REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 36 OF 2014

WEST KENYA SUGAR LTD.....APPELLANT

VERSUS

ISAAC MUKUVI SHILOLI.....RESPONDENT

(Being an appeal from the judgement and decree of the MIG Moranga (Principal Magistrate)

and delivered on 18th March 2014 by C. Kendagor (Ag SRM) in the Chief Magistrate's Court

at Kakamega in Civil Case No. 195 of 2011, Isaac Mukuvi Shiloli vs. West Kenya Sugar Ltd)

JUDGEMENT

1. In this court he appellant has raised five grounds of appeal in his memorandum of appeal in respect of both liability and quantum of damages. I will first deal with the issue of liability followed by quantum.

Liability

2. In ground (e) the appellant has faulted the trial court both in law and fact in failing to apportion liability to the plaintiff (now the respondent) despite evidence produced by the defendant (now the appellant). The key witnesses in respect of liability include the respondent (Pw 2), whose evidence is supported by that of his co-workers namely Wilson Shipande (Pw 3) and Wilson Milimo Shipanga (Pw 3). The evidence of Pw 2 was that the bagasse feeder during his third trip poured bagasse on him. As at that time there no place that he would have escaped to. As a result, the conveyor machine conveyed him to the hole. The said conveyor held his right leg tightly. It was also his evidence that he was not provided with a helmet and boots. There were also no guard that would have prevented a person from falling into the hole.

3. Furthermore, Pw 2 testified that he had worked for the appellant company for five years. Finally, he also testified that the company supervisor used to give them gate passes. He then produced his copy of the gate pass as exhibit P3; since the original used to remain with the company.

4. The evidence of Pw 2 is supported by that of Wilson Shipande (Pw 3). Pw 3 testified that Pw 2 fell after the bagasse pushed the shovel. In response Pw 3 raised his hand in order to tell the operator to stop the shovel. Pw 3 personally used his sweater to stop the switch. He then called the supervisor, Timothy Ndalila (Dw 1). Pw 3 also testified that casual workers were not given helmets and boots.

5. In addition to the foregoing witnesses, the respondent called Wilson Milimo Shipanga (Pw 4), previously referred to as Pw 3 in the record of the proceedings. Pw 4 testified that Pw 2 was a fellow worker and that he used his sweater to switch off the feeder. Pw 4 then switched off the conveyor chair and that is what saved his life. The conveyor belt held and squeezed the respondent's leg and that is how he got injured. Pw 4 screamed to alert the operator to switch off the machine. The operator switched off the machine. It was also the evidence of Pw 4 that the respondent slipped, but that if he had worn the booths he would not have slipped. He also testified that they were not given implements.

6. Furthermore, it was the evidence of Pw 4 that the supervisor (DW 1), was not present, since he was supervising the boiler section.

7. Following the testimony of Pw 4, the respondent closed his case.

8. The appellant then called its supervisor (DW 1). Dw 1 testified that bagasse is the waste product of the sugar cane that is brought to the feeding pit by a shovel. The workers then used fork jembes to pull the bagasse into the pit. It was his further evidence that the respondent made a mistake by escaping in running in the opposite direction towards the feeding pit and as a result he fell into that feeding pit. It was also his evidence that workers were provided with nose masks, helmets and industrial boots. He further testified that the helmet would not have helped the respondent.

9. Furthermore, it was the evidence of Dw 1 that there was a bagasse shovel that was operated by a Mr. Ambetsa. It is this Ambetsa who switched it off. Dw 1 saw the accident happen and in particular he saw the respondent falling into the pit. Dw 1 then removed the respondent from the pit. It was also the evidence of Dw 1 that the workers were provided with protective gears, which they signed for; which gears could not have helped. Dw 1 further testified that there are slippery surfaces, which were not where the respondent worked.

10. Dw 1 continued to testify that the respondent stepped in the feeding pit, while avoiding blame. As a result, the bagasse fell upon him. He also testified that the respondent was an experienced worker. This was the respondent's first accident at the boiler section. He further testified that he did not carry the records, which are kept by the safety officer.

11. This is a first appeal. As a first appeal court I am required to independently re-assess the entire evidence and make my own independent findings, deferring to the trial court in respect of findings of fact based on the demeanour of the witnesses. See ***Peters v Sunday Post Ltd v. Peters (1958) EA 424***. I have done so. I find that the respondent (Pw 2) and his witnesses were credible and cogent. The accident occurred because the bagasse feeder poured the bagasse upon him as a result of which he was conveyed into the bagasse pit. He had no place to escape to, since there was no place to escape to. Furthermore, the appellant did not provide any guard to prevent a person from falling into the pit. Additionally, no alarm was raised to alert him that the bagasse was being brought so that he would give way.

12. Furthermore, there is consistent and cogent evidence that the appellant company did not provide the respondent and its workers (Pw 3 and Pw 4) with helmets, booths and other protective gears. This is in breach of the company's common law and statutory duties of care in failing to provide them to its workers.

