



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 533 OF 2012

BRIAN KHAYUMBI SHIEMIAPPELLANT

VERSUS

TRIDDEV BUILDERS CO. LTDRESPONDENT

(Being an appeal against the judgment of Honourable Cheruto C Kipkorir Resident Magistrate delivered on 2nd February, 2012 at Milimani Commercial Courts)

JUDGMENT

The appellant brought a suit against the respondent in the lower court claiming damages for injuries sustained at a construction site in Nairobi. He blamed the respondent for failing to maintain a safe system at work and working environment. He also blamed the respondent for employing a reckless crane operator and failed to provide protective gear. Further he blamed the respondent for failing to exercise any rescue operation mid-air to forestall grave injury upon him.

From the pleadings the appellant was given duties by the respondent's foreman and or supervisor of unloading tiles from a crane and placing them on a roof of a building under construction. While he was doing so, the crane operator abruptly began to lower the crane before the appellant fully disembarked thereby causing him to lose balance and fall from the sixth floor to the ground of the building.

The plaintiff pleaded vicarious liability against the respondent for the acts of the crane operator, foreman and supervisor. As a result of the fall, the appellant suffered a compound fracture to the right femur, fracture of the left distal radius and loosening of all incisor teeth. There was also injury to the mouth on the lower lip leading to inability to bite solid food stuff and had a painful right thigh with inability to walk for long.

He was then 18 years old earning a monthly salary of Kshs. 6,000/=. As a result of the injuries, he was unable to resume duties as a casual worker and claimed lost earnings from the defendants. He also lost capacity to earn in future following the said injuries.

After a discharge from hospital he required future surgery at the cost of Kshs. 120,000/=. His prayers included general damages for pain, suffering and loss of amenities, lost earnings and loss for future earning capacity, special damages and future medical expenses, costs and interest.

The respondent denied the appellant's claim, and pleaded that the appellant was injured due to his carelessness as he lost footing while disembarking from the crane. Particulars of negligence were denied.

The attachment of vicarious liability on the part of the crane operator, foreman or supervisor was denied.

It was pleaded that the appellant's injuries were solely caused by or substantially contributed to by the plaintiff's own negligence. He was accused of failing to exercise caution as an experienced worker thereby causing self-inflicted injuries; he acted without due regard to his safety; he exposed himself to the risk of injury; failed to take any precautions to avoid the injury and failed to be alert thereby losing his footing.

The respondent averred that the injuries resulted from circumstances outside its control and no liability could attach. The particulars of injuries and special damages were denied and so were loss of earnings and loss of earning capacity.

After a full trial however, the trial court held the respondent liable to the degree of 80% while finding that the appellant was 20% to blame for the accident. On quantum the appellant was awarded Kshs. 450,000/= general damages, Kshs. 12,000/= lost earnings for 2 months, and Kshs. 120,000/= cost of future medical expenses. There was no award for loss of future earning capacity.

In this appeal, the appellant has faulted the trial court for making an award that was inordinately low in the circumstances of the case, and making an award of Kshs. 12,000/= lost earnings for 2 months when at the date of the trial the appellant was still walking with the aid of crutches. It was also contended that the award of Kshs. 120,000/= as cost of future medical expenses was an admission that the appellant was incapacitated, yet the court failed to make an award on lost earnings up to the date of the trial. The lower court was also faulted for not making an award for loss of future earning capacity.

The appeal was opposed and both parties have filed written submissions and cited some authorities which I have noted. The appellant testified in support of his pleadings and also called Doctor Moses Kinuthia who examined him following his injuries. On the other, hand the respondent called one witness Mr. Zachariah Kinyanjui who was the crane operator.

The trial court assessed the evidence of both the appellant and the respondent's witness and found that both had different versions of events on how the accident happened, but found that the respondent's witness who was the crane operator was not professionally trained to operate the crane. He therefore found that the respondent was negligent in employing an unqualified person to operate the crane, thereby breaching its duty of care to the appellant. He cited some authorities to support his observation.

Relying on the evidence of the respondent's witness, and relating the same to the particulars of negligence set out in the defence, the trial court observed that these were not rebutted in cross-examination and found that the appellant was not paying attention while working. Weighting the evidence before him, he found the respondent 80% liable to the appellant while the appellant was 20% liable.

As the appellate court, I have considered the evidence on record. The respondent had a higher duty of care upon the appellant, while the appellant also ought to have appreciated the risks of working under such circumstances and taken appropriate measures to protect himself. It was alleged in the pleadings that he was experienced. He had worked with the respondent from the year 2007 as a construction worker. He was injured in February, 2008 and nowhere does he deny that he was experienced to do so. My assessment of the occurrence and the circumstances of the accident agrees with the learned trial magistrate and I am unable to disturb the apportionment of liability he arrived at.

On quantum, the guide was to be found in a report dated 27th May, 2009 prepared by Doctor Moses Kinuthia. When he gave evidence, on 13th August, 2012 the doctor said the fracture could have healed by then, but the appellant had developed a complication of osteoarthritis and may not be able to engage in manual work. Otherwise, he related the injuries as set out in the pleadings.

The learned trial magistrate reviewed several authorities and made an award of Kshs. 450,000/= general damages. I have looked at the same authorities and whereas the awards therein more or less compare with the injuries sustained by the appellant, I am of the view that the closest authority was that of **Coast Bus Mombasa Limited Vs. Anne Awiti Onege (2012) eKLR.** The appellate court would only interfere with an award of the lower court if that court acts on wrong principles or the award is inordinately high

or low to appear as an entirely erroneous estimate.

The appellant sustained serious injuries and as at the time he gave evidence, which was about 4 years after the accident, he was still using crutches to walk. He was still in pain and could not walk long distances. I am of the view that an award of Kshs. 450,000/= was on the lower side. An award of Kshs. 600,000/= is the appropriate award as general damages for pain, suffering and loss of amenities. Loss of earnings belongs to the category of special damages. The appellant was earning Kshs. 6,000/= per month. This has not been seriously disputed by the Respondent. He did not have a pay slip but LD 104 showed his pay. This is a form under workman's compensation Act which bears the stamp of the respondent. The appellant therefore proved his monthly salary.

The appellant could not work after the accident. He said as much in his evidence in chief. He was in hospital for 3 months and thereafter discharged. The Loss of earnings that should have been awarded is Kshs. 18,000/= to cover 3 months. He pleaded loss of earning capacity. The trial court should have awarded the appellant damages under that head.

Being a casual worker and in good health, the appellant would have worked for many years to come. He was 22 years old at the time of the trial. His type of work had attendant risks just as what befell him in this case. I would use a multiplier of 25 years to calculate his loss of earning capacity which brings the total to $Kshs. 25 \times 12 \times 6000/ = 1,800,000/=$. The medical report however did not give the degree of permanent incapacity. The contents do not show that he cannot do anything else, and the only evidence on record is his own statement that he cannot do the same work he used to do and walk long distances. This does not mean that he cannot do anything else. I believe he can be engaged in small business like operating a kiosk. That being the case, the figure of Kshs. 1,800,000/= shall be reduced by half leaving a balance of Kshs. 900,000/=.

The future medical expense of Kshs. 120,000/= was not seriously disputed. The doctor proved payment of Kshs. 9,000/= special damages. This brings the total to Kshs. 1,647,000/= less 329,400/= contributory negligence leaving a balance of Kshs. 1,317,600/=.

In the end the judgment of the lower court is hereby set aside in relation to quantum in its entirety and in place thereof there shall be judgment for the appellant in the total sum of Kshs. 1,317,600/=. The appellant shall also have the costs and interest which shall also be reduced by 20% contributory negligence on his part.

Dated, signed and delivered at Nairobi this 23rd day of January, 2017

A. MBOGHOLI MSAGHA

JUDGE