REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL DIVISION

HIGH COURT CIVIL APPEAL CASE NO. 27 OF 2016

DIAMOND TRANSPORTER LIMITED.....1ST APPELLANT

MAHUMU DAHIR .....2ND APPELLANT

VERSUS

JOSEPH KIOKO MWIKALI ..... RESPONDENT

(Being an appeal from the Ruling delivered on 4th April, 2017 by Hon. C. Kutwa (Principal Magistrate) Senior Principal Magistrate's Court at Githunguri in SRMC No. 24 of 2015).

JUDGMENT

1. The Respondent instituted this suit in the Lower Court vide the amended plaint dated 19th November, 2015. The Respondent's claim was for payment of damages arising out of an injury while at work. The Respondent attributed the injury to the alleged negligence of the Appellants who were his employers.

2. The claim was denied as per the statement of defence dated 28thMay, 2015. In the alternative the injury was blamed as wholly or substantially caused by the negligence of the Respondent.

3. In a reply to the defence, the Respondent joined issues with the Appellants and reiterated the contents of the plaint.

4. The Respondent's case was that he was injured while on duty as a turn boy in the Appellants' motor vehicle at Bidco Oil Refineries Ltd and was transporting oil from Thika to Limuru. It was stated that the motor vehicle developed some problems with the gear box and while they were trying to fix it and in the process of offloading it the gear box slipped and fell. The Respondent was cut on the left hand middle finger and in 3rd finger sustained a crack and was amputated. The Respondent blamed the injury on the Appellant's failure to provide a safe system of work and failure to maintain the motor vehicle in question.

5. The Appellant supervisor, DW1 Abdille Mohamed Kanyare testified that the Respondent was not the company's employee and that the Respondent's name did not appear in the records of the company. That if accidents occur, they are also recorded and there was to such entery.

6. The trial magistrate entered judgment in favour of the Respondent on 100% liability basis as follows:

a) General damages Ksh. 350,000/=

b) Special damages Ksh. 3,500

c) Costs and interest

7. The Respondent was dissatisfied with the said judgment and appealed to this court on the following grounds:

1. That the learned trial magistrate erred in law and in fact in holding that the Plaintiff was an employee of the defendant.

2. That the learned trial magistrate erred in law and in fact by failing to apportion liability to the plaintiff considering that the injuries sustained by the plaintiff were manifestly self-inflicted.

3. That the learned trial magistrate erred in law and in fact and misdirected himself by failing to consider at all the submissions made before him by the defendants and reached an erroneous conclusion thereby occasioning a miscarriage of Justice.

4. That the learned trial magistrate erred in law and in fact by awarding manifestly excessive amount of general damages of Ksh.350,000/= and by having disregard of the submissions by the defendant and cited legal authorities.

5. That the learned trial magistrate in assessing quantum of damages took into account irrelevant factors and wrong decision principles and arrived at a wrong decision and excessive award on quantum of damages.

8. The appeal was disposed of by way of written submissions which I have considered.

9. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

> **"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. 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 if it appears either that he has clearly failed on some point 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 (Abdul Hameed Saif v Ali Mohamed sholan (1955), 22 E.A.C.A. 270)".**

10. The Respondent's evidence was that he was an employee of the Appellants for five years and that he used to be paid in cash. The Respondent however did not have any documents to confirm the said employment but stated that the manager Mahumu Dahir (2nd Appellant) used to assign him work. The Respondent's evidence further reflects that he was with a driver at the material time and that a mechanic was sent. Although it was denied that the Respondent was an employee of the Appellant, DW1 conceded that he used to see the Respondent at the Appellants' premises.

11. The second Appellant is the one who used to employ turn boys as per the evidence of DW1 who also conceded to have sent money to the Respondent. However the 2nd Appellant did not testify herein. The employer's register and the safety apparrel register were not produced. Upon evaluation of the evidence, I am in agreement with the holding by the trial magistrate that the Respondent was an employee of the Appellants. It is also noteworthy that the trial magistrate saw DW1's employment card which reflected that DW1 was a driver and not a supervisor as stated in his evidence. As a driver DW1 may not be the keeper of the employment records and it's not surprising that he did not avail the same in court.

12. The Respondent's evidence that he was not supplied with gloves or any other safety apparent is not controverted by any other evidence. Gloves may have provided a better grip and lessened the impact on the fingers and the extent of the injury. The Appellants' witness having conceded that he was a driver and not a supervisor made his evidence of less probative value as he did not give on was probably not in a position to give evidence on the safety measures undertaken by the Appellants' company. The evidence of the Respondent on what happened at the scene was also not rebutted by any other evidence.

13. However, the Respondent's evidence does not state whether he was offloading the gear box alone. His evidence is that he was a turn boy and not a mechanic. He also testified that the gear box was heavier than himself. He may have therefore contributed to his own predicament. I therefore apportion liability on a 50:50 basis. The award therefore works out as follows:

General damages Ksh.350,000/=

Special damages Ksh. 3,500/=

Total **Ksh.253,500/=**

Less 50 contribution Ksh.176,750/=

14. On the quantum the Appellant relied on the case of **Eastern Produce K Ltd v Allan Okisai Wasike [2014] eKLR** in which the award of Ksh.200,000/= was conformal for injuries resulting in traumatic amputation of the left Index finger and severe pains as a result of the injury.

15. The Respondent's counsel relied on the case **Crown Industries Ltd v Benedict Omondi [2011] eKLR** in which the award of Ksh.400,000/= was not interfered with by the High Court for injuries for loss of left Thumb and injuries to the middle finger and ring finger right hand.

16. The award of Ksh.350,000/= as general damages is reasonable and within the range of similar awards. I am guided by the case of **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A M. Lubia and olive Lubia 91985) 1 KAR 727,** where the Court of Appeal observed:-

> **"....the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial court are well settled. The appeal court must be satisfied either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages....."**

17. With the aforegoing, I set aside the judgment of the Lower Court and substitute the same with a judgment for the sum of Ksh. 176,759/= interest and costs. The appeal having been partially successfully each party shall bear own costs.

Dated, signed and delivered at Kiambu this 6th day of July 2018

B. THURANIRA JADEN

JUDGE