REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 332 OF 2016

MANJI FOOD INDUSTRIES LIMITED.....APPELLANT

-VERSUS-

PHELISIAN MUSYOKA MAWEU.....RESPONDENT

(Being an appeal from the judgment and decree of Honourable M. Obura

(Mrs.) (Principal Magistrate) delivered on 20th June, 2015 in CMCC No. 1860 of 2015)

JUDGEMENT

1. The respondent filed the plaint dated 9th April 2015 against the appellant, claiming general and special damages as well as costs of the suit and interest on the damages.

2. The respondent pleaded in his plaint that he was at all material times employed by the appellant and that sometime on or about the 31st of January, 2014 while carrying a heavy bag of flour assisted his colleagues and in the course of his employment, the respondent suffered a bag prolapse.

3. The respondent blamed the appellant for his injury on the premise of negligence and/or breach of duty on the part of the appellant.

4. The appellant entered appearance and filed its statement of defence on 19th May, 2015 largely denying the existence of a contract between itself and the respondent, and further denying the particulars of negligence and/or breach of statutory duty as well as the injuries captured in the plaint.

5. Each party called one (1) witness to give evidence for the plaintiff's and defendant's cases respectively, following which submissions were exchanged between the parties. In the end, the trial court entered judgment in favour of the respondent as follows:

a) Liability	*100%*
b) General damages	*Kshs.900,000/=*
c) Special damages	*Kshs.1,500/=*
Total	*Kshs.901,500/=*

6. Being dissatisfied with the judgment, the appellant has now lodged an appeal against the same vide the memorandum of appeal dated 27th June, 2016 and amended on 18th January, 2017 raising the five (5) grounds set out hereunder:

i. THAT the learned trial magistrate erred in law and in fact by holding the appellant 100% liable despite overwhelming evidence to the contrary.

ii. THAT the learned trial magistrate erred in law and in fact by awarding general damages at Kshs.900,000/= that were manifestly excessive and incommensurate with the injuries suffered.

iii. THAT the learned trial magistrate failed to appreciate the totality of the evidence and circumstances of the case before arriving at her erroneous decision.

iv. THAT the learned trial magistrate erred in law and in fact in completely overlooking the appellant's submissions.

v. THAT the learned trial magistrate failed to notify the appellant of the lack of its submissions or inquire as to their filing despite the submissions having been filed on 15th April, 2016.

7. The appeal was canvassed by way of written submissions which the parties have filed. On its part, the appellant submits that it had taken all necessary precautions to ensuring a safe working environment for the respondent, hence the respondent mainly contributed to his injury by failing to disclose that he had a pre-existing back ailment/condition, adding that in any event, the respondent's account of events at trial was not corroborated by an independent witness.

8. It is also the appellant's argument that the trial court overlooked its submissions by stating that the same were not in the court file at the time of preparing the judgment, yet the appellant had filed its submissions and the trial court had previously confirmed this to be the position. Consequently, the appellant contends that the learned trial magistrate arrived at a wrong finding on this issue.

9. The appellant's submissions further state that the award made by the trial court was high and excessive hence it ought to be interfered with.

10. The respondent has opposed the appellant's submissions by contending that his evidence was sufficiently corroborated by the DOSH 1 Form produced before the trial court and confirming his employment with the appellant and the nature of injuries sustained; in turn challenging the evidence of DW1 as being uncorroborated and hearsay.

11. The respondent further supported the trial court's finding on liability, arguing that the said magistrate took into account all relevant factors and evidence in arriving at her finding.

12. On quantum, the respondent equally urged this court not to interfere with the award made on general damages for the reason that the trial court applied the proper principles in assessing the same in addition to considering the nature and extent of his injuries.

13. I have taken into account the rival submissions and authorities relied upon in addressing the grounds of appeal. I have also re-evaluated and reconsidered the evidence tendered before the trial court. It is apparent that the appeal is challenging both the finding on liability and the award of general damages. I will therefore address its grounds contemporaneously under the two (2) limbs.

