REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 243 OF 2016

CHANNA CONSTRUCTION COMPANY LIMITED.....APPELLANT

-VERSUS-

JOSHUA NDAKALU MUKUNA.....RESPONDENT

(Being an appeal from the judgment delivered by Honourable M. Chesang (Mrs.) (Resident Magistrate) on 21st April, 2016 in CMCC NO. 1311 OF 2014)

JUDGMENT

1. The respondent, being the plaintiff in CMCC NO. 1311 OF 2014 filed a suit against the appellant on 17th March, 2014 seeking general damages for pain and suffering, future loss of earnings and future medical expenses. The respondent also prayed for special damages in the sum of Kshs.187,513/=.

2. The claim is alleged to have arisen from injuries sustained by the respondent while working as a casual labourer at the appellant's construction site.

3. The respondent had pleaded that while operating a concrete mixer on a wooden platform, the said platform collapsed, thereby resulting in a fracture of the respondent's left femur, requiring surgery to fix a K-nail.

4. Upon hearing the parties, the trial court awarded the respondent general damages at Kshs.1,000,000/= and future medical costs amounting to Kshs.100,000/=

5. The appellant being aggrieved, preferred this appeal and put forward the following grounds:

> ***i. THAT the learned trial magistrate erred in law and in fact by allowing the respondent's prayers in its plaint dated 7th February, 2014 apportioning liability at 90%:10% in favour of the respondent.***
>
> ***ii. THAT the learned trial magistrate erred in law and in fact by ignoring the appellant's pleadings and evidence while totally relying on the respondent's evidence and pleadings.***
>
> ***iii. THAT the learned trial magistrate erred in law and in fact by making a finding that the respondent was entitled to general damages of Kshs.1,000,000/= and further medical expenses of Kshs.100,000/=.***

6. The parties recorded a consent to have the appeal disposed of written submissions. I have considered the grounds of appeal together with the submissions on record. I have also re-evaluated the evidence presented before the trial court. Though the appeal raises three (3) grounds, it is my considered view that those grounds revolve around the twin issues of liability and quantum.

7. On liability, the respondent both pleaded and testified before the trial court that he was at all material times employed by the appellant as a casual labourer. The respondent also gave evidence to the court that he was never issued with an employment card or any document from the labour office, and that the site on which he worked and sustained the injuries was situated at Kayole.

8. It was also the respondent's evidence before the trial court that he had previously complained to the appellant regarding the faulty machine but was instead told to either continue working or leave his job.

9. The respondent relied on a medical report and the case summary as evidence of the injuries sustained. The recorded proceedings shows that *Mr. Onyango* counsel for the appellant raised an objection on the production of the aforesaid documents on the basis that the case summary was neither stamped nor signed, whereas the medical report ought to have been produced by the relevant medical doctor.

10. *Mr. Asiyo* advocate for the respondent challenged the objection on the basis that the same was never raised at the pre-trial stage.

11. In the end, the trial court overruled the objection, holding that the appellant had every opportunity to raise the same at the pre-trial stage and even during the call-over of the causelist on the hearing date but did not. The appellant was however granted a right of appeal.

12. On its part, the appellant pleaded that the respondent was solely to blame for the accident. DW 1 (Mandeep Channa) denied that the respondent ever worked for the appellant or that the appellant has any contact with Victory Faith Ministries which happens to be the site on which the respondent claims to have undertaken his duties during the time of the accident.

13. DW 1 also stated that the appellant used to issue identity cards and that it has a full record of workers.

14. In her judgment the magistrate stated that since the appellant denied that the respondent was its employee, it was required to prove this by way of evidence but did not. The said magistrate also stated that the location of the appellant's offices was never in question since the respondent had alleged that the accident occurred at the construction site at Kayole.

15. Having re-evaluated the evidence presented before the trialcourt, it is trite law that he who alleges must prove. In the present instance, it can be discerned from the judgment of the trial court that the trial court considered both parties' evidence and written submissions in arriving at its finding that since it was the appellant's argument that the respondent was not its employee, it was required to prove this through credible evidence.

16. The trial court likewise took into account the respondent's argument that he was a casual labourer who was never issued with a contract of employment, identity card or other relevant documentation. In the premises, it was reasonably upon the appellant to then prove the absence of employment of the respondent by way of employment records, but this was not done.

