



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 120 OF 2014 & 186 OF 2015

ATLAS PLUMBERS & BUILDERS LTD.....APPELLANT

=VERSUS=

JOSHUA OMONDI OGAL.....RESPONDENT

(Being an appeal against the Judgment/Decree of Hon. Kombo Chief Magistrate delivered on the 18th July, 2014 in Nakuru CMCC No.1176 of 2010 – Joshua Omondi Ogal –Vs- Atlas Plumbers & Builders (K) Ltd)

JUDGMENT

INTRODUCTION

1. This is a judgment on two appeals arising from Civil No.1176 of 2010. Both parties in the lower court were aggrieved by the judgment delivered on 17th July 2014. The defendants filed Appeal No.120 of 2014 while the plaintiff filed Appeal No. 86 of 2015.
2. I will do one judgment in file number 120 of 2014, which was filed earlier and will refer the plaintiff as respondent and defendant as appellant. The respondent/plaintiff's claim against the appellant/defendant was for general damages, damages for loss of earnings and earning capacity, future medical treatment and special damages for the injuries he sustained on 22nd March 2009 while working for the appellant/defendant.
3. The trial court apportioned liability at 50:50. Plaintiff was awarded general damages of Kshs.700,000 for pain, suffering and loss of amenities and special damages of Kshs.500.
4. The defendant/appellant appealed against both liability and quantum while the plaintiff/respondent appealed against liability but supported the trial court's finding on quantum. Combined grounds of Appeal are as hereunder:-
 - a) That the learned trial magistrate erred in law and in fact in apportioning liability equally (50 :50) among parties herein
 - b) That the learned trial magistrate erred and misdirected himself in law and in fact in his assessment of damages awardable to the respondent/plaintiff that were inordinately high in the circumstances.
 - c) That the learned trial magistrate erred in law and in fact in disregarding and/or ignoring the evidence adduced, exhibits produced and submissions filed and arrived at a wrong conclusion.

APPELLANT/DEFENDANT'S SUBMISSIONS

5. Mr. Mahida for the appellant /defendant submitted that the plaintiff sustained injury when glasses fell as he was offloading them from a lorry. He further submitted that the supervisor warned workers to move when he saw the glass was not stable but plaintiff ignored the warning. He argued that because the plaintiff knew that the glass would fall liability would have been higher than 50%.
6. In respect to quantum, the defendants/appellant's advocate submitted that the trial magistrate failed to consider authorities cited by the defendant and in awarding damages of Kshs.750,000, he placed reliance on authorities cited by plaintiff, which showed more serious injuries. He urged court to look at **Case No.105 of 2008 SDV Tanzania (k) Ltd vs Scholastic Nyambura.**

RESPONDENT'S/PLAINTIFF'S SUBMISSIONS

7. Counsel for the respondent submitted the appellant's allegation to the effect that the supervisor raised alarm on falling glass never arose during trial. He submitted the glass was carelessly packed in the vehicle and that plaintiff and his colleagues were in the process of running

away when the glass hit him. He further submitted that in line 18 of the judgment, defence witness confirmed that the glass was not stable and in line 19 he said all the glasses collapsed and fell. He added that the fall was so sudden and it is not a must that all workers would have been injured as it depended on where each of them stood.

8. Counsel further submitted that plaintiffs/respondent's argument is that the appellant/defendant failed to provide a proper working environment. He added that the plaintiff never made any mistake and the appellant/defendant should not be blamed 100%. He urged court to uphold the decision on liability in the trial court by apportioning liability at 50:50.

9. Counsel for plaintiff/respondent supported quantum awarded by the trial court. He submitted that plaintiff sustained serious injuries as shown in paragraph 42 to 47 of the proceedings and argued that plaintiff's injuries were bound to fetch an award of Kshs.750,000. He added that the doctor found the function of plaintiff's limb reduced as he cannot work without support. Permanent disability assessed at 20%.

ANALYSIS AND DETERMINATION

10. This being the first appellate court, I am obligated to reevaluate evidence adduced before the trial court and arrive at an independent determination.

11. On perusal of court record, I note that the plaintiff said, he did not expect the glass to fall. He further stated that the glass was on his side and that the glasses were not properly parked in the vehicle. He also said that he would have prevented the injury. He however never explained how he would have prevented the injury.

12. There is no doubt that the employer was expected to ensure that the working environment was safe. Safety comes with ensuring proper parking of the glasses to avoid fall while being offloaded. On the other hand, the employee is also expected to exercise diligence while working to prevent injury, which can be foreseen.

13. The plaintiff having seen how glasses were packed, he should have exercised extra care to prevent or reduce effect of an injury. The greatest duty however lie with the employer. Record show that the plaintiff said the glasses were on his side thus explaining why only he and not the other employees was injured.

14. From the foregoing, my view is that a smaller percentage of liability should have been apportioned to the plaintiff. I therefore find the plaintiff 30% liable thus apportion liability at 30:70 in favour of plaintiff

15. In respect of quantum, I note from the doctors evidence that the plaintiff sustained compound displaced fracture in the right tibia and fibula and deep cut wounds on the legs. At time of examination, he found a prominent protruding deformity on the right leg in the lower part and an extensive wound on the lower part on the anterior aspect of the leg. The leg had developed cellulitis and osteomyelitis with restricted movements at the ankle joint. Fractures on the right tibia and fibula had malunited.

16. The doctor testified that the deformity in the right leg is permanent and assessed permanent disability at 20%. He testified that osteomyelitis is difficult to treat as the infection is on the bone itself and that the patient may eventually require skin grafting or amputation

17. I have compared injuries with injuries suffered in the cited authorities and find award granted reasonable. It is not unreasonably high or low to warrant award being disturbed. Total damages awarded were 705,000 less 30%(211,500) net is kshs.493,500.

FINAL ORDERS

1. Finding on liability is hereby set aside
2. Liability apportioned at 30:70 % in favour of plaintiff
3. Appeal on quantum is dismissed.
4. I enter judgment for plaintiff against the defendant/Appellant for four hundred and ninety three thousand five hundred shillings only (Kshs.493,500).
5. Interest on 4 above from the date of this judgment.
6. Costs in the trial court to be paid by defendant/appellant to the plaintiff/respondent.
7. Each party to bear own costs of the appeal.

Judgment Dated, signed and delivered at Nakuru this 2nd day of May 2019.

.....

RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Jared Court Assistant

Mawenzi Holding Brief for Manyo Counsel for Appellant

Gekonga Counsel for Respondent