



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 19 OF 2015

DEVKI STEEL MILLS LIMITED.....APPELLANT

VERSUS

THAIKON MWAKHA OKUTOYI.....RESPONDENT

*(Being an appeal from the judgment of Chief Magistrate's Court at Machakos delivered by **Honourable I M. KAHUYA (Senior Resident Magistrate)** on 30th January, 2015 in **MACHAKOS C.M.C.C. NO. 93 OF 2014**)*

JUDGMENT OF THE COURT

1. The Appeal arises from the judgment of Hon I. M. Kahuya – Senior Resident Magistrate in **Machakos CMCC No. 93 of 2014** delivered on the 30/01/2015. The Appellant had been found wholly liable at 100% for an accident that occurred on 15/08/2011 and awarded the Respondent Kshs.180,000/= as general damages, Kshs.1,500/= as Special damages. The Respondent was also awarded costs of the suit and interest.

2. The Appellant was dissatisfied by the said judgment and lodged the present appeal in which it raised two grounds of appeal namely:-

(a) That the learned trial magistrate erred in law and fact by not taking into account the evidence of the Defendant witness and the Appellant's submissions on liability, therefore erroneously finding the Appellant 100% liable, in spite of the fact that the Respondent had not established a casual link between his injury and any negligence on the Appellant's part.

(b) That the learned Magistrate erred in law and fact by failing to take into account the Appellant's submission on quantum thereby erroneously awarding the Respondent damages which are inordinately high and excessive given the nature of the injuries sustained by the Respondent.

3. The Appellant therefore prays for the following reliefs:-

(a) The Judgement of the trial court on liability be set aside and this Honourable court do make a finding on the same and apportion liability accordingly.

(b) The judgment of the trial court on quantum of general damages be set aside and in the alternative this Honourable Court do make a finding on the damages payable to the Respondent.

(c) The cost of this Appeal and of the Court below be borne by the Respondent.

4. With the leave of the court, parties filed submissions. It was submitted for the Appellant that the Respondent's claim was fraudulent since he had not been on duty on the date he is alleged to have been injured and further the daily attendance registers and first aid registers did not have his names. It was further submitted that should this court find for the Respondent, then liability be apportioned. Respondent was to blame for exposing himself to apparent danger and hence the doctrine of "***volenti Non fit injuria***" should be applied in the circumstances. It was also submitted for the Appellant that the trial court erred in the assessment of general damages by awarding a sum which was manifestly excessive and that this court do interfere with the award and substitute it with an award of Kshs.60,000/= in the event the court finds the Respondent had proved his case.

5. It was submitted for the Respondent that the Respondent's case in the lower court had been proved on balance of probability and that the Appellant was solely liable in damages to the Respondent at 100% and that the award of damages by the trial court be upheld. The Respondent's counsel submitted that Appellant's Appeal lacks merit and same should be dismissed with costs to the Respondent.

6. This being the first appellate Court, its duty is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions. (See the cases of **SELLE =VS= ASSOCIATED MOTOR BOAT CO. LTD [1968] EA 123** and **PETERS =VS= SUNDAY POST [1958] EA 424**).

7. The Respondent had testified before the trial court and stated that he had been employed by the Appellant as a tongsman which involved putting hot pieces of metal into a rolling machine using tongs. He stated that he reported for work on 15/08/2011 and duly punched the clocking machine and to sign after same was printed out. He stated that the rolling machine developed problems and the machine fitter was called to repair it but however one of the metal pieces later rolled out and fell on his left foot and was injured. He was given first aid by his Supervisor one Wambua and as the Company nurse was not in, he proceeded to Athi River Medical Services where he was treated and discharged. He blamed the Appellant for the accident because he was not provided with safety gear which would have prevented him from sustaining the injury. He also blamed the machine fitter for not ensuring that the machine was put on its normal working condition.

