REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL NO.20A OF 2015

AEGIS CONSTRUCTION LIMITED.....APPELLANT

VERSUS

MARY KANYUA.....RESPONDENT

J U D G M E N T

A. Introduction

1. This appeal is against the judgement of Embu Senior Resident Magistrate which was delivered on the 2nd April 2015 in Embu Case No. 171 of 2008. The appellant asserts that the trial magistrate erred and misdirected himself on issues of liability and quantum.

2. The appellant filed a memorandum of appeal dated the 29th April 2015 on the 30th April 2015 seeking to set aside the judgement of the trial court on liability to reverse the orders of the lower court on quantum and for the Respondent to pay costs of the lower court as well as the appeal.

3. The appeal is grounded on the following points: -

1) The learned magistrate erred in law and fact in failing to find that no negligence was established against the Appellant.

2) The learned magistrate erred in failing to analyze the evidence of the Respondent and arrive to conclusion that the Respondent also contributed to the occurrence of the accident.

3) The learned magistrate erred in law and in fact and failed to appreciate that there was a contradiction between the Respondent's pleadings and the Testimony in court over the date of injury.

4) The learned magistrate erred in law and fact in making an award which was excessive and not commensurate with the nature of injuries sustained by the Respondent.

5) The learned magistrate erred in law ad fact by deciding in favour of the Respondent when it was clear that the Respondent did not prove that the appellant was the contractor on the said road.

6) The learned magistrate erred in fact by not taking into account the fact that the Respondent did not suffer any residual disability.

7) The learned magistrate erred in law by not considering the submissions made by the appellant and authorities cited and the evidence placed before him.

8) *The learned trial magistrate misdirected himself on all points of law*.

The parties herein agreed to dispose of the appeal by way of written submissions.

B. Appellant's Submissions

4. In his submissions, the appellant stated that the burden of proof in establishing negligence on his part lay with the Respondent, a fact which was not proved and subsequently not considered by the trial magistrate.

5. The appellant further submitted that the respondent chose to walk on a section of the road that was under construction at night and she didn't use any lighting and as such contributed to the accident which the trial magistrate should have had regard to in apportioning liability in

the ratio of 50:50. On this, the appellant relies on the case of **LUCY MUTHONI MUNENE VS KENNETH MUCHANGE & ANOTHER HCCA NO. 858 OF 1988** [1994]

6. The Appellant also raises the issue that the Respondent "*was not certain when the accident occurred*," as she gave different dates on which the accident occurred in her plaint and testimony and as such the trial magistrate should not have found in her favour.

7. Finally, the appellant submits that the award of Kshs. 400,000 is too excessive for the injuries sustained by the Respondent given that the court had relied on a then 10-year-old case that had granted an injured person Kshs. 160,000 for similar injuries as the Respondent.

C. <u>Respondents Case</u>

8. The Respondents submit that the appeal lacked merit and ought to be dismissed with costs. The Respondent relies on the testimonies given in the trial court specifically by Dr. John Elijah who testified that the fracture she suffered could not heal due to her age.

9. The Respondent further relies on the testimony of P.W.3, Joyce Ciumwari, who corroborated her testimony of the fact that the road on which the accident occurred was used by the Respondent daily and that the trench that the Respondent fell into had not been dug in the morning as the Respondent passed. Further to this, the Respondent emphasized the fact that there were no warning measures taken by the appellant to warn the pedestrians of the dug trenches.

10. The Respondent also submitted that the Appellant never called any evidence or witness to controvert that of the Respondent and that the trial magistrate was proper in awarding the general damages considering the injuries sustained by the Respondent and her age.

D. <u>Issues for Determination</u>

1) Whether the trial magistrate erred in law and fact in apportioning liability against the Appellant at 100%.

2) Whether the general damages award was inordinately high.

3) Who is to bear the costs of this appeal.

E. <u>Analysis & Determination</u>

11. The duty of the 1st appellate court was discussed in the case of **MWANGI VS WAMBUGU, [1984] KLR 453:**

> "*A Court of Appeal will not normally interfere with a finding fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding; and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.*"

12. According to the medical report the respondent suffered a fracture of the right bone near the ankle joint, a pain she complained of recurring especially at the ankle joint. Dr. John Elijah who produced the medical report, which was marked as exhibit 1, further stated that the Respondent's injury could not heal.

13. P.W.3, Joyce Ciumwari, testified and corroborated the Respondent's testimony that they used the same road early in morning when they were no trenches on the road and further that she was in the company of the respondent on their way back home in the evening when the respondent fell into the trench.

14. P.W.3 further stated that there were no signs alerting pedestrians of the dug trenches and that the trenches were not covered.

15. The Appellant did not call any witness to controvert the evidence given by the Respondents nor did they submit any document in support of the allegations in their statement of defence and as such the Respondents assertions remained unchallenged.

16. I have carefully evaluated the evidence on record. The appellant did not dispute that the respondent fell in the trench dug by the appellant. The respondent's evidence was very clear that she passed through the same route in the morning and that there were no trenches. It is in the evening when she was walking home that she fell into the trenches. This means that the trenches were dug during the day.

17. It was not in dispute that the appellant did not fix any warning signs on the road for pedestrians on the existence of the trenches. The respondent passed on the road around 7.30 pm when it was dark and assuming it was as safe as she left it in the morning, proceeded to walk ahead just to fall into the trench.

18. The evidence of the respondent was well corroborated by that of his witness PW2. She was walking on the road at the same time with the respondent but on the left side which had no trenches. The respondent walked on the right side where trenches had been dug. There was no evidence to controvert that of the respondent since the appellant did not call any witnesses.

19. I find no contradiction of the respondent's evidence and her pleadings as alleged by the appellant. No demonstration of the alleged contradictions was exhibited.

20. The appellant has not shown how the respondent may have contributed to the accident to justify apportionment of liability.

21. I have carefully considered the judgment of the learned magistrate on liability and find that his finding was supported by cogent evidence.

22. I find that the magistrate was well guided by the evidence to find the appellant fully liable.

23. The principles guiding appeal courts in dealing with cases of damages are well explained in the several cases and are well established.

24. In the case of **KEMFRO AFRICA LIMITED T.A MERU EXPRESS SERVICES & ANOTHER VS A.M. LUBIA & ANOTHER CA No. 9 [1982-1988] 1 KLR 7827** it was held: -

> "*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 judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.*"

25. I have perused the judgment of the magistrate on quantum and note that he considered the submissions and the authorities of both parties.

26. The case of **IMCO ENGINEERING & BUILDING CONTRACTORS LTD VS JOSEPH MACHARIA KARANJA [2005] eKLR** relied on by the Appellants was the most comparable in terms of injuries suffered by the respondents where in both instances the individual suffered multiple injuries to the right leg. It is this 10-year-old case that the trial magistrate relied on in which general damages for pain and suffering were accessed at Kshs.160,000/=.

27. Considering the injuries suffered by the respondent, I am of the considered opinion that the award of Kshs. 400,000 awarded by the trial magistrate is reasonable taking into account the inflation as at the time of rendering judgement.

28. On the issue of costs, its settled law that costs follow the event and hold the opinion that the award by the trial magistrate of costs to the respondent was appropriate. I further endorse the award of costs in this appeal to the respondent. This is supported by the case of **ORIX OIL (KENYA) LIMITED VS PAUL KABEU & 2 OTHER [2014] eKLR** where the court stated:

> "**…***the court should have been guided by the law that costs follow the event, and the Plaintiff being the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied the costs or the successful issue was not attracting costs. None of those deviant factors are present in this case and the court would still have awarded costs to the Plaintiff, which I do.*"

29. In conclusion, it is my opinion that the trial magistrate did not err in law or fact in granting the Respondents general damages of Kshs. 400,000/= for pain and suffering. Neither did the court err in awarding costs to the respondent.

30. The judgment of the lower court is hereby upheld on liability and quantum.

31. I find no merit in this appeal and dismiss it with costs to the respondent.

32. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 7TH DAY OF NOVEMBER, 2018.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Kiai for Kathungu for Respondent