



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL APPEAL NO.8 OF 2018

SHIVLING SUPERMARKET LTD.....APPELLANT

VERSUS

KENNEDY O. OCHOLLA.....RESPONDENT

(Being an appeal from the judgment and decree of the Chief Magistrate's Court Homa Bay in Civil Suit No.40 of 2016 delivered on 28th February, 2018 – Hon. T. Obutu, SPM)

JUDGMENT

[1] The five grounds of appeal contained in the memorandum of appeal dated and filed herein on 27th March 2018, by **Okongo, Wandago & Co. Advocates**, on behalf of the appellant, **Shivling Supermarket Limited**, are an expression of the appellant's dissatisfaction with the judgment of the Senior Resident Magistrate in **Homa Bay CMCC No.40 of 2016**, in which the respondent, **Kennedy Otieno Ochola**, was awarded general damages for pain and suffering in the sum of Kshs.600,000/= together with costs and interest.

[2] As was pleaded in the plaint, the respondent (plaintiff) suffered injuries to his right hand while in the course of his employment as a casual worker at the appellant's (defendant) premises in Homa bay on the 24th December 2015. He blamed the appellant for the accident or mishap on the grounds that it failed to warn him of the existing risk and exposed him to the risk of injury "**inter alia**".

[3] The appellant in its statement of defence denied the respondent's claim and contended that, if the accident indeed occurred, then it was wholly or largely contributed to by the respondent's negligence in failing to have sufficient regard for his own safety and failing to heed the appellant's working or safety regulations, among other factors.

[4] The trial of the case proceeded with the respondent's (**PW1**) testimony. He did not call any witness but a prescription note was produced as an exhibit together with a cash-receipt (**P. Exhibit 1 a-b**) and a hospital discharge summary (**P. exhibit 2**).

A medical report by Dr. Nyawade dated 7th April 2016 (**P. exhibit 3**) was produced by consent of the parties. However, the appellant did not lead any evidence at the trial. It purported to close a defence case which it had not in the first place opened by calling its witnesses.

[5] Be that as it may, the trial court proceeded on the basis of the evidence availed before it and rendered its judgment on the 28th February 2018, in which it awarded the respondent the impugned amount of Kshs.600,000/= having found the appellant fully liable for the accident. This appeal is a result of that decision.

[6] Being a first appeal, the duty of this court as was held in the case of **Abdul Hameed Saif –vs- Ali Mohammed [1955] 22 EACA 270** and the case of **Selle –vs- Associated Motor Boat Co. Ltd. [1968] EA 123**, was to re-visit the evidence availed at the trial and arrive at its own conclusions having in mind that the trial court had the advantage of seeing and hearing the witnesses.

[7] In that regard, the evidence availed by the respondent was re-considered by this court which now forms the view that the evidence was uncontroverted and as such, it did establish on a balance of probabilities that the appellant (defendant) was liable to the respondent on account of the negligence of its driver in failing to exercise proper lookout and recklessly reversed the appellant's motor vehicle Reg. No. KBY 284 Mitsubishi Fiat thereby causing its door to come into contact with the respondent's right hand and fracture his four fingers which were trapped and pressed against a gate situated at the spot where the respondent stood while undertaking his assignment.

[8] The medical report by Dr. Nyawade, however, showed that the respondent suffered fracture of the right second and third phalanges and dislocation of the right wrist joint.

The report indicated that the injuries were on the way to full recovery without significant permanent disability.

Although the appellant indicated in its defence that the respondent was wholly or partly to blame for the accident, no evidence was led in

support of the allegation.

[9] In the circumstances, this court agrees with the trial court in finding the appellant fully liable for the accident and overrules its grounds one, two and five of the appeal.

However, grounds three and four are hereby sustained for reason that the injuries suffered by the respondent were minor and incapable of having devastating residual effects, such that an award of Kshs.600, 000/= for pain and suffering was excessive.

[10] At the trial, the respondent proposed a sum of Kshs.1.5 million for pain and suffering and cited a decision of the High Court in that regard.

On the other hand, the appellant proposed a sum of Kshs.200, 000/= and also relied on decisions of the High Court in that regard.

This court's view is that a sum of Kshs.350, 000/= general damages for pain and suffering would suffice as reasonable and adequate compensation to the respondent for injuries suffered.

[11] In sum, this appeal succeeds in part and is allowed to the extent that the award of Kshs.600, 000/= made by the trial court is hereby set aside and substituted for an award of Kshs.350, 000/= together with costs and interest.

The parties shall bear their own costs of the appeal.

Ordered accordingly.

J.R. KARANJAH

JUDGE

20.11.2019

[Dated and delivered this 20th day of November, 2019]