REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 11 OF 2013

SINOHYDRO CORPORATION LTD.....….APPELLANT

VERSUS

BOAZ OCHOLA…….……...…….RESPONDENT

(Being an Appeal from the Judgment of the Resident Magistrate Hon. P.Wechuli in NyandoPMCC NO.100 of 2012 delivered on 17th January 2013)

JUDGMENT

Boaz Ocholasued*(hereinafter referred to as respondent)* sued **Sinohydro Corporation Ltd *(hereinafter referred to as appellant)*** in the lower court claiming damages for injuries allegedly suffered on 6th December 2010 while the respondent was lawfully working for the appellant.

The defendant/appellant filed a statement of Defence and denied the claim and urged the court to dismiss it with costs.

In a judgment delivered on**17th January 2013,**the learned trial Magistratefound that the appellant had proved his case on a balance of probability, apportioned liability at 100% in favor of the respondent as against the appellant, and awarded the respondent general damages in the sum ofKshs. 60,000/- .

The Appeal

The Appellant being dissatisfied with the lower court's decision preferred this appeal and filed the Memorandum of Appeal dated 13th August 2014 which set out 4 grounds of appeal to wit:-

1. The Learned Magistrate erred in law and in fact in quantifying the damages for injuries that were not proved by the plaintiff/respondent

2. The Learned Magistrate failed to appreciate the fact that the plaintiff having pleaded injury to the left hand was incapable of proving injury by way of medical report indicating injury to the right four fingers and by way of oral testimony indicating injury to the head.

3. The Learned Magistrate failed critically analyze all the documentary evidence that were produced *vis-a vis*the pleadings thereby making an erroneous decision on quantum of damages

4. The Learned Magistrate's finding was erroneous and unconscionable and the one incapable of being supported by material on record.

SUBMISSIONS BY THE PARTIES

When the appeal came up for mention on 28.3.17; the parties' advocates agreed to canvass it by way of written submission which the appellant's counsel dutifully filed.

Appellant's submissions

It was submitted for the appellant that the respondent did not prove that he suffered the injuries pleaded in the plaint and further that did not proof the causal link between the appellant's negligence and the injury.

Respondent's submissions

The respondent's counsel did not file submissions.

The evidence

I have perused the entire record of appeal and considered the submissions by the appellant. I note that the appeal revolves around quantum which I shall consider as hereunder.

This being the first appeal, it is my duty under section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of **Selle v Associated Motor Boat Co. Ltd (1968) EA** 123 cited by the appellant where Sir Clement De Lestang (V.P) stated that:

> ***"An appeal to this Court from a trial by the High Court is by way of retrial and the principles uponwhich this Court acts in such an appeal are well settled. Briefly put they are that this Court mustreconsider the evidence, evaluate it itself and draw its own conclusions though it should alwaysbear in mind that it has neither seen nor heard the witnesses and should make due allowance inthis respect. In particular this Court is not bound necessarily to follow the trial judge's findingsof fact if it appears either that he has clearly failed on some point to take account of particularcircumstances or probabilities materially to estimate the evidence or if the impression based onthe demeanor of a witness is inconsistent with the evidence in the case generally''.***

In a plaint dated 21.3.12 and filed on22.3.12; the respondent pleaded at paragraph 8 that he suffered:

> **Soft tissue injuries to the right four fingers**

In his evidence in chief and in cross-cross-examination; the respondent maintained that he was injured on the fingers of the left hand. He blamed the appellant's carpenter for dropping the shutter on him. The treatment note issued by the appellant PEXH. 1 shows that the respondent was injured on the left hand fingers. Dr. Omuyoma's report dated 28.2.12 and produced as PEXH. 2 (a) shows that the doctor observed that plaintiff suffered soft tissue injuries to the right four fingers and had bruises and pain on the said fingers.

Analysis and Determination

I have perused the entire record of appeal and considered the submissions by counsels for both parties. It is not disputed that the respondent was an employee of the appellant and he was injured at his work place. The issue in question is whether the injuries suffered by the respondent are supported by the evidence on record.

The appellant submitted on the issue of causation and cited Section 107 and 108 of the Evidence Act which places a duty on whoever alleges to prove. The appellant cited ***StatpackIndustries v James MbithiMunyao [2005]***eKLR where the court rendered itself on the issue of causation as follows:

> ***"Coming now to the more important issue of "causation", it is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily a result of someone's negligence. An injury per se is not sufficient to hold someone liable for the same".***

A reading of the memorandum of appeal clearly shows that the appellant does not challenge the trial magistrate's finding on liability. I shall therefore not belabor on that point.

Regarding the injuries suffered by the respondent; the learned trial magistrate rendered himself as follows:

> ***"I have seen the medical documentation evidencing that the plaintiff suffered soft tissue injuries to the fingers in the nature of bruises."***

I have considered the case of ***Dakianga Distributors (K) Ltd v Kenya Seed Company Limited [2015] eKLR*** cited by the appellant which reiterates the principle that parties are bound by their pleadings. The initial treatment note issued by the appellant PEXH. 1 corroborates the respondent's evidence that he was injured on the fingers of the left hand. The fact that Dr. Omuyoma stated that the respondent had injuries on fingers of the right hand may possibly have been an error and it is not fatal to the respondent's case. I therefore find that respondent's evidence supports the pleadings.

The question that arises is whether I should now interfere with the lower court's award. The principles upon which this court should proceed are those stated in the case of **KEMFRO AFRICA LIMITED t/a MERU EXPRESS SERVICE, GATHOGO KANINI VS A. M. M. LUBIA & ANOTHER. [1998]eKLR**.

> ***"…. 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."***

The same principle was reinstated in ***Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5***where the Court of Appeal in held:-

> ***An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low ….***

General damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards as the Court of Appeal observed in ***Simon Taveta v Mercy MutituNjeru Civil Appeal 26 of 2013 [2014] eKLR***thus:

> "***The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past".***

The appellant suffered soft tissue injuries to fingers of left hand. The respondent proposed a sum of Kshs. 150,000/- and cited ***MKS HCCC 42 OF 1995 Abednego Kyalo v EliudKioko&Anor*** **in which the plaintiff was awarded** Kshs. 100,000/- for multiple soft tissue injuries bruises over the head, left shoulder, nose, upper lip , below the chin and left knee.The injuries healed with cosmetic significance.

Appellant offered Kshs. 50,000/- and cited ***Peche Foods Factory v JacktoneOchiengOnyango[2011] eKLR*** in which the court in dismissing the appeal assessed proposed damages at Kshs. 50,000/- for a deep

cut on the left hand specifically the mid and proximal phalanx of the 2nd left hand finger.

The authority cited by the respondent relates to more serious injuries than then ones suffered by the respondent in this case. The case cited by the appellant has injuries comparable to the ones suffered by the respondent.

I have reviewed the entire record of trial and the judgment passed regarding the assessment of damages and I find no error that would invite this courts interference with the discretion as exercised. I find no merit in the grounds of appeal impugning assessed damages.

In the end and for the reasons given on the assessment above, the appeal is dismissed in it's entirely. The respondent did not defend the appeal. Appellant shall therefore bear its costs of this appeal

DATED AND DELIVERED THIS 15TH DAY OF JUNE 2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Clerk FELIX

Appellant Mr. Maganga

Respondent N/A