REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 206 OF 2011

STEEL STRUCTURES LIMITED.....APPELLANT

-V E R S U S –

DANIEL MUTINDA.....RESPONDENT

(Being an appeal from the judgement and decree of Hon. R. A. Oganyo (Mrs) Principal Magistrate in Milimani CMCC No. 3563 of 2008 delivered on 27th day of April, 2011)

JUDGEMENT

1. Daniel Mutinda Kioko, the respondent herein, filed an action against Steel Structures Ltd, the appellant herein before the Chief Magistrates Court, Milimani claiming damages for the injuries he suffered while working for the respondent. The suit proceeded for hearing in the trial court and in the end the appellant was found wholly liable and the respondent was awarded ksh.380,000/= as general damages. Being aggrieved, the appellant preferred this appeal.

2. On appeal, the appellant put forward the following grounds in its memorandum of appeal.

> ***1. The learned trial magistrate erred in law and in fact by holding that the plaintiff had proved his case against the defendant on a balance of probabilities.***
>
> ***2. The learned trial magistrate erred both in law and in fact in failing to consider the evidence on record and hence arrived at an erroneous finding on liability.***
>
> ***3. That the learned trial magistrate erred in law and in fact by failing to find that the plaintiff did not prove that he was the defendant's employee at the material time or at all and hence arrived at an erroneous finding on liability.***
>
> ***4. That the learned trial magistrate erred in law and in fact by failing to consider the defendant's submissions on record thus arrived at an erroneous finding on liability.***
>
> ***5. The learned trial magistrate erred in law and in fact by failing to uphold precedent and the doctrine of stare decisis.***
>
> ***6. The learned trial magistrate erred in law and in fact by awarding general damages that are so manifestly excessive as to be erroneous vis a vis the injuries allegedly sustained by the plaintiff.***
>
> ***7. The learned trial magistrate erred both in law and in fact by not properly considering the medical reports on record and hence arrived at a wrong assessment of damages that are so manifestly excessive as to be erroneous.***

3. When the appeal came up for hearing, learned counsels recorded a consent order to have the same disposed of by written submissions.

4. I have re-evaluated what was before the trIal court and considered the rival written submissions. The recorded evidence indicate that the appellant was served and filed a defence to the respondent's claim and the case proceeded to full trial. At the trial the respondent testified and called one witness to testify on his behalf. The appellant did not summon any witness. The parties thereafter filed their respective submissions. I have already stated that the appellant was held liable and the court awarded ksh.380,000/= in general damages, ksh.1,500/= as special damages and kshs.5,000/= as the doctor's court attendance fees. Though the appellant put forward a total of seven (7) grounds of appeal, those grounds revolve around issues in respect of liability and quantum of damages. The first question to be answered on appeal is whether or not the respondent was an employEE of the appellant and who was to blame for the accident and to what extent? The appellant is of the view that the respondent did not tender any iota of evidence to prove that he was an employee of the appellant. It is argued that he did not even recall his identity number yet it is a document which every Kenyan citizen carried along. The appellant also argued that it made attempts to have the respondent verify his identity before the trial court with no success. It is further argued that though the appellant did not call for any witness to testify in support of its defence before the trial court, it was prudent for the respondent to prove liability against the appellant which burden the respondent did not discharge. The appellant also argued that the claim being an action based on tort, the case is hinged on grounds of negligence where it was incumbent upon the respondent to prove that he was owed the duty of care by the appellant and that there was negligence on the appellant's part. In a nutshell, the appellant is saying that the respondent did not avail evidence showing that he was an employee of the appellant therefore the person who presented himself as the claimant is a fraud and hence would not have been injured in the appellant's premises. The respondent urged this court to dismiss the appeal. It is argued that the issue touching on the respondent's identity card was not pleaded in the defence neither did the appellant serve the respondent with a notice to produce his identity card. The respondent pointed out that when issue was raised the respondent clearly stated his identity card got lost, and given the fact that he was not given notice that the same was required he did not come along with the police abstract form to confirm the loss. It was also pointed out that the court observed the respondent's demeanor and was satisfied that the person before the court was on a balance of probabilities the respondent. After taking into account the rival submissions, I think it is appropriate at this stage to re-examine the way the trial magistrate determined the issue touching on the respondent's identity and the liability. I have carefully perused the appellant's defence and its written submissions presented before the trial court and it is clear that the appellant right from the beginning had questioned the respondent's employee status with the appellant. The appellant also denied that the accident occurred in the appellant's premises. It also denied that it was negligent. It is therefore clear to me that the respondent's identity had been questioned *ab initio* and it was incumbent upon him and his legal advisers to avail credible evidence to prove his identity as an employee of the appellant. I have also examined the proceedings taken before the trial court. At the trial, the respondent stated that on 5.4.2006, he went to work where he set up a platform to enable him paint the section he was deployed. The respondent said that while he was painting a crane lift which was being controlled and operated by one John Muthama hit the respondent's wooden platform thus making him fall down and get injured. The respondent said he was a casual employee for eight months. He unsuccessfully sought to produce an LD form 104. In his evidence in cross-examination, the respondent said he lost his identity card. He said that LD104 form was filled by the appellant when he got injured and that as a casual labourer he was never issued with certificates. He said that he blamed the appellant company for causing its employer to use a crane lift to lift steel that the same place he was designated to paint. In her judgment, Hon. R. A. Onyango (Mrs) learned Principal Magistrate, analysed the evidence of the respondent's identification. She acknowledged the fact that the respondent was unable to produce LD104, a form filled by the appellant and issued to the respondent upon suffering an injury. The learned Principal Magistrate also concluded that since the appellant did not tender evidence to controvert the respondent's assertion that he had been employed as a casual labourer by the appellant, then the respondent was not engaged by the appellant.

5. With respect, the trial Principal Magistrate cannot be faulted. The respondent from the beginning had made his status known. He specifically stated that he had been employed by the appellant on temporary basis as a painter. It is not enough for the appellant to merely deny the respondent's assertion that he was

its employee. The respondent testified and specifically explained the duties assigned to him by the appellant. He stated that on the material date he was assigned duties to paint the appellants premises and stood on a wooden platform along Likoni Road, Nairobi. This piece of evidence needed to be rebutted but the appellant did not deem it fit to do so. Having come to the same conclusion as the learned Principal Magistrate that the respondent was an employee of the appellant, let me now turn my attention to the question of liability. On this issue, the respondent's take is short and straightforward that he made a wooden platform which he used while painting the appellant's premises standing along Likoni Road, Nairobi. It is his evidence that a crane with a fork lift was operated in the same premises hit the wooden platform thus making it crumble. In the process the respondent fell down. I am convinced that the respondent established that the appellant was under a duty of care to ensure that its employees including the respondent worked in a safe work environment. The appellant did not deem it fit to controvert this piece of evidence when it failed to summon any witness.

6. With respect, the learned Principal Magistrate cannot be faulted in holding that the appellant was wholly liable for the accident.

7. Having disposed of the issue on liability, I now turn my attention to the issue touching on quantum. The respondent tendered evidence showing that he suffered the following injuries:

i. Right hand.

ii. Right leg got fractures.

iii. Injuries on the back.

Dr. Cyprianus Okoth Okere (PW2) also stated that the respondent suffered grievous harm being on the hand and with fractures cut wounds, bruises, blood loss, pains and soft tissue injuries. PW2 assessed the respondents to have suffered 5% permanent disability. I have already stated the kind of awards made.

8. The appellant was of the view that the award of ksh.380,000/= was inordinately high. The appellant is of the view that a sum of ksh.250,000/= was adequate compensation for the injuries suffered. The appellant relied on **Kisii H.C.C.C no 55 of 2007, Jecona Otieno Obongo =vs= Michael Ouma Yaok**e where this court awarded the plaintiff kshs.250,000/= for a fracture of the lower one third of the tibia bone. The appellant also cited the case of **Zakariah Nachari =vs= Cleopha Waswa eKLR** in which this court awarded ksh.250,000/= for swollen right knee and right leg, a communuted fracture of the right tibia.

9. The appellant also complained that the award on special damages of Ksh.1,500 should not have been made because there ws no document produced to prove the same. It is also pointed out that the doctor's attendance should not have been because the same is not pleaded. The respondent on the other hand is of the view that the award should not be disturbed. He pointed out that the authorities relied on are in respect of less severe injuries than those the respondent suffered. It is also argued that the appellant did not demonstrate to the court that the award was manifestly high and excessive. As regards special damages and the doctor's fees, the respondent argued that there is nothing wrong for the court to make the awards since it is permissible in law. I have on my part considered the rival arguments and the authorities cited. I have perused the authorities submitted by the parties before the trial court and in my view, those authorities were in respect of more serious injuries unlike those suffered by the respondent.

10. I find the case of **Jeconia Otieno Obongo =vs= Michael Ouma Yaoke (2010) eKLR** to be relevant to this case where the court made an award of ksh.250,000/= for a fracture of the tibia bone. The decision was made about seven (7) years ago. The decision being impugned on appeal was made about six years ago. However apart from the fact that the respondent suffered a fracture of the right leg, he also suffered injuries on the right hand and on the back. In the circumstances, an award of ksh.380,000/= as general damages in my view is not inordinately high nor excessive. I find the award to be commensurate with the injury suffered.

11. The appellant has complained that the respondent should not have been awarded special costs because the same was not proved. The record shows that the respondent tendered a receipt showing he paid ksh.7,000/= for medical report fees. There was therefore prove of that prayer. I find no merit in the challenge. The appellant has also complained that the doctor's attendance fees should not have been given because it was not pleaded as a special damage. This issue was correctly captured by the learned Principal Magistrate that the prayer should be regarded as part of the costs incurred at the trial hence the appellants challenge cannot stand.

12. In the end, and on the basis of the above reasons, I find the appeal to be without merit. It is dismissed in its entirety with costs to the respondent.

Dated, Signed and Delivered in open court this 27th day of January, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent