



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 50 OF 2007

ADOLF LOVELACE GEORGE T/A SULLIVAN AND COMPANY 1971.....APPELLANT

VERSUS

PETER MWAU MULWA.....RESPONDENT

(Appeal from the original judgment and decree of Hon. E.C Cherono (SRM) in Milimani Commercial Courts, CMCC No. 8869 of 2002, delivered on 17th January, 2007)

JUDGEMENT

1. The Respondent, **Peter Mwau Mulwa**, sued, **Adolf Lovelace George Sullivan t/a Sullivan & Company 1971, the Appellant**, seeking, for workman's compensation following injuries he suffered on 20th May, 2002 when he was electrocuted by a defective electrical appliance at the appellant's premises while undertaking his duties. As a result he suffered electrical burn wound on the left hand, specifically on the middle, index and ring fingers and left lower back soft tissue. The claim is based on an employers' breach of common law contractual duties towards his employee which led to the injuries suffered by the employee while in the course of duty. The dispute was heard by the trial magistrate who found the appellant 100% liable and awarded the respondent a global award of kshs 181,500/= as damages.

2. The Appellant, aggrieved by the Trial Court's decision, filed this appeal on the following grounds:

1. *The Learned Magistrate erred in law and in fact by holding that the appellant was 100% liable for the accident;*
2. *The Learned Magistrate erred in law and in fact by holding that the respondent was in permanent employment;*
3. *The Learned Magistrate erred in law and in fact by making an excessive award on general damages given the injuries sustained by the respondent;*
4. *The Learned Magistrate erred in law and in fact by failing to consider the appellant's defence and evidence;*

3. This being the first appeal, this court is bound to re-evaluate the evidence tendered before the trial court and arrive at an independent conclusion but also taking into account the fact that it did not have the advantage of hearing and observing the demeanour of the witnesses. In **Peters v. Sunday Post Limited (1958) EA at Pg. 424**, it was held interalia as follows:

"It is a strong thing that for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which

should be exercised with caution: It is not enough that the appellate court might itself have come to a different conclusion."

3. The respondent's case was that, on 20th May, 2002, he was at work at the appellant's premises, where he worked as a welder. He stated that on that day, a Mr. George who worked for the defendant instructed him to climb a lorry where he used the welding machine that was on the ground. He claimed, that George passed to him the welding rod, goggles and hammer and when the welding machine was switched on, the earth wire threw him at distance. He testified that he was taken to hospital and was treated and he was latter treated by Doctor **Moses Kinuthia**, who prepared a report of his treatments of injuries that included, injury on the 3 fingers and shoulder. He added that, during the course of his work, he was not given hand gloves or a helmet for his safety.

4. The appellant's case was presented by its managing director who testified that he did not know the respondent as he did not employ the plaintiff. He stated that he had employed someone who dealt with casual employment in the company. He averred that he was not informed of any accident that had occurred that day and added that, the company had supervisors who issued protective materials to the staff. The appellant also called its supervisor, **Anthony Gachanja** who testified as DW2. He stated that he knew the respondent since he had assigned him welding duties where he was to weld a trailer. He asserted that they agreed on a pay of kshs 200/= per day and he issued the respondent with protective gear that included gloves, helmet and an eye shield. He further claimed that the respondent failed to put on the gloves and denied claims that he was electrocuted. He averred that the respondent touched the rod using bare hands.

5. DW3, **Jane Bridge Letitica** the third appellant's witness, testified that she was an accountant in the appellant's company and paid the respondent a total of kshs 200/= per day. She stated that the accident was reported to her and she arranged for respondent to be treated.

6. I have re-evaluated the evidence as adduced in the lower court and I have considered the submissions of the parties as filed in this court.

7. Having set out the background of this appeal I now wish to consider the merits or otherwise of this appeal. I will first address the first and fourth grounds of appeal where the appellant claims that the Magistrate erred in apportioning 100% liability against the appellant and failing to take into consideration the defence and evidence. The appellant submitted on this grounds to the effect that the respondent claimed he had 20 years experience and the magistrate wrongly held the appellant 100% liable for lack of training. It further submitted that, the respondent's supervisor produced all the protective clothing that was given to the respondent in court. The respondent on the other hand submitted that, the appellant failed to observe section 99(1)(b) of the Occupational Safety and Health Act, that requires the supervisor to have thorough knowledge and experience of the machine or process since DW2 did not have experience in electricals and that the respondent was not being supervised as required .

8. I have perused the lower court record, it is apparent that DW2, produced in court the protective gear that is supplied to their employees. The protective gear included the gloves and helmet that the respondent claims he was not given. The appellant also claimed that the respondent was not electrocuted as he claimed and instead, that he used the welding machine without putting on the necessary protective gear. DW2 further alleged that, the respondents after being injured, jumped off the trailer that he was welding and could not have been electrocuted. The respondent on the other hand claimed that he was not given gloves and helmet that could have saved him from the electrocution that was caused by earth wire. Other than his testimony he, did not adduce any other evidence that could have shed more light on the circumstances that surrounded his injuries. He however, produced the doctors report, which report the doctor stated that he suffered electrical burn wounds on the left ring, middle and index fingers. It is possible that the respondent was given the protective gear but he failed to put it on. It is also possible that he was not given the gear at all. It is also likely that the respondent was electrocuted given the doctors report. I note that the respondent claimed that he had 20 years experience in welding, I expect that he knew his way round the machine and would have been more cautious. Had he put on the gloves, if at all they were supplied to him, he would have avoided the electrocution. in the circumstances therefore,

taking into consideration both parties evidence as adduced in the trial court, I am convinced that the trial magistrate did not consider the evidence as adduced by the appellant in totality. I am inclined therefore to agree with appellant that liability should have been apportioned at 50:50%.

9. In the second ground of appeal, the appellant has complained that learned magistrate erred in holding that the respondent was in permanent employment. I have read the Magistrates judgement, indeed he stated that " *DW2's testimony that the plaintiff was employed on 25.5.2002 as a casual labourer cannot be true. If indeed the plaintiff was employed as a casual labourer on the fateful day, what documents did the defendant receive from the plaintiff for it to believe that he was well trained as a welder?*" Indeed enough evidence was adduced to the effect that he was actually a casual labourer. The appellant called witnesses to prove that he was casual labourer and it was upto the respondent if at all he claimed otherwise to adduce evidence to that effect. Onus of proof lay squarely on the respondent. The magistrate erred in shifting the burden of proof.

10. Having said that I now move to the third ground of appeal where the appellant claims that the Magistrate erred in law and in fact by making an excessive award on general damages given the injuries sustained by the respondent. The magistrate in awarding damages awarded a global sum of kshs 181,500/= after taking into consideration the authorities presented by the parties. I have looked at the medical report by **Doctor Kinuthia** which was adduced during trial. The doctor listed the injuries suffered as: electrical burn wound on the left ring, middle and index fingers and left lower back soft tissue injuries. He stated that the respondent complained of pain in the left ring, middle and index fingers and painful lower back. The appellant referred to the case of **Devki Steel Mills Limited vs Joseph Mutua Mulwa [2004] eKLR**, where the court awarded kshs 150,000/= for damages and the case of **Eldoret Steel Mills Limited vs Moengata Obino Josephat [2014] eKLR** where the Court made an award of kshs 76,500/=.

11. The respondent on the other hand submitted that the injuries he sustained would require prolonged medication and he would be unable to engage in meaningful employment as concluded by the Doctor. He therefore argued that the sum awarded was fair and just. He relied on the case of **Kanderbox Jan Mohmed vs Bamburi Portland Cement Company Limited HCC No. 32 of 1993** Mombasa where the plaintiff suffered burns on his right hand, thumb, palm and wrist and was awarded kshs 280,000/=. I have taken the authorities cited into consideration and bearing in mind that assessment of damages is a matter of discretion which this court can only interfere with if decision was wrong or was based on a wrong principle or it was manifestly excessive or inadequate. Taking the case of **Devki Steel Mills Limited vs supra**, cited by the appellant, the court upon assessing the injuries suffered by the plaintiff that included burns on the sole of his right foot, interior abdominal wall and left wrist and bruises on the cheek upon electrocution was awarded kshs 150,000/= for damages. The other case cited by the respondent **Kanderbox Jan Mohmed vs Bamburi Portland Cement Company Limited supra**, where the plaintiff who suffered injuries on his right hand thumb, ring finger, little palm and wrist and was awarded Kshs 280,000/=. If I was to consider the authorities cited by the parties, I am of the view that the sum of kshs. 181,500/= awarded by the trial magistrate was appropriate.

12. In the end, I hereby set aside the trial court's decision on liability order that each party shoulders 50% liability. I further uphold the sum of kshs 181,500/= awarded for general damages by the trial court. Consequently the respondent shall have 50% of the above figure. The above sum shall attract interest at court rates from the date hereof till payment in full. The respondent shall also have the costs of the appeal and suit.

Dated and delivered in open court this 3rd day of March, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondent