



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KAJIADO

CIVIL APPEAL NO. 20 OF 2016

PETER BENARD MAKAU.....APPELLANT

V E R S U S

PRIME STEEL LIMITED.....RESPONDENT

(Being an appeal from the judgement of Hon. Magistrate

Mr. Okuche determined on 17th November 2016)

JUDGEMENT

Peter B. Makau, the appellant who was the plaintiff in Civil Case No. 192 of 2015 appeal, to this court against the judgement of the Senior Resident Magistrate dated 17th November 2016, in the judgement the court awarded liability at 80%: 20% in favour of the appellant whilst on general damages of 2010 less 20% liability apportionment to be borne by the defendant Respondent in this appeal.

Being aggrieved with the entire judgement the appellant lodged on an appeal based on the following grounds:

- 1. That the Learned Magistrate erred in law and in fact in considering issues which he ought not to have considered and holding the appellant to be 20% liable**
- 2. That the Learned Magistrate erred in law and erred in fact in demanding damages that were very low in view of the injuries sustained by the appellant**
- 3. That the Learned Magistrate erred in law and in fact in making a finding and arriving at an award of damages which inordinately low as to represent an erroneous estimate of damages payable.**
- 4. That the Learned Magistrate erred in law and in fact in failing to give due consideration on the contents of the appellant submissions and more specifically the allegations on quantum.**

The basis of the claim and evidence adduced at the trial

According to the appellant plaint and pleadings he filed a claim hinged on the breach of the terms of the contract of employment by the defendant/respondent company. More specifically on or about 9th June 2014 the appellant averred that while working for the respondent company cutting billets from the heap of their weighing approximately 900kgs some of them fell on his right foot and as a result suffered serious

injuries. He blamed the entire episode of the accident on the respondent for failing to provide a safe place and system of work at the premises. Exposing the appellant to risk of injury which they knew or ought to have known. Failing to provide protective wear/gear such as gumboots. The defendant/respondent denied both causation, liability and award of damages arising from the alleged accident.

The appellant/plaintiff at the trial court was put on strict proof on each of the element of the claim.

The appellant evidence at the trial was to that on 9th June 2014 while working for the respondent company he got injured on his foot. the appellant further deposed that as a result he sought medical treatment at Athi River Clinic. he was later to be examined by Dr. Titus for purposes of a medical legal report. in support of the injury he produced medical report as an exhibit. the appellant further told the court that the respondent failed to provide him with protective shoes and favourable environment.

The respondent company called no evidence at the trial. the appellant counsel together with the respondent legal counsel agreed to file submissions on the issues pending delivery of judgement. From the evidence and submissions by both counsels the learned trial magistrate found that on liability there was contributory negligence or breach of statutory duty of care. He apportioned liability at 80%:20% in favour of the appellant. The award of damages at 102,000 and less 20% liability to be borne by the respondent.

On appeal learned counsel Mr. Mwakio for the appellant submitted that the finding on liability by the trial magistrate was erroneous in view that there was no evidence to be relied upon.

Mr. Mwakio further argued and submitted that the learned magistrate award was so manifestly and individually low in the circumstances of the injuries suffered by the appellant. The appellant counsel accordingly asks this court to set aside the finding on liability and evidence the award of damages payable. The following authorities were cited in support of the appeal by counsel. **East African Portland Cement company Limited Versus Thika Kenol - 2016 EKLK KEMFRO AFRICA Limited T/A MERU EXPRESS Service Gathogo & another Versus Lubia and Olive Lubia 1982-1988/KAR 727-730 Gicheru Mutua & Another 2005 2KLR 333, Kazungu Birya Versus AG HCCC 4093 of 1991.**

On the part of the respondent. learned counsel Mr. Iseme Kamau vehemently opposed the appeal arguing that it lacks merit. In the submissions learned counsel reiterated the evidence and material placed before the trial court. Mr. Iseme Kamau argued and submitted that the appellant while executing his duties with the respondent company failed to exercise due care and diligence. It was therefore appropriate that he shoulders part of the negligence and breach of statutory duty of care obligations. He supported the finding and apportionment on liability by the trial court. For this legal proposition learned counsel relied and cited the following cases:

Steel Pacer Industries Versus James Mbithi Munyao 2005 EKLK PAN African Paper Mills EA Limited Versus Vincent Simiyu Festo 2014 EKLK

Mr. Iseme Kamau on quantum summarized that as deduced from the evidence and medical reports the appellant suffered soft tissue injuries and fractured bone. Learned counsel further contended that authorities referred to the trial counsel provided the range in which the trial magistrate used to apply his legal mind and exercised discretion appropriately. In his submissions learned counsel invited this court not to interfere with the award arrived at by the trial court.

