



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 399 OF 2015

TWIGA CONSTRUCTION COMPANY LIMITED.....APPELLANT

VERSUS

ANDREW OMANGA MAGARE.....RESPONDENT

JUDGMENT

1. The respondent, *Andrew Omanga Magare* sued the appellant, *Twiga Construction Company Limited* in the lower court seeking general and special damages for injuries sustained in an accident which occurred on or about 4th February 2010 in the course of his employment by the appellant.

2. In his plaint dated 9th March 2010, the respondent blamed the accident on the negligence and/or breach of the appellant's contractual and statutory duties. The particulars of the appellant's alleged breach of contractual and statutory duties are specified in paragraphs 5 and 6 of the plaint.

3. In its statement of defence dated 20th May 2010, the appellant denied liability as alleged in the plaint and put the respondent to strict proof thereof. The appellant contended that if the accident in question occurred which was denied, it was wholly caused or materially contributed to by the respondent's negligence. The particulars of the alleged negligence were pleaded in paragraph 5E of the defence.

4. After a full trial, the learned trial magistrate *Hon. A.M. Obura (Mrs)* (PM), delivered her judgment on both liability and quantum on 21st July 2015.

She found the appellant 100% liable for the accident and awarded the respondent a total of KShs.62,000 in both general and special damages.

5. The appellant was aggrieved by the trial court's decision hence this appeal. In its memorandum of appeal filed on 21st August 2015, the appellant relied on six grounds of appeal in which it faulted the learned trial magistrate's decision on both liability and quantum. The gravamen of the appellant's complaint is that the trial court erred in its finding on liability as the respondent had failed to discharge his burden of proof given the evidence on record. On quantum, the appellant averred that the award of general damages in the sum of KShs.60,000 was inordinately high considering the injuries sustained by the respondent and the judicial authorities that had been submitted to the trial court by the appellant.

6. When the appeal came up for hearing on 7th June 2018, both parties agreed to have the appeal prosecuted by way of written submissions. The appellant's submissions were filed on 28th June 2018 while those of the respondent were filed on 27th June 2018.

7. This being a first appeal to the High Court, it is an appeal on both facts and the law. I am alive to the duty of the first appellate court which is to reconsider and to re-evaluate all the evidence adduced before the lower court to enable it make its own independent conclusions bearing in mind that unlike the trial court, it did not have the advantage of seeing or hearing the witnesses.

8. That said, it is important to point out at this stage that the mandate of an appellate court is not unlimited. It is now settled law that an appellate court will only interfere with a finding of fact made by the lower court if it is satisfied that it is based on no evidence or on a misrepresentation of the evidence or if it is based on a wrong legal principle. The court will also interfere with decisions based on the exercise of the trial court's discretion if it is satisfied that in arriving at the impugned decision, the trial court misdirected itself by considering irrelevant facts or failed to consider relevant facts and thereby arrived at an erroneous decision-

See: *Makube V Nyamoro, [1983] KLR 403*; *Kiruga V Kiruga & Another [1988] KLR 348*; and *Mbogo V Shah, (1968) EA 93*.

9. I have carefully read and considered the grounds of appeal, the evidence on record, the written submissions filed by both parties and the authorities cited. I note that the appellant in its written submissions abandoned its appeal on quantum. The only issue therefore arising for my determination is whether or not the learned trial magistrate erred in applying the law on the standard of proof in civil cases and in her

finding that the appellant was 100% liable for the accident.

10. The evidence on record as well as the submissions filed by the parties show that it is not disputed that the respondent was working for the appellant as a casual worker at the time in question and that he slipped and fell on a slippery floor while carrying a 50kg bag of cement as a result of which he sustained soft tissue injuries to his chest.

11. In his testimony, the respondent blamed the accident on the appellant's negligence or breach of its statutory duties as it had failed to provide him with protective gear namely gumboots (safety boots) and had also refused to act on his request to provide him with another worker to assist him carry the heavy bag of cement.

12. The appellant called one witness, a storekeeper, who did not offer any evidence to controvert the claims made against the appellant by the respondent.

13. The learned trial magistrate in her finding on liability correctly addressed her mind to both the common law and statutory duty of care required of an employer to an employee. She found the appellant 100% liable for the respondent's injuries considering that the respondent's evidence that the appellant had failed to provide him with safety boots and another worker to assist in carrying a heavy bag of cement despite his request to that effect remained uncontroverted by any evidence to the contrary. The learned magistrate also correctly found that the appellant had failed to offer any evidence to prove its claim that the respondent contributed to the occurrence of the accident. In the premises, I am unable to fault the trial court's finding that the respondent had proved his case against the appellant on liability on a balance of probabilities.

14. From the foregoing, it is clear that the learned trial magistrate was fully aware and properly applied the law on the burden and the standard of proof required in civil cases in arriving at her decision on liability. I have not come across any indication from the trial court's judgment that suggests that the trial magistrate erred in applying either the burden or the standard of proof in this case. Consequently, I find no basis upon which this court can interfere with the trial court's finding on liability. Considering that the appeal on quantum was withdrawn, I am satisfied that this appeal lacks merit and it is therefore dismissed with costs to the respondent.

It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI this 18th day of October, 2018.

C. W. GITHUA

JUDGE

In the presence of:

Ms Karanja for the appellant

Mr. Mwaura Kamau for the respondent

Mr Fidel: Court Assistant