14. The first limb touches on the finding on liability. The respondent who was *PW1* stated in his evidence that he was at all material times working with the appellant as a machine operator/mixer and that his duties of employment entailed mixing ingredients into a mixer machine used to make biscuits. He went on to state that on the material day, he was carrying a heavy sack of flour together with 3 other employees and that they were trying to raise it to the level of the machine when his back suddenly snapped and he was forced to climb down the ladder.

15. It was the respondent's testimony that he went to the Production Manager, Mr. Easting, to inform him of the incident and that he was later taken to hospital where he was admitted, treated and discharged after 6 days. He stated that he resigned from the appellant company soon thereafter and that he blamed the company for failing to provide both adequate manpower for purposes of loading the material into the mixer machine and protective gear to its employees.

16. On being cross examined, the respondent indicated that he has been a trained mixer for 6 ½ years and was therefore experienced at performing his duties. The respondent further admitted to having had a chronic back problem prior to the date of the injury though he added that the same was not serious. He then stated that though he was provided with overall, he was not supplied with boots which would have prevented him from slipping and hurting himself.

17. Upon re-examination, the respondent admitted that on the material date it was the first time he lodged a complaint since joining the appellant company. He also stated that he did not receive prior training on use of the machine.

18. Christopher Nzioka gave evidence as *DW1* that he was at all material times working for the appellant as the Head of Human Resources. He stated that the respondent was a trained and experienced employee, confirming the nature of his employment.

19. The witness testified that ordinarily, 4 workers would attend to the machine and are assisted in pouring the mixture therein, adding that no complaint was lodged in respect to that number. He also went on to explain that there exists in the appellant company a procedure for lodging complaints and handling accidents/injuries that occur in the employment premises.

20. DW1 gave evidence that the respondent's name did not appear on the injury register, thus making it impossible to ascertain that he was injured in the appellant's premises and in the course of his employment. The witness further stated that the form which was filled by the respondent bore inconsistencies.

21. During cross examination, DW1 reiterated that there was no record of an injury having been sustained by the respondent on the material day since no report was made on the same.

22. In her judgment, the learned trial magistrate found that the respondent had proved to the required standard that he was injured at his place of work and that the same was as a result of strenuous work undertaken. The trial magistrate also found that the appellant ought to have ensured the safety of the respondent by providing a safe working environment but did not; ultimately finding that the appellant had breached its statutory duty of care and was to be held 100% liable.

23. From the foregoing, it is not disputed that the respondent was at all material times an employee of the appellant and that he was at his

place of employment on the material date. Going by this position, I am satisfied that the respondent proved on a balance of probabilities that he was injured in the course of his employment but failed to present credible evidence to attribute negligence on the part of the appellant.

24. In that case, I now have the duty of re-evaluating whether the appellant was to blame for the injury and consequently, whether the finding on liability was proper. On the one hand, the respondent admitted in his oral evidence that he had a chronic back condition which persisted prior to the date of injury and there is medical evidence to confirm this. Also, there is no indication that the respondent at any one point informed the appellant of his back problems.

25. Further to the above, the respondent's averment that complaints had been made to the appellant in regard to the working conditions were negated in his re-examination when he stated that it was the first time he had made a complaint.

26. It is also noteworthy that the respondent had been trained and had worked for the appellant for a considerable number of years and throughout this period, there is no indication that he had raised any concerns with the appellant on his working conditions.

27. Drawing from the above set of circumstances, I am convinced that the respondent, being ultimately responsible for his own well-being, has not demonstrated that he made the appellant aware of his unique situation or at the very least appealed for a different assignment that would not put too much strain to his back.

28. I am of the considered view that whether or not the respondent followed the procedure in reporting his injury does not automatically dispel the likelihood that he sustained his injury in the appellant's premises and in the course of his employment. The respondent has not established on a balance of probabilities that he was injured during the course of his employment as a result of negligence on the part of the appellant.

29. The learned Principal Magistrate therefore erred in finding the appellant liable yet the respondent had failed to establish liability.

30. The appellant also stated that its submissions were overlooked by the learned trial magistrate. The trial magistrate in her judgment indicated that the appellant's submissions were neither filed nor placed in the court file by the time the judgment was being written.

31. I have perused the record and it is apparent that when the parties appeared before the trial court on 22nd April, 2016 both the appellant's and respondent's advocates mentioned that the respective submissions had been filed, and the trial court issued them with a judgment date. The record also shows that the submissions by the appellant were received on 15th April, 2016 precedes delivery of the judgment on 20th June, 2016.

32. It therefore follows that the learned trial magistrate misdirected herself in concluding that the appellant's submissions were never filed and subsequently, acted wrongly in overlooking the said submissions in view of the record of 22nd April, 2016. In the event that she was unable to trace them, she ought to have directed the appellant to avail another copy thereof.

33. On quantum the appellant urged this court to substitute the award of Kshs.900,000/= under the head of general damages substituted with the award of Kshs.150,000/= citing ***Dickson Ndungu Kirembe & another v Theresa Atieno & 4 others [2014] eKLR*** where an award of Kshs.400,000/= was made for injuries to the head, chest *inter alia*; and ***Mumias Sugar & Company Limited v Mohammed Kweyu Shaban [2018] eKLR*** where the High Court on appeal upheld the award of Kshs.800,000/= for a prolapse of intervertebral discs. The award of Kshs.150,000/= was equally proposed before the trial court.

34. On the part of the respondent, he urged the trial court to award Kshs.1,500,000/= as general damages for pain and suffering and loss of amenities and cited the case of ***Joan Isbirte v Aga Khan Hospital Mombasa HCCC No. 10 of 2000*** where an award of Kshs.800,000/= was made for general damages for injuries involving fracture of the spine.

35. In making her award, the learned trial magistrate found the authority cited by the respondent to involve injuries of a more severe nature and settled for the award of Kshs.900,000/= as general damages.

36. The courts have applied certain specific guiding principles for determining instances where an award by a trial court ought to be interfered with. These were considered in the famous case of ***Kemfro Africa Ltd t/a Meru Express Services 1976 & Another [1976] v Lubia & Another (No. 2) [1985] eKLR*** thus:

a) ***Whether an irrelevant factor was taken into account.***

b) ***Whether a relevant factor was disregarded.***

c) ***Whether the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.***

37. The appellant's position is that the award made in the absence of consideration of its submissions and that the same is inordinately high. On the first factor, I have already determined upon re-evaluation that the appellant's submissions were not taken into account despite the same having been filed beforehand.

38. According to the medical report dated 2nd October, 2014 prepared by Dr. Cyprianus Okoth Okere and produced as evidence before the trial court, the prognosis of the respondent's injury was a prolapsed intervertebral disc L4, L5 and the injury was categorized as grievous harm with a degree of permanent incapacity of about 30%.

39. I find relevance in the case of ***Mumias Sugar & Company Limited v Mohammed Kweyu Shaban [2018] eKLR*** cited by the appellant where the injuries sustained are comparable to those in the present appeal. However, I note that this particular authority was not cited before the trial court for its consideration. It is clear from the other authorities cited before the trial court that they are in respect of more serious injuries therefore they cannot be deemed as comparable.

40. In ***Mumias Sugar & Company Limited*** *(supra)* the degree of permanent incapacity was assessed at 15% which falls below the degree assessed in the present scenario. I have also considered the case of ***Kennedy Mwangi Muriithi v Attorney General & another [2016] eKLR*** where the court awarded general and aggravated damages in the sum of Kshs.1,500,000/= to a petitioner who had sustained an intervertebral disc prolapse. Such award in fact surpasses the award made by the trial court in the present instance.

41. In view of the foregoing, if the respondent ‘s case on liability had been affirmed on appeal I would not disturb the award of Kshs.900,000/= as general damages made by the learned trial magistrate since the same is neither high nor excessive..

42. The appeal as against is allowed. The order entering judgement is set aside and is substituted with an order dismissing the suit. Costs of the suit and the appeal are given to the appellant.

Dated, signed and delivered at Nairobi this 11th day of October, 2019.

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J. K. SERGON

JUDGE

In the presence of:

……. for the Appellant

…….. for the Respondent