8. The Appellant called one witness who stated that the Respondent was not on duty on the material date, the witness produced a biometric attendance register for the month of August, 2011 and maintained that the Respondent had not been on duty on the said date. An injury register was also produced which did not have names of the Respondent and that even though there was evidence of Respondent's treatment at a private facility, the same was unprocedural because he ought to have been examined by the Appellant's doctors before being referred to the said medical facility. It is the contention of the Appellant that the Respondent's claim is fraudulent.

9. The issues and Determination:-

From the grounds of Appeal and the evidence tendered as well as the submissions, I find the issues for determination as follows:-

(i) Whether the learned trial Magistrate erred in law and fact in finding the Appellant's to be 100% liable for the accident.

(ii) Whether the award of Kshs.180,000/= is inordinately high.

10. As regards the first issue and as noted from the record of Appeal and submissions, the Respondent had sued the Appellant for injuries sustained while in the employment of the Appellant. The Respondent had stated that he had been assigned duties as a tongsman whereby he was to place some hot pieces of metal into a rolling machine. The Respondent had claimed that the Appellant had not provided him with the requisite protective gear and further failed to ensure that the working environment was safe for him. Hence the Respondent being the claimant was under a duty to establish certain conditions namely that he was owed duty of care by the Appellant, that the Appellant breached that duty and that as result of the

breach of duty of care he suffered injuries as a result. Under the Occupational Safety and Healthy Act (Cap 154 Laws of Kenya) work places must be secure and safe and healthy for persons at work and that every occupier or employer is under obligation to ensure safety health and welfare at work of all persons working therein (see Section 6(1) of the said Act). However, the obligation is not absolute in that an employee who gets injured due to his own negligence, the employer is not liable thereof. The Respondent herein claimed that he was injured while at the Appellant's Steel Mills Factory and blamed the Appellant for not providing him with safety gadgets. The Appellant has denied the same and maintains that the Respondent was not even on duty on the 15/08/2011 since the biometric attendance register as well as first aid register did not contain his names. I have perused the biometric attendance register and note the same has some alteration with a pen. Indeed the Appellants witness Muhia Ndungu (DW.1) admitted to the alterations for several workers. Some entries indicated times the workers clocked in while others did not clock. There are areas indicated that a certain worker was absent. Others showed some signatures while others had no signatures despite the biometric register indicating a worker had clocked. There was therefore some discrepancies which the Appellant's witness admitted. Another evidence of proof of presence of workers was the first aid register. Such a register was produced and did not contain the names of the Respondent. The treatment sheet filled and issued by Athi River Medical Clinic was confirmed by the Appellant implying that the Respondent had sustained injuries on the 15/08/2011. The Appellant conducted its own investigations and confirmed the same. The Appellant contends that if injuries were sustained by the Respondent then they were obtained elsewhere and not at the Appellants premises. The Respondent claimed that the Appellant's nurse was absent on the date in question and he was forced to seek medication elsewhere at his own cost as he was then feeling a lot of pain. The Appellant did not endeavour to call any of its medical officers to testify and further the Appellant's witness did confirm that indeed the nurse had not been on duty that day. The Appellant's view was that even if the nurse was absent the Respondent should have agreed to be assisted by the Appellant's authorized officers to an outside facility at the cost of the Appellant but not to do so himself. The Respondent has stated that he was then experiencing excruciating pain and decided to take himself to the hospital and paid the charges from his own pocket. This then could explain the reason why the biometric attendance register was not signed by the Respondent at the end of his shift. I am therefore convinced that the Respondent had been on duty at the Appellant's premises on the 15/08/2011. As noted hereinabove, the Appellant was under obligation to ensure compliance with the Provisions of Section 6(1) of the Occupational Safety and Health Act namely to ensure the safety, health and welfare at work of all persons working in its Steel Mills Factory. The Respondent has stated that the rolling machine had malfunctioned and though repairs were later effected one of the hot pieces of metal rolled out and fell on his left foot injuring him. The Respondent stated that he had not been provided with safety gear by the Appellant. Indeed the Appellant did not avail the safety or protective equipment register to show that the Respondent had been issued with any. It is my finding that the Appellant had breached its duty of care towards the Respondent and that the Respondent had gotten injures as a result. I must however point out it was also incumbent upon the Respondent to exercise due care and diligence to himself. He was expected to know that the work entailed risks and expected to be alert at all times. I am sure the Respondent had been inducted appropriately on the job and that was not the first time he entered the Appellants premises. Hence he must also bear some blame for the accident and I hereby apportion liability as between the Appellant and Respondent in the ratio of 80% to 20% respectively. Hence the first ground of Appeal partly succeeds.

11. On the issue of quantum of damages, it is trite law that the Appellate Court will only interfere with quantum of damages where the trial court either took into account an irrelevant factor or left out a relevant factor, or where the award was too high or too low as to amount to an erroneous estimate or where the assessment is not based on any evidence (see **KEMFERO AFRICA LTD T/A MERU EXPRESS & ANOTHER =VS= A. M. LUBIA AND ANOTHER [1982- 88] IKAR 727, BUTT =VS= KHAN [1982 – 88]KAR 5**).

12. As has already found out that the trial Magistrate erred by not taking into account the relevant factor of the Respondent's liability. As regards special damages the sum of Kshs.1,550/= was specifically proved by the production of receipts and the same was therefore proved at Kshs.1,550/=.

13. On the prayer for general damages the trial Magistrate awarded Kshs.180,000/= for pain and

suffering. The Appellant maintains that it is on the higher side and wants this court to interfere with the same. Appellant's counsel proposes the sum of Kshs.60,000/= whereas counsel for the Respondent submits that the figure be left untouched and if possible be increased and court to take note that awards for such injuries ranged between Kshs.150,000/= Kshs.200,000/=.

14. The Appellant's Counsel had cited before the trial court the case of **CHANNAN AGRICULTURAL CONTRACTORS LIMITED =VS= FRED BARAZA MUTAYI – KAKAMEGA HCCA 29 OF 2012** whereas counsel for the Respondent had cited the case of **DEVKI STEEL MILLS =VS= JOSEPH MUTUA – NBI HCCA 658 OF 2002.**

15. It seems both learned counsels still rely on the said authorities in this Appeal. In the authority of **CHANNAN AGRICULTURAL CONTRACTORS LIMITED =VS= FRED BARASA MUTAYI, KAKAMEGA HCCA NO. 29 OF 2012,** the Respondent therein who had sustained blunt injury to the chest, cut wound to the head and left leg was awarded Kshs.150,000/= less 10% contributory negligence. In the other case of **DEVKI STEEL MILLS =VS= JOSEPH MUTUA – NBI HCCA 658 OF 2002,** a Respondent who sustained burns on sole right foot, burns on abdominal wall, left wrist and bruises on cheek was awarded Kshs.150,000/=. The Respondent herein was examined by Dr. Loiposha who noted burns and cut wound on left leg and noted that he had fully recovered. The Respondent's injuries are comparable to those of the Plaintiffs in the cited cases. It is also noted that the cases were decided several years ago and the incidence of inflation on the economy has to be considered. In the premises I find the award of Kshs.180,000/= by the learned trial Magistrate was not inordinately high. She had not taken into account irrelevant factors and thus the estimate arrived by her was not at all erroneous. I do find that the sum of Kshs. 180,000/= is a reasonable award for general damages. Hence the Appellant's ground of Appeal on quantum fails.

16. In the result the Appellant's Appeal partly succeeds. The Judgment of the trial court is hereby set aside and substituted with an award of Kshs.145,240/= to the Respondent which has been computed as follows:-

(a) General damages for pain & suffering.....Kshs.180,000.00

(b) Special damagesKshs. 1,550.00

Kshs. 182,550.00

(c) Less 20% contribution.....Kshs. 36,310.00

Total.....Kshs.145,240.00

17. As the Appeal has partly succeeded the Appellant shall have half costs of the Appeal while the Respondent shall have full costs of the suit in the lower court.

It is so ordered.

Dated, signed and delivered in court at Machakos this **11TH** day of **MAY** 2017.

D. K. KEMEI

JUDGE

In the presence of:

Muumbi for Applicant

Langalanga for Respondent

C/A: Kituva.....