REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO.664 OF 2012

GURDEV ENGINEERING &

CONSTRUCTION LIMITED.....APPELLANT

VERSUS

ALLAN OTIENO OSULA.....RESPONDENT

(Being an appeal from the Judgment and Decree delivered on 9th November, 2012 by Hon. Ole Keiwua (Principal Magistrate) Chief Magistrate Milimani Commercial Courts in CMCC No.6166 of 2011).

JUDGMENT

1. Vide a plaint dated 3rd December, 2011 the Appellant was sued by the Respondent for damages arising out of injuries allegedly sustained while the Respondent was working for the Appellant. The Respondent blamed the injuries on the Appellant's failure to provide a safe system of work or breach of common law duty of care.

2. The Appellant in it's statement of defence denied the claim. In the alternative, it was pleaded that if the accident occurred, it was caused and or substantially contributed to by the Respondent.

3. The case proceeded to a full hearing. The trial magistrate held that the Appellant was 95% liable for the injuries. General damages were assessed at Ksh.350,000/= and special damages at Ksh.2,000/=. The total award came to Ksh.334,500/= after being subjected to 5% contribution.

4. The Appellant was aggrieved by the said judgment and appealed to this court. The grounds of appeal are essentially on the question of liability and quantum.

5. The appeal was canvassed through written submissions which I have considered.

6. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

> **"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 demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)".**

7. The Respondent Allan Otieno Osula testified (PW1). His evidence was that the Appellant was his employer. That he was carrying out welding work repairing a door. He blamed the injury on the grinder machine that he was using which he stated had no guard and ended up injuring him on the left hand. While denying the blame on his part, the Respondent's further evidence was that he was not trained on how to use the grinder and also blamed the Appellant as the employer for not providing him with any safety gear.

8. The Respondent maintained his line of evidence during cross-examination. He pointed out that he had used a grinder before, that he had not been issued with any gloves and that at the material time he was together with an experienced colleague by the name Stephen.

9. Stephen (DW1) testified on the Appellant's side. Stephen conceded to having been working for the Appellant together with the Respondent at the material time removing a door. DW1 described himself as the Respondent's supervisor and testified that he had shown the Respondent how to use the machine. DW1's evidence is that he saw the injury but blamed the Respondent for failing to carry out instructions and stated that what was being cut was an iron sheet and not the string.

10. There is no mention that the Respondent was supplied with any safety gear, e.g. the gloves mentioned by the Respondent. The injury while at work is conceded to. The instructions not followed have not been pointed out. I would agree with the trial magistrate holding that the Appellant was 95% liable for the injury.

11. According to the medical reports by R.P. Shah dated 4th July, 2012 the injuries sustained a compound fracture of the lower part the of ulna bone, left forearm and injury to ulna nerve. Treatment included an operation and nerve and tendon repair. Recovery was expected but with stiffness of the left little finger and weakness of all the fingers. His opinion is that these were permanent disabilities which he assessed at 15%.

12. The Respondent was first seen by his doctor Mr. W.M. Wokabi a Consultant Surgeon, on 7th November, 2011. Dr. Wokabi again examined the Respondent on 2nd October, 2012. Dr.Wokabi's medical reports essentially agree with the report by Dr. Shah that the Respondent sustained a fracture of the ulna and the nerves, tendon and a severed blood vessel. That treatment included an operation and repair to the nerves and tendons and that the Respondent recovered satisfactorily. Dr. Wokabi's opinion was that the Respondent was left with a scar and a moderately restricted outward movement of the wrist. He assessed the functional disability at 12%

13. The Appellant had submitted for an award of Ksh.120,000/= as general damages. He relied on the case of **Khilna Enterprises Ltd v Charles Maina Migwi [200] eKLR** where an award of Ksh,100,000/= was made as general damages for a fracture of the left ulna distal fracture and radial styloid process.

14. The Respondent had submitted for an award of Ksh.500,000/= as general damaged. He relied on **HCCC Nbi 4272/92 Mathew Mutua Mutio v Car & General (K) Ltd** and **HCC Nbi 883/91 Stephen Ayodi & others v Joeph K Mwaniki** where general damages awarded was Ksh.300,000/= for fractures to the hand.

15. I have also looked at the following authorities:

(a) **Henry Albert Andera v Car & General (K) Ltd [2000] eKLR** where an award of Ksh. 400,000/= was made for compound fractures of the right ring and little fingers and fracture of the radius and ulna bones of the right forearm.

(b) **Akamba Public road Services Limited v Rosemary Amoit [2018] eKLR** where an award of Ksh.400,000/= was made for the following injuries:

(a) Swollen right arm;

(b) Fracture of the right radius, distal third;

(c) Bruises on the left hand which was tender;

(d) Bruises on the right hand.

16. In my view the award of general damages is within a similar range of authorities and this court is not inclined to interfere with the same. As stated by the Court of Appeal in case of **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A M. Lubia and olive Lubia 91985) 1 KAR 727:**

> **"....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 court are well settled. The appeal court must be satisfied either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages....."**

17. Special damages claimed was Ksh.2,000/= for the medical report by Dr. W.M Wokabi. The same was specifically proved as per the receipt of Ksh.2000/= produced as an exhibit.

18. With the foregoing, I find no merits in the appeal and dismiss the same with costs.

Dated, signed and delivered at Nairobi this 4th day of April, 2019

B THURANIRA JADEN

JUDGE