REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 362 OF 2014

HAVI CONSTRUCTION LIMITED.....APPELLANT

-VERSUS-

ISAIAH KAMAU NJERU.....RESPONDENT

(An appeal from the judgment delivered by Honourable Mr. C. Obulutsa (acting Chief Magistrate) on 18th July, 2014 in Civil Case No. 1492 of 2012)

JUDGMENT

1. The appellant was the defendant in Civil Case No. 1492 of 2012 whereas the respondent was the plaintiff in that instance. The respondent filed a plaint on 28th March, 2012 seeking both special and general damages for breach of contract and injuries sustained in the course of his employment with the appellant. The appellant entered appearance and filed a statement of defence on 23rd August, 2012, following which the respondent responded by way of a reply to defence. The suit proceeded for hearing and the trial court delivered its judgment on 18th July, 2014 with reliance on the respondent's submissions.

2. The appeal before this court is against the abovementioned judgment and the consequent decree. The memorandum of appeal is dated 15th August, 2014 and is premised on six (6) grounds.

3. The parties filed their respective submissions. The appellant by and large contended that the learned trial magistrate did not consider its submissions despite the same having been filed. It was also the appellant's submission that the learned trial magistrate failed to consider the evidence of DW 1 that the respondent was wholly liable or in the alternative, largely to blame for the accident, adding that the award made was inordinately high.

4. In opposition thereto, the respondent submitted that the appellant was liable for failing to provide the necessary protective gear and ensuring safety measures were in place. On the question of the award on general damages, the respondent maintained that the same was not so excessive as to warrant an interference.

5. I have considered the rival submissions and noted that the grounds of appeal are three-fold. The first limb to be addressed concerns whether or not the learned trial magistrate erred in failing to incorporate the appellant's submissions in the delivery of his judgment. I have perused the record of appeal to which are annexed the appellant's submissions. It would appear the same were filed on 27th June, 2014. Be that as it may, the proceedings reveal that parties were directed to file submissions by 23rd May, 2014 and when the matter came up in court on the said date, it was noted that the appellant had not filed its submissions. As such, the time for filing the same was extended up until 25th June, 2014 and on which date, the submissions had not been filed and the trial magistrate proceeded to issue a judgment date.

6. In light of the foregoing, it is apparent the appellant filed its submissions outside of the ordered timelines; nevertheless, this was done prior to the delivery of the judgment. It remains uncertain whether the appellant's submissions once filed were availed to the learned trial magistrate for consideration. Suffice it to say, I am convinced that the submissions were not filed inordinately late and the trial magistrate ought to have taken the same into account but did not do so. In the circumstances, ground 1) stands.

7. The second limb touches on the learned trial magistrate's finding on liability. It is well noted that DW 1 gave evidence before the trial court that the respondent constructed his own platforms and that he was provided with the necessary safety gear but did not make use of them. The learned trial magistrate in his analysis stated that there was no proof of issuance of such gear as claimed by the appellant. In arriving at this finding, it is apparent that the trial magistrate did not take to mind the statement by DW 1 alluding that the platform which is said to have resulted in the respondent's fall was in fact constructed by him.

8. Upon perusal of the proceedings and more specifically the cross-examination of PW 2, he acknowledged having taken part in the building of the containers standing on the platform but stated that he did not construct the actual platform.

9. The circumstances to my mind point towards contributory negligence on the part of the respondent. He admitted that he was engaged in the construction of containers on a platform and which platform he ought to have known was either secure or otherwise. By virtue of the fact that he continued to utilize the said platform without questioning its condition at the earliest opportunity leads me to find that there exist an aspect of shared liability between the parties. I am therefore convinced the learned trial magistrate did not wholly consider the evidence of DW 1. Consequently, the finding on liability was erroneous, making grounds 2), 5) and 6) valid to this extent.

10. However, on the issue of the safety gadgets, I have found upon perusal of the record of appeal that no evidence was adduced to support the appellant's averment that the gadgets were availed to the respondent. In this sense, I have no reason to doubt the soundness of the trial magistrate's finding. Resultantly, ground 3) is untenable.

11. Lastly, I shall address the award on quantum of damages. The renowned case of *Kemfro Africa Ltd t/a Meru Express Services 1976 & Another [1976] v Lubia & Another (No. 2) [1985] eKLR* addresses the subject as follows:

> ***"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."***

12. That said, it is the appellant's submission on the one hand that the award of Kshs.700,000/= was manifestly excessive and not proportionate to the injuries sustained by the respondent, citing the case of *Benard Mwangi Omwansa v Maina Kigundu & Another-Nakuru HCCC No. 220 of 1993*. The respondent on the other hand is satisfied that the award given is reasonable.

13. In awarding the relevant sum as general damages, the learned trial magistrate considered the proposed sum by the respondent coupled with the cited authority and circumstances of inflation.

14. Moreover, I am persuaded by *Ben Mengesa v Edith Makungu Lande [2013] eKLR* where the court upheld an award of Kshs.900,000/= for blunt injuries to the head and neck, in addition to injuries to the spine and legs.

15. In view of the foregoing, I am satisfied that the award in respect to general damages is reasonable and there is no need for me to interfere with the same as it is. Ground 4) fails.

16. The upshot is that the appeal succeeds only in terms of grounds 1) and 2). As concerns grounds 5) and 6), the same are allowed in terms of liability whereas grounds 3) and 4) are untenable. I make the following consequent orders:

a) The learner trial magistrate's finding on liability is hereby set aside and substituted with an order to the effect that liability be apportioned in the ratio of 80:20 in favour of the respondent.

b) The award on general damages is sustained subject to 20% contributory negligence.

c) The respondent shall have half of the costs of the appeal.

Dated, signed and delivered at **NAIROBI** this **1st** day of **March, 2019**

L. NJUGUNA

JUDGE

In the presence of:

……. for the Appellant

……. for the Respondent