REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 21 OF 2017

METAL CROWNS LIMITED.....APPELLANT

VERSUS

ELIUD MUSEMBI NTHALIKA.....RESPONDENT

(Being an appeal from the judgment of Honourable K.I. Orenge (Mr.) (Senior Resident Magistrate delivered on 28th December, 2016 in CMCC NO. 4798 OF 2013)

JUDGEMENT

1.The respondent instituted a suit against the appellant before the Chief Magistrate's Court seeking general and special damages for injuries he sustained in the course of his employment with the appellant as a general worker.

2. It was the respondent's case that on or about 18th October, 2012, the appellant in breach of his statutory duties assigned him the task of repairing a printing machine in the course of performing his assigned task, a forklift driver negligently ran over him, causing him to sustain serious injuries.

3. At the hearing, the respondent was the sole witness whereas the appellant opted to close its case without calling for any witnesses. Moreover, the parties agreed by consent to produce the two (2) medical reports detailing the respondent's injuries without calling their respective makers.

4. Subsequently, the parties filed written submissions and the trial court rendered its judgment in favour of the respondent and against the appellant as hereunder:

a) Liability-100%

b) General damages-Kshs.800,000/=

c) Special damages-Kshs.2,000/=

d) Costs for future medical expenses-Kshs.120,000/=

Total-Kshs.922,000/=

5. The appellant being dissatisfied with the aforesaid decision preferred this appeal and put forward the following grounds in his memorandum:

i) THAT the learned trial magistrate erred in law and in fact by entering judgment against the

appellant and finding it 100% liable in the absence of proof of the same.

ii) THAT the learned trial magistrate erred in law and in fact as the evidence adduced did not support any negligence on the part of the appellant.

iii) THAT the learned trial magistrate erred in law by shifting the burden of proof to the appellant whereas the same had not been discharged by the respondent.

iv) THAT the learned trial magistrate erred in law and in fact by reaching a conclusion that was contrary to the evidence placed before him and thus finding the appellant liable.

v) THAT the learned trial magistrate's award of damages was inordinately high considering the nature of injuries sustained by the respondent, and the same was made without regard to comparable awards.

vi) THAT the learned trial magistrate erred in law and in fact by holding that the respondent's injuries were of a serious nature contrary to the evidence adduced.

vii) THAT the learned trial magistrate erred in law and in fact by failing to take into account the authorities cited by the appellant.

viii) THAT the learned trial magistrate erred in law and in fact by basing the award on extraneous conditions and factors.

6. The appeal was canvassed by way of written submissions. I have re-evaluated the case that was before the trial court. I have also considered the written submissions. Grounds (i) to(iv) relate to liability while grounds (v) to viii) are in respect of quantum.

7. On liability, the appellant submits that the respondent failed to establish the particulars of negligence against it and the assertion that it failed to provide a safe working environment for the Respondent.

8.The appellant further stated that in any case, the respondent was equally responsible for ensuring his own safety while working and that he was to blame for failing to do so on the material day.

9. The respondent on his part supported the trial court's decision, stating that while he had tendered evidence to show that he had taken the necessary precautions but the forklift driver who ran over his leg was obviously negligent and the appellant is therefore vicariously negligent.

10. The respondent also argued that his evidence was not rebutted by the appellant when it failed to call for evidence in support of its defence.

11. The oral evidence presented by the respondent (PW 1), indicates that he worked in the maintenance department of the appellant company and that on the material date, he was assigned the task of repairing a machine.

12. PW 1 stated that while he was under the said machine, a fork lift ran over his left leg, causing him to sustain injuries to the leg and ankle.

13. It was also his testimony that the fork driver did not give any warning signal that he was approaching, neither did he hear the forklift approach.

14. In cross examination, the respondent claimed that there were markings next to the machine he had been working on at all material times and that he had put a signage three (3) metres away from the machine.