13. Furthermore, the evidence of the appellant's supervisor (Dw 1) was incredible. Dw 1 testified that the company used to provide protective gears to the respondent and other workers. He also testified that the workers used to sign for them. While under cross examination, Dw 1 admitted that he did not carry the records to the court, which were kept by the safety officer. It is difficult to believe his evidence, since he knew or ought to have known that this evidence was crucial to their case. Furthermore, Dw 1 testified that the respondent escaped towards the feeding pit and that he was an experienced worker. This evidence of Dw 1 suggests that the respondent was escaping into the pit to meet his death. The evidence of the respondent and his witnesses was that after shovel supervisor poured the bagasse upon him, he had no place to escape to. As a result, he was pushed onto the conveyor and driven into the feeder pit.

14. The totality of the evidence clearly shows that the appellant company was totally to blame for the accident. In the circumstances, I find that the respondent did not contribute to the accident. It therefore follows that no liability can be apportioned to the respondent. The appellant's appeal in this regard is hereby dismissed.

Quantum

15. In ground (a) the appellant has faulted the trial court for awarding a sum of Kshs 605,500 as general and special damages, which award is manifestly excessive in view of the injuries sustained by the respondent.

16. It is trite law that special damages must be pleaded and proved. It is for this reason that they must be dealt with separately. In this regard the evidence of Dr. Charles Andai (Pw 1) is that he prepared a report in respect of the injuries sustained by the respondent, a matter in regard to which he charged Kshs. 5,000 (exhibit P 1 (b) for his services. He also testified that it was going to cost the respondent Kshs 50,000 the plates and screws, which had been internally fixed to his femur as part of the treatment. The respondent therefor pleaded and proved Shs 5,000 as special damages, which I hereby uphold.

17. The award of general damages depends on the nature of the injuries sustained and comparable awards in similar cases. According to Dr. Charles Andai (Pw 1), the respondent sustained the following injuries. A fracture of the right femur, which was internally fixed at Kakamega nursing home. The x-ray film confirmed the fracture of the right femur lower distal 1/3. On physical examination, the respondent had difficulties in walking. The doctor also noted a fresh surgical scar measuring 34 cm in length. Pw 1 was of the opinion that he suffered serious skeletal, that is, clotted fracture of the right femur which was internally fixed by plates and screws. Pw 1 expected the respondent to recover within one year. The plates and screws will have to be removed. This will cost Kshs. 50,000.

18. Mr Shilenje, counsel for the appellant in the magisterial court cited the following two cases in respect of quantum. First, **Kasanga Musumba v Aris Luhunyo, HCCC No. 259/1991, Mombasa**, in which the plaintiff therein was awarded Kshs 120,000 only. Second, Swabaha Mafudh (a minor) v Mini Bakeries Ltd, HCCC No 46 of 1990, in which the plaintiff therein was awarded Kshs 90,000 only.

19. Mr. Khasoa, counsel for the respondent cited **Jecinta Wanjiku v Samson Mwangi. HCCC No 180 of 1986, Mombasa, (2006) eKLR** in which awarded Kshs 1,000,000 for pain and suffering and loss of amenities in respect of the following injuries. Head injury with cerebral concussion and a wound on the left forehead and scalp. Fracture of acetabular rim right hip. Fracture of the right knee. Post traumatic osteoarthritis in the right knee.

20. I bear in mind that the assessment of damages is in the discretion of the trial court. That court considered the authorities cited by the parties. It in particular found that the plaintiff in *Jecinta Wanjiku v Samson Mwangi, supra*, suffered more serious injuries than the respondent in the instant case. The court did not give reasons for rejecting the authorities cited by the appellant.

21. I have considered the authorities cited by both counsel in the light of the applicable law. I find that the authorities cited by counsel for the appellant were decided in the 1990s and therefore are very old. They therefore did not assist the trial court in establishing the recent awards by the court in awarding general damages for pain and suffering and for loss of amenities; for those authorities did not take into account the inflationary trends over the years. See **P. N. Masharu Ltd v. Omar Mwakoro Makenge (2018) eKLR**. The shilling has been losing its purchasing power over the years since the 1990s. The trial court failed to take this into account the loss of the purchasing power of the shilling in awarding general damages. Furthermore, it also failed to take into account that the respondent was expected to recover within a year without any residual disabilities. In the circumstances, I find that the trial court did not exercise its discretion judicially.

22. This court is therefore entitled to interfere with the discretion exercised by the trial court. The award of Kshs 605,500 was manifestly excessive. The appellant's appeal is hereby allowed. The said award is hereby set aside. In its place I hereby award the respondent Kshs. 250,000 as general damages plus Kshs. 50,000 being the cost of removing the plates and screws from the femur. I therefore enter judgement for the respondent in the sum of Kshs 3O0,000.

23. Each party shall bear its own costs.

Judgement signed, dated and delivered in open court at Kakamega this 6th day of September, 2019.

In the presence of Mr. Shilenje for the appellant and the respondent in person.

J M BWONWONGA

JUDGE