He relied and he relied on the following decisions of the superior courts. **Kazungu Birya Ngumbo (Supra), Harun Muyana Boge Versus Daniel Okello Oguho 2015 EKLK. Simon Muchemi & another Versus Gordon Osore 2013 EKLK.** in the circumstances of the cases cited Mr. Iseme Kamau urged this court to dismiss the appeal.

I have considered the evidence, submissions from both counsels and is now my singular duty to reevaluate the entire case and come up with my own findings.

This is a first appeal from the trial court. the well settled principles in the case of **Selle Versus Assorted Motor Boat Company 1968 EA Company 1968 EA 123-126** have since been long settled to guide me in the determination of this appeal. the court held:

“Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial. Judge’s findings of fact appear earlier that he has clearly failed on some part to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence. In the case generally.”

These principles form the approach of this court in the matter.

The following issues therefore arise for determination

- (1) Whether the trial magistrate erred in law and fact in apportioning liability at 80% 20% in favour of the appellant.
- (2) Whether there was an error or a misdirection on the assessment of quantum by the Learned Trial Magistrate.

I start in appraising the evidence on the issue of liability.

The case before the trial court depended wholly on the testimony of PW1 who testified on how he sustained injuries on his foot while in the course of his employment. The respondent opted not to adduce any evidence in rebuttal. The learned trial magistrate in his judgement opined as follows:

“I will find that the plaintiff has contributed to the accident taking in to entirety of the evidence and the circumstances of this case I will assess the liability at the ratio of 80%:20% in favour of the plaintiff. “

On quantum he pronounced himself as follows:

“I have considered the injuries sustained by the plaintiff, I will award him a sum of 100,000/= special damages of Kshs. 2,000/= less 20% liability contribution.”

On review of the evidence before the trial court and his final decision the learned trial magistrate appears to me to have applied the principles on comparative negligence. The general principles in apportionment of negligence arises in circumstances where the defendants are not solely to blame for the claimant's injuries. From the pleadings and evidence, the trial court holds the claimant partially responsible for the acts of negligence which he then used to apportion damages.

This appeal reminds me of the character on the doctrine of negligence. By its nature there are two or more defences to a negligence act. But I can just cite two of the significant relevant to this appeal.

First – ***volenti non-fit injuria*** means that the claimant voluntarily agrees to undertake the legal risk of harm at his own expense.

Secondly, ***Ex turpicausa*** - which means that from a bad cause no action arises.

(See <https://catalogue.pearsoed.co.ke.uk><http://www.rulaw.com>(defencelesan negligence)

The question therefore one has to ask himself is how comparative negligence can be used to apportion liability. The jurisprudence on the employer-employee relationship has come of age and developed over time by the English courts in which our law is based.

In one of the traditional cases delivered by the **English Court of Appeal in Smith Versus Baker 1891 AC 325**: the court told took this approach as demonstrated in this passage.

"The plaintiff was employed by the defendants on the construction of a railway. while he was working a crane moved rocks over his head both he and his employers knew there was a risk of a stone falling on him and he had complained to them above this. A stone fell and injured the plaintiff and he sued his employers for negligence employers pleaded volenti non-fit injuria but this was rejected by court and held: that although the plaintiff knew of the risk and continued to work, there was no evidence that he had voluntarily undertaken to run the risk of injury. merely confirming to work did not indicate Volenti."

I hold the view that in cases involving an employee-employer relationship specifically where the claim is for breach of statutory duty the court should exercise discretion in a slow manner to attribute contributory negligence to an employee. This approach is anchored on the fact that the employees' sense of danger will have been impaired by familiarity, repetition, noise, confusion, fatigue and preoccupation with work. In order for contributory negligence to accrue the plaintiff's fault must be a legal and factual cause of the harm suffered.

It is true that there are two possible ways a court can apportion liability for negligence. One is on causation, secondly, on blameworthiness. The appellant sued the respondent on negligence acts based on a breach of care owed as a term of employment it is best that a trial court makes it clear what the appellant negligence entails: Does it involve the events which caused the injury or the severity of the injury? These questions must be answered if no provisions exist in the statute.