15. I have also examined the judgment of the trial court and it is apparent that the trial magistrate

reasoned that in view of the fact that the evidence presented by the respondent was not rebutted by the appellant, such appellant was wholly liable for the accident.

16. There is no doubt that the respondent was at all material times an employee of the appellant, despite the fact that the appellant denied the same in its pleadings. The proceedings which form part of the record of appeal show that the respondent adduced his employment card as exhibit 1 before the trial court.

17. There is no doubt that the appellant owed the respondent a statutory duty of care while in the course of his employment. The appellant was expected to provide a safe working environment for all its employees without exception.

18. It is also correct to state that all employees are equally responsible for ensuring their own safety while working the respondent understood the nature of his work and more specifically, the fact that he was underneath a machine at the material time.

19. The respondent further mentioned that there were markings near the machine, but there was nothing to confirm his version of accounts.

20.I am convinced that the failure by the appellant to present evidence was fatal. Had the appellant tendered evidence, the trial court would have been in a position to state whether or not liability should be apportioned. The respondent managed to prove on a balance of probabilities that the appellant was wholly to blame.

21. Grounds (v) – (viii) are in respect of quantum. In its submissions, the appellant argues that the award is inordinately high in view of the nature of injuries the respondent sustained.

22. The appellant also submits that the authority referred to by the trial court did not offer a comparable case by virtue of the fact that the injuries sustained therein were more serious than in the respondent's case.

23. The appellant proposed a sum of Kshs.550,000/= to be a reasonable award.

24. On his part, the respondent urged this court to find that the award made was reasonable and commensurate with the injuries he sustained.

25. I have looked at the medical reports produced by the respondent before the trial court. On the one hand, the first report was made by Dr. Mwaura and is dated 17th July, 2013. The following injuries were recorded as being sustained by the respondent:

a) Fracture of the left tibia malleolus

b) Traumatic injuries to the left ankle joint.

c) Blunt trauma to the lumbar spine.

The said report also assessed permanent incapacity at 20%.

26. On the other hand, the second report by Dr. Wokabi assessed permanent disability at 10% for the following injuries:

a) Compound fracture of the left medial tibia malleolus

b) Compound fracture of the left ankle joint.

c) Compound fracture of the left lateral fibula malleolus.

27. In his judgment the learned trial magistrate found the authorities cited by the appellant to be on the lower side. The said magistrate was then guided by the case of *Mwaura Muiruri v Suera Flowers Limited & Another [2014] eKLR* where an award of Kshs.1,450,000/= was made for multiple injuries. Ultimately, the magistrate settled for an award of Kshs.800,000/= as general damages.

28. Having arrived at the above into consideration, I am alive to the established legal principles in setting aside an award made by a trial court. These were considered in ***Kemfro Africa Ltd t/a Meru Express Services 1976 & Another [1976] V Lubia & Another (No. 2) [1985] eKLR*** as well as the Court of Appeal case of ***Mohamed Mahmoud Jabane v Highstone Butty Tongoi Olenja [1986] eKLR*** in this sense:

> ***"Unless the award is based on the application of a wrong principle or misunderstanding of relevant evidence or so inordinately high or low as to be an entirely erroneous estimate for an appropriate award leave well alone."***

29. I have also considered the comparable awards. In the case of ***Alphonza Wothaya Warutu & another v Joseph Muema [2017] eKLR*** the appellate court upheld an award of Kshs.800,000/= made as general damages for relatively similar injuries as those in this case.

30. Likewise, in ***S A O (Minor Suing Thro next Friend) M O v Registered Trustees, Anglican Church of Kenya Maseno North Parish [2017] eKLR*** bearing comparable injuries, the High Court on appeal set aside an award of Kshs.200,000/= for being inordinately low and substituted it with an award of Kshs.600,000/= as general damages.

31. From the foregoing, I see no reason to interfere with the award on general damages since the same appears to fall within the reasonable range of comparable awards and cannot therefore be said to be inordinately high.

32. In the end, this appeal is found to be without merit. It is dismissed in its entirety with costs being awarded 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