17. In fact, though DW 1 testified that the respondent was never an employee of the appellant, he acknowledged that he had no evidence to support this argument, despite stating that the appellant kept a record of all its employees. As it stands, no record or list of employees was placed before the trial court.

18. The respondent raised an objection against the production of the medical report by the respondent. While it would have been appropriate to have the medical report produced by the maker thereof, the appellant did not challenge its production at the earliest opportunity or prior to the hearing, neither did it challenge the trial court's order by way of an appeal at the time but instead, opted to proceed with the hearing to its conclusion.

19. Upon re-evaluating the evidence presented before the trial court, I am satisfied that the learned trial magistrate rightly considered the evidence presented before her and was correct in her finding that the respondent had proved his case on a balance of probabilities. I am also satisfied that the learned trial magistrate rightly apportioned liability in the ratio of 90:10 in favour of the respondent. I have no reason to find that there was a hint of bias on the part of the said magistrate. Consequently, Grounds (i) and (ii) of the appeal collapse.

20. On quantum, it is not in dispute that the respondent presented evidence showing that he suffered a fracture to his left femur.

21. The respondent proposed an award of Kshs.1,500,000/= and Kshs.100,000/= as general damages for pain and suffering, and future medical costs respectively.

22. The appellant on the other hand proposed the sum of Kshs.150,000/= as the appropriate award, submitting that the future medical costs had not been proven.

23. In awarding Kshs.1,000,000/= as general damages and Kshs.100,000/= for future medical costs, the learned trial magistrate indicated that she had considered the evidence presented before her, the nature of injuries sustained, and the submissions as well as the authorities by the parties.

24. The appellant now argues that the learned trial magistrate's award was made in the absence of evidence or reference to its cited authorities, thereby leading to an inordinately high award. It is the appellant's submission that the award ought to be disturbed and substituted with an all-inclusive award of Kshs.400,000/=.

25. The respondent on the other hand has submitted that in making the award, the trial court was guided by the evidence placed before it, the authorities cited by the respondent as well as the future medical costs as indicated in the medical report relied upon.

26. The respondent added that in any event, comparable authorities on similar injuries fall within the range of the award made by the trial court, hence the same should not be disturbed.

27. I have taken into account the factors to be considered by the appellate court before interfering with the decision of a trial court on quantum. ***Ndungu Dennis v Ann Wangari Ndirangu & another [2018] eKLR*** cited by the appellant as well as ***Simon Muchemi Atako & another v Gordon Osore [2013] eKLR*** cited by the respondent. The court in the former case placed reliance on the renowned case of ***Butt v Khan (1977) KAR 1*** and went ahead to reason the following:

> ***"I can only interfere with an award of damages if the aggrieved party satisfies one of two conditions:***
>
> ***i. That the trial Court took into account irrelevant factors or left out relevant factors when assessing damages; or***

ii. The amount of damages is so inordinately high or low that the quantum awarded must be a wholly erroneous estimate of damages."

28. It is apparent from her judgment that the learned trial magistrate took into account the injuries sustained plus the submissions and authorities cited. The said magistrate also indicated that she did not find the authority cited by the appellant to be helpful or relevant since the same was decided over 20 years back.

29. I have considered the authorities cited by the appellant. The injuries sustained therein included a fracture to the femur, similar to those sustained by the respondent. The learned trial magistrate therefore erred when she disregarded the appellant's authority as being irrelevant.

30. It is also apparent that the learned trial magistrate did not specify how she arrived at the award on general damages. However, upon re-examining the authorities cited by the respondent, I am satisfied that the award given fell within comparable awards to similar injuries. The trial magistrate therefore arrived at the correct finding on quantum, notwithstanding her failure to consider the appellant's authority.

31. As concerns the award on future medical expenses, I have re-evaluated the case that was before the trial court and it is apparent that the award on this head was made on the basis of the medical report relied upon by the respondent.

32. The said medical report, it would appear, provided a break-down of costs required to remove the K-nail inserted in the respondent's left femur, totaling Kshs.100,000/=.

33. In view of the evidence, there is nothing to show that the appellant sought to call an independent medical expert to give a separate opinion on the estimated costs for a surgery of such nature. In the premises, I am convinced that the learned trial magistrate correctly applied her mind in awarding the same as prayed.

34. In the end, I find no merit in the appeal, the same is dismissed with costs to the respondent.

Dated, Signed and Delivered at Nairobi this 2nd day of May, 2019.

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J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent