REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 185 OF 2014

TRANSWOOD LIMITED.....APPELLANT

VERSUS

WILLIAM ASWANI ATUKUNYA.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon D. Ole Keiwua (Mr) Principal Magistrate (PM) at the Chief Magistrate's Court at Milimani Commercial Courts in CMCC No 4409 of 2007 delivered on 25th April 2014)

JUDGMENT

INTRODUCTION

1. In his decision of 25th April 2014, the Learned Trial Magistrate, D. Ole Keiwua (Mr) Principal Magistrate (PM), entered judgment in favour of the Respondent herein against the Appellant for the sum of Kshs 97,600/= made up as follows:-

General Damages for pain and suffering	**Kshs 120,000/=**	
Special Damages	**Kshs 2,000/=**	
		Kshs 122,000/=
Less 20% contributory negligence	**Kshs 24,000/=**	
		Kshs 97,600/=

Plus costs of the suit and interest.

2. Being dissatisfied with the said judgment, the Appellant filed his Memorandum of Appeal dated 14th May 2014 and filed on 15th May 2014. It relied on eight (8) grounds of appeal.

3. Parties requested court to render its decision based on its Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

4. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.

5. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123** and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

> **"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution:**

it is not enough that the appellate court might have come to a different conclusion…"

6. Having considered the Appellant's grounds of appeal, it appeared to this court that the issues that had been placed before it for determination were:-

1. Whether or not the Respondent's suit was defective and/or incompetent *ab initio* on account of Summons to Enter Appearance having expired before being served upon the Appellant herein.

2. Whether or not the Learned Trial Magistrate erred in law and fact in having found the Appellant liable for the injuries that the Respondent sustained.

3. Whether or not the Learned Trial Magistrate awarded the Respondent damages that were manifestly excessive and/or inordinately high so as to warrant interference by this court.

7. The court therefore found it prudent to deal with the said issues under the separate and distinct headings shown herein below.

I. COMPETENCE OR OTHERWISE OF THE RESPONDENT'S CASE

8. Ground of Appeal No (6) was dealt with under this head.

9. The Appellant submitted that the Respondent obtained Summons to Enter Appearance on 23rd May 2007 but served the same upon it four years later, on 14th April 2011. It was its contention that there was no evidence to demonstrate that the validity of the said Summons had been extended and consequently, his suit lapsed for non compliance with Order 5 Rule (1) and (2) of the Civil Procedure Rules, 2010.

10. It was emphatic that there was no suit in existence at the time the matter proceeded for hearing and that the Learned Trial Magistrate erred in having failed to take note of that fact.

11. It placed reliance on the case of **Fina Bank Ltd vs Satyam Industries Kenya Ltd & 4 Others [2015] eKLR** where the court therein held that as the summons were not renewed during the life time of the original summons, the suit stood abated as against the 2nd, 4th & 5th defendants therein.

12. On his part, the Respondent submitted that the Appellant's Preliminary Objection that the suit was defective on the ground that the Summons to Enter Appearance were served upon it after they had expired was dismissed on 23rd October 2012 by Hon Obulutsa for lack of merit.

13. It was his argument that the said Learned Magistrate found that the said Preliminary Objection ought to have been based on law and not on facts, which facts he contended, ought to have been raised during the hearing of the case.

14. It was therefore his submission that the Appellant could not raise the issues at this stage and more so,because it did not appeal against the order of the said learned magistrate.

15. It was his averment that the Summons to Enter Appearance were served upon the Respondent on 9th August 2007 which was about three (3) months after he filed his suit in the lower court and consequently, they were valid. He thus urged this court to dismiss the Appellant's submissions that his suit in the lower court was incompetent.

16. A perusal of the Record of Appeal showed that the Appellant filed a Notice of Preliminary Objection dated 4th April 2012 on 23rd July 2012. The ground of objection was as follows:-

"The Defendant will at the hearing hereof raise a preliminary objection of law on the ground that the suit is defective or bad in law for the reason that the Summons were served on the Defendant 12 months after issue without a Court Order for extension of validity of Summons.

It is proposed to ask the court to strike out the suit."

17. In his Ruling of 23rd October 2012, Hon Obulutsa observed that whereas the Appellant had contended that it had been served with Summons to Enter Appearance in April 2011, there was nothing to attest to this. He was, however, persuaded to find that the said Summons to Enter Appearance were served upon it on 9th August 2007 as was evidenced in the Affidavit of Service that had been filed.

18. The said Learned Magistrate relied on the case of **Mukisa Biscuits vs Westend Distributors** (citation not given) where it was held that a preliminary objection must be based on a point of law and not on facts. In dismissing the Appellant's Preliminary Objection, he concluded that it had to be determined whether the Summons were served in 2007 or 2011, as a matter of fact.

19. This court did not see any decision from the High Court overturning the Ruling of the said Learned Magistrate. His Ruling therefore remained effective at all material times. The court therefore agreed with the Respondent's submissions that the Appellant could not raise the same issue regarding the invalidity of the Summons to Enter Appearance on account that it was served with the same four (4) years after suit was filed at this stage because it did not appeal against the said Ruling. In any event, it was not a subject matter of the Appeal herein.

20. In the premises foregoing, this court found and held that Ground of Appeal No (6) was not merited and the same was hereby dismissed.

I. LIABILITY

21. Grounds of Appeal Nos (1), (2), (3),(5) and (8) are dealt with together as they are all related.

22. The Appellant submitted that there was no employer-employee relationship between it and the Respondent herein because he had been employed by an independent contractor known as Javan who was liable for his injuries.

23. It argued that the Learned Trial Magistrate did not address himself to the principles that underpin the doctrine of vicarious liability. In this regard, it placed reliance on the case of **Kenya Breweries Ltd vs Meshack Momanyi Osiemo [2018] eKLR** where the court dismissed a suit that had similar facts.

24. On his part, the Respondent was emphatic that he was employed by the Appellant as a casual worker and that he reported the accident to his immediate Supervisor when he sustained injuries in the course of his employment. He urged this court to disregard the evidence of the Appellant's sole witness who told the Trial Court that the Appellant only issued a supplementary **(sic)** note to facilitate his treatment for the reason that he did not adduce in evidence a sub-contract agreement, which he averred did not exist.

25. He averred that the Appellant's witness informed the Trial Court that he gave Javan to give him (the Respondent) and two (2) other workers gloves they were to use but that the Appellant was not responsible for his safety. It was his contention that if that was so, then Javan would have dealt with them directly without involving the Appellant herein. It was further his submission that if indeed Javan was a sub-contractor, the Appellant ought to have enjoined him as a third party to the suit in the lower court.

26. He contended that the Appellant did not adduce in evidence the Master Roll and contract documents which were in its possession and consequently, this could only be interpreted to mean that the said documents were prejudicial to its case.

27. He further submitted that although the Appellant produced records to show the protective devices it used to give to its workers, it did not tender any evidence to show that it provided its workers with gloves.

28. He therefore argued this court not to interfere with the Learned Trial Magistrate's decision to apportion liability at 80%-20% against the Appellant herein.

29. In his testimony during trial, the Respondent stated that he was employed by the Appellant in 2004 as a casual and he was paid on a weekly basis. He said that on 21st October 2005, he reported to work to smoothen timber but due to the fact that the worker who was holding the timber did not hold the same properly, he was injured on the finger. He submitted that the Appellant was negligent for not having trained the worker properly and for failing to have given him gloves to use as he performed his work.

30. Mutuku Kilonzo, the Appellant's Workshop Manager (hereinafter referred to as "DW 1") confirmed that the Appellant issued safety equipments, which included gloves, to its employees. He adduced in evidence records evidencing the supply of the safety devices.

31. He admitted knowing the Respondent herein but was emphatic that he had been employed by Javan Omutayi Omuhoto who had been contracted to clean doors and not by the Appellant herein.

32. He stated that he issued a complimentary note to the said Javan who then took the Respondent to Mariakani Hospital for treatment. He blamed the said Javan for the injuries the Respondent herein sustained.

33. Notably, the exhibits the parties relied upon in support of their respective cases were not part of the Record of Appeal. Be that as it may, this court took the liberty to peruse the lower court file so as to come to a just and fair determination of the matters that had been raised herein. This was in the spirit of Article 159(2)(d) of the Constitution of Kenya,2010 that mandates courts to administer justice without undue regard to procedural technicalities.

34. Through the actions of DW 1, who was the Appellant's agent, this court found and held that the Respondent had ably demonstrated that he was the Appellant's employee. Expecting him to have adduced proof that he was employed by the Appellant as a casual was too onerous a task for the reason that all employment records were in its custody. The burden of proof was on the Respondent to provide proof to show that the Respondent was Javan's employee and not its employee.

35. This court, however, noted that the Appellant did not adduce any evidence to show that it had sub-contracted the said Javan, who in turn had allegedly employed the Respondent herein. The fact that the Appellant took the responsibility to have the Respondent treated at Mariakani Hospital pointed to it having been liable for his injuries. It had no obligation to issue a sub-contractor with a complimentary note to take its employee to hospital.

36. As the Respondent correctly argued, the Appellant had no obligation to give gloves to a sub-contractor to give its employee. A sub-contractor is at all material times an independent party and is always responsible for the safety of its workers. Responsibility can never shift to a principal party who has not employed those workers.

37. As DW 1 admitted knowing the Respondent herein, in the absence of any evidence to the contrary, this court accepted the Respondent's evidence that he was at all material times on employee of the Appellant herein.

38. In **Kenya Breweries Ltd vs Meshack Momanyi Osiemo** (Supra), Githua J observed as follows:-

> **"…Express Kenya Ltd was an independent contractor meaning that it serviced its contract with the Appellant independently and was therefore responsible for its own employees…"**

39. It was thus the view of this court that since the Appellant did not provide proof to show that the Respondent was employed by the said Javan, it had to be found liable for the injuries the Respondent sustained. The doctrine of vicarious liability which is applicable when a servant and/or agent of a principal is negligent and causes another to suffer loss or injury, was not applicable in the circumstances of this case because the Respondent sustained injury by himself. The same was not caused by another worker.

40. His argument that his injury was as a result of the other worker not holding the timber properly not proven was debatable. Save for stating that the said worker was not holding the timber well, he did not explain how the said timber was to be held so as to have concluded that the said worker was the one who caused him to sustain the injuries.

41. This court only found and held that the Appellant was liable for not having provided the Respondent gloves during the course of his work when he sustained the injury as the Learned Trial Magistrate also found. It could not, however, say with certainty that the environment was not safe or that the Respondent's worker was not properly trained as the Learned Trial Magistrate observed as no evidence was adduced to that effect.

42. The court therefore saw no justification in interfering with the apportionment of liability at 80%-20% against the Appellant as the Learned Trial Magistrate had determined.

43. In the circumstances foregoing, the court found and held that Ground of Appeal Nos (1), (2),(3), (5) and 8 were not merited and the same are hereby dismissed

II. **QUANTUM**

44. Ground No. (4) and (5) were dealt with together as they were related.

45. The Appellant argued that the Learned Trial Magistrate relied on the Medical Report of Dr Mwaura who never came to court to adduce the same. It relied on the provisions of Section 67 as read with Section 65 of the Evidence Act Cap 80 (Laws of Kenya) where it is stipulated that the contents of any document must be proved by way of primary evidence but which can also be proved by secondary evidence in exceptional circumstances. It was emphatic that documents must be produced by their authors as provided for in Section 35 of the Evidence Act.

46. It placed reliance on the case of **Kenneth Nyaga Mwige vs Austin Kiguta & 2 Others [2015] eKLR** where the Court of Appeal held that:-

> **"The marking of a document is only for purposes of identification and is not proof of the contents of the document…."**

47. It also relied on other cases which it never furnished the court with, to support its argument that the probative value of the Medical Report by Dr Mwaura was low as it remained untested for not having been taken through cross-examination and having been unauthenticated, the same was heresay. It also took issue with the Respondent for not having produced in evidence, treatment notes from Mariakani Hospital.

48. The Respondent submitted that the Appellant's counsel was in court when it was agreed that he produces all the documents. He was categorical that at no time did the Appellant raise any objection when he produced the same in court.

49. He pointed out that the case of **Kenneth Nyaga Mwige vs Austin Kiguta & 2 Others** (Supra) was distinguishable from the facts of this case because in that case, the documents were marked for identification but never produced as exhibits while in his case, the Medical Report was produced and marked as an exhibit.

50. A careful perusal of the proceedings showed that the Respondent adduced in evidence the Medical Report of Dr Mwaura and a receipt for Kshs 2,000/=. They were marked as Plaintiff's Exhibit 2(a) and (b) respectively. There was no indication that counsel for the Appellant objected to the Respondent adducing the documents on behalf of the maker who was not called as a witness in this case.

51. Going further, this court noted the Respondent's assertions that the Appellant took the treatment receipts. The Appellant did not deny this fact in DW 1's testimony. Notably, although it averred that the Respondent did not produce any treatment notes from hospital, this court saw the Hospital Attendance Card from Mariakani Cottage Hospital which was tendered in evidence. The same had indicated the treatment the Respondent was given in hospital. In the absence of any evidence to the contrary, this court accepted the Respondent's evidence that he was treated at the said hospital. It was unreasonable for the Appellant to have expected the Respondent to have produced other treatment records which would ordinarily be in custody and possession of the hospital. In any event, DW 1 did in fact admit that the Respondent was injured during the course of his employment. The Appellant's arguments therefore fell by the wayside.

52. Whilst it is correct as the Appellant submitted that all documents must be produced by their authors unless there are exceptional circumstances as provided in the Evidence Act, the Appellant did not object to the Respondent tendering in evidence the said Medical Report and receipt proving payment of Dr. Mwaura's charges. It did not also raise the said issue in its submissions in the lower court. The court took the liberty of going through the said submissions that were not attached in the Record of Appeal.

53. It was therefore this court's position that having acquiesced to the production of the said documents by the Respondent, the Appellant was estopped from challenging the same at this appellate stage.

54. It thus found itself in agreement with the Respondent's submissions that the facts in the case of **Kenneth Nyaga Munge vs Austin Kiguta & 2 Others** (Supra) were distinguishable from the facts of this case and were therefore not relevant in the circumstances of this case.

55. Bearing in mind that the Appellant had not made any submissions on the excessiveness of the award on quantum that was made by the Learned Trial Magistrate, having relied only on the ground that the Respondent should not have awarded any amount because no Medical Report was adduced in evidence and which this court found not to have been supported by the facts, this court came to the firm conclusion that the Appellant had not persuaded this court to interfere with the Learned Trial Magistrate's discretion to award the sum of Kshs 120,000/= general damages.

56. This is despite that fact that it would have awarded the Respondent a lower amount for the injuries that he sustained. Its conclusion was premised on the principle that an appellate court will not interfere with an award merely because it would have awarded a lower or high sum. It should only interfere with the award of a trial court where the award was manifestly excessive or inordinately low or high so as not to have represented the correct assessment of the damages that should have been awarded.

57. A similar position has been taken by other courts. In the case of **Butt vs Khan [1977] 1 KAR,** it was held as follows:-

> **"An Appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."**

58. In the circumstances foregoing, the court found and held that Grounds of Appeal Nos (4) and (7) were not merited and the same are hereby dismissed.

DISPOSITION

59. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 10th July 2017 was not merited and the same is hereby dismissed with costs to the Respondent herein.

60. It is so ordered.

DATED and DELIVERED at NAIROBI this 14th day of November 2019

J. KAMAU

JUDGE