The Scholarly English Text by **Winfield and Johowicz on the 19th Edition Sweet & Maxwell 2014 at 703 paragraph 23-042** states as follows:

"The lack of care that will constitute contributory negligence varies with the circumstances of each case. thus, the greater the risk of suffering damage the more likely it will be; all other things being equal. that the reasonable person in the claimant's position would have taken precautions in respect of that risk. The reasonable person will be careless and so the claimant who does not anticipate that the defendant might be negligence may be guilty of contributory negligence. however, the law does not require the claimant to proceed with a timorous fugitive constantly working over his shoulder for the acts from others"

The apportionment of liability between the appellant and the respondent in the respective ratios should therefore take the form of both causation and capability.

As shown from the record in the trial court only the evidence of the appellant was tendered before it. Whether the injury was occasioned entirely by the negligence or improper conduct of the appellant or whether the respondent company so far contributed to the misfortune is a matter of evidence before the trial court. It is interesting to note that the learned trial magistrate decided to mitigate the award of damages by way of apportioning liability without evidence to support such a finding. In my view, the decision that the appellant was partly responsible for his own harm was reached by the trial magistrate without a legal or factual basis.

That exercise of discretion of contributory negligence can only be applicable where evidence has been led to justify a legal direction by the trial court.

That therefore brings me to the jurisdiction of this court to interfere with the inferior court findings where there has been a misdirection as earlier settled in various cases: **(see Mbogo & another Versus Sane 1968 EA 93). [BUTT Versus KHAN (1981) KLR 349]**

When I apply the above principles, I find no reasons or evidence on how the trial court arrived at apportionment of liability of 80%:20%. What the appellant presented as the cause of the accident was prima facie evidence which remained uncontroverted by the respondent. I am therefore of the considered

viewed that the trial magistrate fell in error which resulted in apportioning liability in absence of cogent evidence. I would therefore in the circumstances review the findings on liability by setting aside the contributory negligence and substituting it with 100% liability in favour of the appellant.

The second complaint by the appellant was on the award of damages that it was too low given the nature of injuries suffered. As it is in the first limits of this appeal the principles in which this court will move to interfere with the findings of the trial court are well settled. In the classic case of **Ahmed Butt Versus Khan 1982-88 IKAR (Supra)**. The court of appeal had this to say:

"An appellant court will not dismiss an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimates. 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"

What is of concern to this court is whether the learned trial magistrate erred in both and fact in awarding general damages of Kshs. 100,000 and special of Kshs. 2000. I have pursued and examined the record in its entirety. The trial magistrate heard the evidence of the appellant and admitted medical reports corroborating the nature of injuries sustained.

It is not disputed that the appellant suffered soft tissue and a fracture to his toe According to Dr. Nzina who prepared a medical legal report dated 10th March 2015 upon examination of the appellant opined that the soft tissue injuries and fractured bone would heal with no residual permanent disability. On this evidence at least, the thing is clear that the major injury was the fracture to the right toe accompanied with soft tissue injuries. At the trial both counsels made submissions relying on various authorities on award of damages for pain and suffering.

The awards were based on evidence and legal principles placed before the learned trial magistrate. Mr. Mwakio for the appellant in his submissions has not persuaded me that in arriving at the quantum on general and special damages the trial magistrate took into account an irrelevant factor, principle or evidence. Learned Counsel has also not demonstrated that the amount so awarded is so erroneous and low so as to occasion an injustice on the part of the appellant. The general acceptable legal principle on award of damages is the aspect that no amount of money can restore a deformed an injure or a lost limb. Compensation and award of damages is principally a way of saying 'pole' to the victim of such accidents. That being the view of the matter I find no reasons to disturb the award of quantum of damages as arrived at by the trial court.

In the circumstances the appeal lodged by the appellant partially succeeds on the issue of liability which hereby set aside and substitute with 100% as against the respondent. The award of quantum remains undisturbed. The respondent to meet the costs of this appeal.

Dated, delivered and signed on 10th May 2018.

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R. NYAKUNDI

JUDGE

Representation

- Mr. Ochieng for Mr. Mwakio for the Appellant
- Mr. Mwamo for Mr. Mburu for the Respondent
- Mr. Mateli - Court Assistant