REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 627 OF 2007

FIROZE CONSTRUCTION LTD .....APPELLANT

VERSUS

BENSON MUSYOKA MUSEMBI.....RESPONDENT

(Being an Appeal from the Judgment delivered by the Honourable A. N. Ongeri (Mrs.) Acting Senior Principal Magistrate on the 20th of June 2007 in Nairobi CMCC No. 7583 of 2004.)

JUDGMENT

1. The Appellant, Firoze Construction Limited was sued in the lower court by the Respondent, Benson Musyoka Musembi. The Respondent's claim was for damages arising out of injuries sustained while at work. The Respondent attributed the injuries to either the negligence or breach of statutory duty by the Appellant who he claimed was his employer.

2. The Appellant filed a statement of defence and denied the claim. In the alternative it was stated that if the Respondent was employed and injured, then the Respondent solely caused or contributed to the negligence. The Respondent filed a reply to the defence and denied any negligence on his part.

3. The case proceeded to a full hearing. The trial magistrate found the Appellant 100% liable for the accident. An award was made of Ksh.400,000/= general damages, Ksh.1,500/= special damages, costs and interest.

4. The Appellant was aggrieved by the said judgment and appealed to this court on grounds that can be summarized as follows:

a) That the judgment is not supported by the evidence.

b) That the Appellant's submissions and authorities were not appreciated.

c) That the award of general damages was excessive and unjustified.

d) That the compensation made under the workmen's compensation Act was not taken into account.

5. The appeal was canvassed by way of written submissions. I have considered the said submissions.

6. 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)".**

7. The Respondent testified as DW2. His evidence was that he had worked with the Appellant for less than one month when he was injured on 26th May, 2004. That he was cleaning a mixer using a chisel when a piece of bitumen hit his right eye. The Respondent blamed the Appellant for not having supplied him with goggles or any head gear. The Respondent also blamed the Appellant for failure to accord him prompt medical attention. His further evidence was that he was not paid any compensation through the Labour Office. According to the Respondent, he lost sight in the right eye and cannot secure any employment.

8. The Respondent's evidence regarding the injury was collaborated by that of the doctor, PW1 Dr. Cyprianus Okoth Okere. The doctor's evidence was that the Respondent sustained a perforation of the right eye which lead to blindness of the said eye. The degree of incapacity was assessed at 50%.

9. Three witnesses testified on the Appellants side. DW1 Stanley Muriuki Gichovi was the head of the plant where the Respondent worked at the material time. His evidence was that the workers were given overalls, goggles and gloves. He produced a safety gear stock list. His further evidence was that the Respondent was among the six workers who were cleaning the bitumen. DW1 could however not tell whether these workers were wearing the safety equipment but stated that the Respondent was not wearing goggles when he was injured. The evidence of DW1 confirms that the Respondent was injured while working for the Appellant. DW1's evidence on whether the Respondent was issued with goggles and whether the Respondent wore them is inconsistent. During his evidence in chief DW1 contradicted himself when he stated that he was not sure if the Respondent wore any safety devices but during cross-examination he was categorical that the Respondent was not wearing any goggles at the material time. The safety gear stock list was produced as an exhibit. The said list reflects that the quantity of the boots, aprons, gloves, goggles and upper-coats issued during the material time.

10. DW3 Zedekiah Inguna Lima a colleague of the Respondent gave evidence that workers were issued with safety gear. His further evidence is that he was not present when the Respondent was injured. However, DW3 contradicted himself during cross examination when he turned around and stated that he was present when the Respondent was injured. His evidence is unreliable and fails to fill in the gaps left by DW1. With the inconsistent and contradictory evidence of DW1 and DW3, it is not possible to tell whether the Respondent was issued with any safety equipment or not. The stock list referred to above does not bear the names of the workers supplied with safety gear and is not of much help in the circumstances of this case.

11. With the aforegoing evaluation of the evidence on record, I cannot fault the holding by the trial court that the Appellant was 100% liable for the injury. The Respondent proved on a balance of probabilities that there was no safe system of work.

12. On the quantum of damages, the medical evidence on record is that the Respondent is blind in the right eye. This medical evidence is not controverted by any other medical evidence. Even the workmen's compensation form LD104 produced as an exhibit by the Respondent reflects the Respondent's injury as perforation of the right eye with loss of eyeball contents. The eye is reflected as blind. The percentage of incapacity is however reflected in the said form as 30% whereas the doctor (PW1) who produced the

medical report gave the same as 50%. Both medical details however reflect blindness in the right eye.

13. The Appellant's submissions in the lower court were for an awards of Ksh. 200,000/= as general damages. The following authorities were relied on:

a) **Wilson Ndege Nguni v Paul Ichura Nguithiru Nairobi HCCC 6777 of 1992** where Ksh.150,000/= was awarded for injuries to both eyes. The Plaintiff therein suffered poor vision and required glasses to improve the same.

b) **Ngare Rashid v Kwale Sawmills- Mombasa HCCC 628/87** where an award of Ksh. 150,000/= general damages was made for loss of sight in the left eye.

14. The Respondent submitted for an award of Ksh.600,000/= as general damages. The following authorities were relied on

a) **John Wainaina Macharia v Rose Nyokabi, Nairobi HCCC No. 875 of 1992** where an award of general damage in the sum of Kshs.300,000/= was made for the total loss of the right eye.

b) **Sammy Waraya Nykora v Ministry V. Naran Muldi & Co** where in 1993 an award of general damage in the sum of Kshs.190,000/= was made plus Ksh.360,000/= for loss of earning capacity.

15. It is noted that the authorities cited by both parties are quite old. Taking into account the passage of time and inflationary trends, I find the award of Ksh.400,000/= general damages awarded by the trial court reasonable compensation for the then 22 year old Respondent. As stated by the Court of Appeal in the case of **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A M. Lubia and olive Lubia 91985) 1 KAR 727:**

> **"....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....."**

16. On the question of the Workmen's Compensation Act, the uncontroverted evidence of DW2 Richard Kyenze an accountant with the Appellant is that the cheque for the sum of Ksh. 212,776/= was forwarded by the Appellant to the Labour Office. A receipt issued by the Labour Office for the said payment was produced as an exhibit. The Respondent filled in the Labour Department form LD104. The Labour Officer subsequently claimed on behalf of the Respondent for the said amount of money. The Appellant therefore discharged its obligation as required by Section 44 of the Workmen's Compensation Act Cap 236 Laws of Kenya (repealed). It is therefore up to the Respondent to follow up the said amount of money with the Labour office.

17. With the foregoing, I deduct the sum of Ksh.212,776 from the award of general damages of Ksh.400,000/=. This brings the same to the sum of Ksh.187,224/=. Consequently the final judgment reads as follows:-

a) General damages Ksh.187,224/=

b) Special damages Ksh. 1,500/=

c) Costs in the lower court and interest to the Respondent.

d) This appeal having been partially successful, each party to meet own costs.

Dated, signed and delivered at Nairobi this 19th day of January ,2017

B. THURANIRA JADEN

JUDGE