioned in the judgement was an error as there was an obligation on the employee to take care of himself. He relied on the cases of **Purity Wambui Murithii v Highlands Mineral Water Co. Ltd, [2015] eKLR** and that of **Karanja v Malele [1983] KLR.**

7. On the assessment of damages against the evidence tendered, the appellant submitted that the medical evidence produced in court was completely worthless and not the kind that trial courts consider as the expert witness who produced the report, Dr. G.K. Mwaura, prepared the report without the initial treatment notes.

8. Further the appellant submitted that the respondent disowned his own pleadings by admitting his omission to sign the verifying affidavit. He admitted as well that he had been paid his dues totalling up to Kshs. 14,553/= by the appellant and that he agreed that he sustained injury in the course of his employment and as such the trial court ought to have found in its favour.

9. The appellant submitted that the general damages awarded to the respondent were excessive based on the injuries and comparative jurisprudence based on the injuries sustained by the respondent. The appellant submitted that the respondent ought to have been awarded Kshs. 50,000/= and supported this by the following authorities, **Cyrus Gachanja Muya & 4 Others v Abbas Mohammed & Another [1999] eKLR, David Okoka Odero v Kilindini Tea Warehouses Ltd (2008) eKLR** and **Sokoro Saw Mils Limited v Grace Nduta Ndungu (2006) eKLR.**

C. Respondent's Submissions

10. The respondent further submitted that the trial court correctly found that he was injured on the material day while at work. It was the respondent's submission that the appellant's witness on the material day did not deny, in cross examination, that the work sheet which showed that the respondent worked for the whole day on the 16th December 2005 was signed so as to facilitate payment. The respondent further submitted the discharge voucher that was produced showing he had been paid his dues and stating that he had not suffered any injuries or accident had been disowned and the appellant had failed to prove its veracity.

11. The respondent further submitted that his evidence was strong and supported by documents whereas the appellant's evidence was based on testimony of a witness who was not called to testify and neither was that evidence supported by documentary evidence. The respondent further submitted that he never disowned his own evidence.

12. On grounds 3 and 4, the respondent submitted that he produced the treatment notes and also called a medical expert who corroborated his evidence of the injuries whereas the appellant's could not controvert the same. The respondent submitted that Dr. A.K. Mwaura who examined the respondent prepared the medical report from the treatment notes he had produced in evidence.

13. The respondent argued that the injuries he suffered were soft injuries and attracted an award of between Kshs. 100,000/= – 200,000/= and thus the award made by the trial court was not excessive.

14. The respondent further stated that he suffered injuries as the appellant had failed to put up a safety net to hold falling objects and for authorizing work to go on above where the plaintiff was working, a fact which the respondent did not controvert.

D. Analysis and Determination

15. The applicable principles in so far as the appeal is concerned were restated by the Court of Appeal in the case of **Simon Muchemi Atako & Another -Vs- Gordon Osore [2013] eKLR** as follows: -

> **"Since this is a first appeal, we are required to consider the evidence adduced before the trial court, evaluate it ourselves and draw our own conclusions, but always bearing in mind and making allowance for the fact that we did not have the opportunity which the trial court had to see and hear the three witnesses who testified.** ***See Selle And Another -Vs- Associated Motor Boat Company Ltd & Others [1968] Ea 123, Ramji Ratna & Company Limited Vs Wood Products (Kenya) Limited, Civil Appeal NO. 117 OF 2001*** **and** ***Hanh -Vs- Singh, (1985) KLR 716.*** **We also bear in mind that this Court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the trial judge is shown demonstrably to have acted on a wrong principle in reaching the findings that he did. Nevertheless, we are entitled to and will interfere if it appears that the trial judge failed to take account of particular circumstance or probabilities material to an estimate of the evidence or where his or her impression, based on the demeanour of a material witness, is inconsistent with evidence in the case generally. See** ***Ephantus Mwangi And Another -Vs- Duncan Mwangi Wambugu, [1982-88] 1 Kar 278).***"

16. In the instant case, the respondent suffered blunt spinal injuries. This was confirmed by PW1 who prepared the medical report. Contrary to the allegations by the appellant that the medical evidence produced in court was completely worthless as it was prepared the report without no initial treatment notes, cross examination of PW1 revealed that PW1 prepared the report using the treatment notes which had the history of the respondent's injuries.

17. The court record reveals that the respondent testimony was that he was hit by a metal bar thus causing his injuries. He was subsequently given Kshs. 700/= to seek treatment by his supervisor. The appellant's did not call the respondent's supervisor as a witness. I am in agreement with the trial court that if the appellant wanted to deny the occurrence of the incident while the respondent was on duty, the burden was on it to call the respondent's supervisor as he would have had first hand interaction with the respondent on the material day.

18. I have gone through the evidence of DW1, who testified on behalf of the appellant. It is my opinion that his evidence failed to dislodge that of the respondent. DW1 did not witness the accident, nor did she fill the discharge a payment voucher. She denies signing a discharge voucher for payment of any compensation. DW1 however acknowledges that according to the appellant's records, the respondent did not report to work on the following day, the 17th December 2005.

19. In my view, the appellant provided a witness who was not useful in its case in that she did not allude to the allegations of negligence. It is my considered opinion that the respondent adduced sufficient evidence to prove that he was injured on the material day and that the appellant failed to provide protective devices, and to warn the respondent of the dangers involved in the job for him to take extra precautions.

20. It is noteworthy that the respondent's testimony in the trial court that he blamed the appellant as there was no safety net to catch falling objects which would have prevented the accident he suffered was not controverted by the appellant.

21. The upshot of the above is that the grounds of appeal as regards liability must fail.

22. In **Halsbury's, Laws Of England, 4th Edition** it is stated at paragraph 662 (p. 476) as follows: -

> **"The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal connection must be established."**

23. In **Boniface Muthama Kavita V Carton Manufacturers Limited Civil Appeal No. 670 of 2003 [2015] eKLR Onyancha J** observed that:

> **"The relationship between the Appellant and the Respondent as employer and employee creates a duty of care. The employer is required to take all reasonable precautions for the safety of the employee, to provide an appropriate and safe system of work which does not expose the employee to an unreasonable risk.**

24. According to **Winfield and Jolowicz on Tort 13th Edn. P.203 Employers liability is defined: -**

> **"At common law the employers' duty is a duty of care, and it follows that the burden of proving negligence rests with the plaintiff workman throughout the case. It has even been said that if he alleges failure to provide a reasonable safe system of working the plaintiff must plead, and therefore prove what the proper system was and in what relevant respect it was not observed."**

25. For the respondent to succeed in his claim, he was required to prove, among others, that he was injured while engaged on duties at the appellant's workplace and that he was assigned or expected to perform some work in the course of his employment. The respondent was obligated to prove any one or more of the particulars of breach of statutory duty, negligence or breach of contract pleaded as against the respondent employer.

26. In **Mumias Sugar Co. Ltd Vs Charles Namatiti CA 151 of 1987, Gichuhi, Masime and Gicheru JJA held:**

> **"An employer is required by law to provide safe working conditions of work in the factory and if an accident occurs while the employee is handling machinery the employer is responsible and will be required to compensate the injured employee."**

27. The above decision of the Court of Appeal acknowledges the statutory duty of care to provide a safe working environment for its workers on part of the appellant. In this case the appellant failed to observe its common law duty of care of an employer of ensuring that all reasonable steps were taken to ensure that the appellant was safe while engaged in his work. The lack of a safety net was in my view unacceptable. I find that there was sufficient evidence on record to prove the particulars of negligence as pleaded in the plaint as observed herein above.

28. In my considered opinion, the respondent proved, on a balance of probability that the appellant had a statutory duty and obligation to provide a safe working environment which included not exposing him to tasks which could result in injury or loss. The Appellant is liable for any injury that its employee, the Respondent sustains in the course of employment.

29. I therefore find no error in the trial magistrate's decision. The appellant was wholly liable for the accident and injury occasioned to the respondent while he was engaged upon the work of measuring metals for filling.

30. As to whether the trial magistrate awarded general damages that were manifestly excessive it is trite law that the appellate court will not interfere with an award of damages by the trial court merely for the reason that it would have exercised its discretion otherwise.

31. In the case of **Kemfro Africa Limited t/a Meru Express Services (1976) & Another -Vs- Lubia & Anor. (No. 2) [1985] eKLR** the Court of Appeal enunciated principles for ground the appellate court by observing that:

> **"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. This Court follows the same principles."**

32. In the instant case, the appellant submitted on an award of Kshs. 50,000/= for blunt spinal injuries. It did not provide any authorities in their submissions to the trial court however in their submissions before this court, they rely on the cases of, **Cyrus Gachanja Muya & 4 Others v Abbas Mohammed & Another [1999] eKLR, David Okoka Odero v Kilindini Tea Warehouses Ltd (2008) eKLR** and **Sokoro Saw Mils Limited v Grace Nduta Ndungu (2006) eKLR.**

33. The respondent submitted award of damages of Kshs. 200,000/= and relied on the case of **Nairobi HCCC No. 4676 of 1990, Elizabeth Egadizi v Philip Kipteret**.

34. In assessing of damages, the general approach has always been that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the level of awards in similar cases. I have re-evaluated the injuries sustained and the cases cited by the parties. The cases cited by the respondent bore little relation to the injuries he sustained. As stated earlier, the appellant did not cite any cases

for consideration by the trial court.

35. It was the duty of the advocates to guide the court by citing relevant cases to enable the court arrives at a fair decision. *The cases* cited by the appellant were not cited before the trial court and an appellate court cannot be expected to fill in the gaps left by inadequate material given to the trial court.

36. I have reviewed the entire appeal record and the judgment of the court regarding assessment of damages. I find no good reason to justify interference with the discretion of the learned magistrate in the award. There is no merit in the grounds of appeal impugning assessment of general damages. In my view the general damages award was proportionate to the evidence on injuries suffered by the respondent.

37. Consequently, I find no merit in this appeal and I dismiss it accordingly.

38. The appellant to meet the costs of this appeal and of the court below.

39. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 6TH DAY OF FEBRUARY, 2019.

F. MUCHEMI

JUDGE