REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CIVIL APPEAL NO.10 OF 2018

BETWEEN

SUKARI INDUSTRIES LIMITED.....APPELLANT

VERSUS

JOHN ODOYO OWAGA.....RESPONDENT

(An appeal from the Ruling of the Senior Principal Magistrate's Court,

Ndhiwa in SRMCC Case No.45 of 2015 delivered on the

26th January, 2017 – HON. B.R. KIPYEGON, SRM)

JUDGMENT

[1] SUKARI INDUSTRIES LIMITED (herein, appellant), was the defendant in Civil Suit No.45 of 2015 at the Senior Resident Magistrate Court in Ndhiwa, where the respondent, **JOHN ODOYO OWAGA**, claimed damages for injuries arising from an accident involving a motor tractor belonging to the appellant, which occurred on or about the 30th August, 2014, while the respondent was in the course of his employment aboard the said tractor.

[2] In the statement of claim dated 18th June 2015, the respondent pleaded that on the material date while in the course of his employment he fell down from the appellant's moving tractor and suffered serious injury which occasioned him great pain, loss and damage. He blamed the appellant for breach of contract and statutory duty and for negligence and prayed for general damages for pain, suffering and loss of amenities together with costs of the suit and interest.

[3] The appellant in its statement of defence dated 28th August 2015, denied the allegations made against itself by the respondent and contended that the respondent was not its employee and that, if the accident indeed occurred then, it was wholly or partly due to the respondent's negligence.

The appellant therefore prayed for the dismissal of the respondent's suit with costs.

[4] After a full trial, judgment was entered in favour of the respondent against the appellant for the sum of Kshs.700,000/= general damages together with costs and interest.

Being aggrieved by the judgment, the appellant filed the present appeal on grounds contained in the memorandum of appeal dated 7th February 2017.

At the hearing of the appeal the appellant through learned counsel, **MR. WAGONDA**, relied fully on the written submissions dated 8th September 2018.

[5] The respondent through the learned counsel, **MR. OJALA**, opposed the appeal and orally submitted that it lacked merit as there was no dispute that the accident occurred and that the respondent was in the process injured. Therefore, the trial court rightly held that the appellant was 100% liable for the accident.

That, the steering wheel of the tractor snapped and caused it to move in a zig-zag manner prompting its driver to jump off the moving tractor thereby omitting to control the tractor with the respondent on board on his own.

[6] Learned counsel submitted that as the respondent was left in a precarious position, he fell down from the tractor and was run over by its wheels. He did not jump off the tractor as alleged on evidence which was hearsay. As such, there were no grounds for the court to apportion liability.

Learned counsel contended that the award of general damages in the sum of Kshs.700,000/= made in favour of the respondent by the trial court was proper and proportional to the injuries suffered.

[7] The respondent thus prayed for the appeal to be disallowed with costs.

In response, the appellant's learned counsel contended that the respondent did not fall down and was not run over by the tractor as he made no indication to that effect in his evidence. That it was doubtful how the accident occurred as the evidence by DW1 showed that the respondent jumped off the tractor. Had he stayed put, chances were that he may never have suffered injuries and if he did, the injuries were not substantial.

[8] Learned counsel for the appellant submitted that it was an error for the trial court to hold that negligence was proved against the appellant and fail to apportion liability between the appellant and the respondent and as the main injury was perforation of the intestines and the rest of the injuries were soft tissue injuries which healed completely without residual incapacity, the award of Kshs.700,000/= was excessive.

Instead, the respondent ought to have been awarded Kshs.120,000/= as general damages on the basis of the cited authorities.

[9] Having considered the appeal in the light of the grounds in support thereof and those in opposition thereto together with the

rival submission, this court was required to re-consider the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (See, **SELLE –VS- ASSOCIATED MOTOR BOAT COMPANY (1968) E.A 123)**.

[10] In that regard, this court is satisfied that liability was proved against the appellant at 100% as there was no dispute that the respondent was its employee and was aboard its tractor in the course of his duty when the tractor was involved in a mishap apparently due to a mechanical defect and caused the respondent to fall off it.

[11] The accident could not have been attributed to the respondent as he was not in control of the tractor. He just found himself in a dangerous position after a defect caused the tractor to move in a zig-zag manner and its driver to **"jump ship".**

The particulars of negligence alleged against him by the appellant were not established and least by the appellant's transport supervisor (DW1) who did not witness the accident and relied on hearsay to allege that the respondent jumped off the tractor and was therefore responsible for the accident and his injuries.

[12] From the foregoing, it would follow that: grounds one, two, five, six and nine are clearly unsustainable.

The rest of the grounds i.e. grounds three, four, seven and eight are essentially on the quantum of damages.

In that regard, medical evidence availed by the respondent was the medical report by Dr. Idagiza, dated 22nd June 2015.

It shows that the injuries suffered were multiple bruises of the body, perforation of the intestines and contused chest. These were classified as grievous bodily injuries resulting in a body disability of 15%.

[13] The respondent proposed an award of Kshs.1 million for the said injuries and relied on two authorities of the High Court where

injuries suffered by the victims were of a more serious nature. The appellant proposed an award of Kshs.120,000/= on the basis of a High Court authority where the injuries were mainly soft tissue injuries but of a less serious nature compared to the injuries suffered herein by the respondent. Indeed, the main injury was the perforation of the intestines.

[14] The trial court awarded a sum of Kshs.700,000/= as general damages for pain, suffering and loss of amenities. This award was in the opinion of this court on a higher side regard being given to all the cited authorities. A sum of Kshs.350,000/= was reasonable and sufficient in the circumstances.

This appeal is therefore allowed only on the issue of quantum of damages but not liability which remains at 100% against the appellant. The award of general damages in the sum of Kshs.700,000/= be and is hereby reduced by a sum of Kshs.350,000/= to become a total sum of Kshs.350,000/= general damages for pain, suffering and loss of amenities. It is accordingly ordered.

J.R. KARANJAH

JUDGE

04.10.2018

[Delivered and signed this 4th day of October, 2018].