REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL APPEAL NO. 26 OF 2015

APPELLATE SECTION

ISINYA ROSES LIMITED……...……...APPELLANT

Versus

ZAKAYO NYONGESA…...…….……RESPONDENT

(Being an appeal from judgement delivered on 20.3.2013 by Hon. M.A. Ochieng (Mrs) at Kajiado in SRMCC No. 57 of 2012)

JUDGEMENT

This is an appeal by the defendant in the lower court SRMCC No. 57 of 2012 hereinafter referred as the appellant against the decision of the Senior Resident Magistrate Court made on 20.3.2015 on a work injury claim.

The brief facts are that the respondent herein alleged to have been employed by the appellant where he was engaged in work assigned to him by the appellant in their premises according to terms of the contract of employment. The respondent claimed that on or about 5/1/2012 while in lawful course of employment with the appellant he sustained physical injuries occasioned by negligence on the part of the appellant. The respondent in his plaint had sought general and special damages plus cost against the appellant.

The appellant in his defence had denied the claim by the respondent on negligence and particulars of existence of an employment contract with the appellant. The appellant therefore averred that the respondent was not injured while in employment and therefore no general or special damages are payable as claimed in the plaint.

The learned trial magistrate after hearing the evidence by the respondent and both counsels having admitted the medical report by Dr. Kinuthia and a corresponding receipts for Ksh.3000/= for the expenses incurred by the respondent proceeded to deliver judgement. From the record the appellant adduced no evidence at the trial.

The learned trial magistrate considered the evidence and having observed the witness decided in her judgement as follows:

> **"(a) Liability – the respondent to bear 15%:85% for the applicant.**
>
> **(b) General damages for pain and suffering Ksh.180,000/=**
>
> **(c) Special damages Ksh.3000/=**

Total quantum Ksh.183,000/= less 15% contribution

Net due and payable to the respondent Ksh.155,550/= plus costs of the suit."

The appellant was aggrieved by the decision of the trial court on both liability and quantum filed a memorandum of appeal dated 22.2.2013 relying on the following grounds:

(1) The learned trial magistrate erred in fact and law in the way she weighed the evidence before the court to determine the issues of quantum and liability.

(2) The learned trial magistrate erred in fact and law by apportioning liability in the ratio of 85%:15% with the plaintiff bearing 15%. The plaintiff had not produced any documents in support of his claim (other than a medical report which had been produced by consent).

(3) The learned trial magistrate erred in law and in fact by awarding a manifestly excessive quantum of Ksh.180,000/= as general damages for minor soft tissue injuries.

(4) The learned trial magistrate erred in law and fact by failing to substantially and adequately consider the appellant's submissions.

As a consequence the appellant prayed for the appeal be allowed and the orders by the learned trial magistrate granted on 23/3/2013 be set aside. The appeal was canvassed before this court by way of written submissions.

The Appellant's Counsel Submissions:

Mr. Mbigi submitted that the respondent at the trial failed to adduce evidence to establish negligence or breach of duty on the part of the appellant. The learned appellant's counsel further contended that what the record reveals is respondent's injured while carrying boxes on the stairs. However, no evidence was adduced to demonstrate the particulars of negligence or breach of duty against the appellant to bring the claim under the purview of compensation.

The learned appellant's counsel further submitted that besides the medical report admitted by counsel there was no other evidence to prove negligence to warrant the trial court to apportion liability at 85%:15%. He relied on the cases of ***Florence Rebecca Kakune v Coastline Bus Safaris & Another [1990] eKLR, Kiema Mutengu v Kenya Cargo Handling Services Ltd KAR [1991] 2258*** for the proposition that a court cannot infer negligence where non-exists, and secondly that there can be no liability without fault.

On quantum learned counsel for the appellant contended failure to prove negligence on the part of the respondent did not entitle him to any damages be it general or special. He further argued that the finding by the trial magistrate on quantum was erroneous in law and fact. The learned counsel further submitted that the trial magistrate had no basis to award general damages of Ksh.180,000/= to respondent. It was counsel's contention that if liability could have been established, the respondent claim fell under the category of compensation for Ksh.30,000/=. He referred the court to the case of ***Sokoro Saw Mills Ltd v Grace Nduta Ndungu [2003] eKLR***, where the court awarded Ksh.30,000/= for soft tissue injuries. Learned counsel prayed for allowing of the appeal.

The Respondent's Submissions:

Mr. Maina submitted that respondent was an employee of the appellant when the accident occurred and injuries sustained. Mr. Maina reiterated the evidence at the trial on the issue of employment and subsequent accident on 5/1/2012 by the respondent. Mr. Maina further argued that the appellant owed the respondent a duty of care failure to which liability would be inferred against the appellant.

According to Mr. Maina submission's this was a case respondent testified on oath on how the accident

occurred blaming the appellant. In that situation the appellant was under a duty to call evidence to controvert the testimony by the respondent which did not happen in the case before this court.

At any rate Mr. Maina further submitted that at the trial the medical report and discharge summary notes was admitted by consent as conclusive proof on the nature of injuries sustained. That prima facie evidence was not challenged by the appellant by insisting for the maker of the documents to be called as a witness. In support of the proposition the respondent proved negligence and breach of statutory duty. Mr. Maina placed reliance on the following cases; ***Timsales Ltd v Moses Mburu [2008] eKLR, Oluoch Eric Gogo v Universal Corporation Ltd*** citing the case of ***Boniface Muthama v Carton Manufactures Ltd Civil Appeal No. 670 of 2003 [2015] eKLR, Embu Public Road Services Ltd v Riimi [1968] EA, Mumias Sugar Co. Ltd v Charles Namatit Civil Appeal No. 151 of 1987***.

Mr. Maina submitted that the authorities cited buttress the following legal principles:

> ***First proposition, the relationship between the appellant and the respondent as employer and employee creates a duty of care. Second proposition, where the accident gave arise to the inference of negligence then the defendant, in order to escape liability has to show there was a probable cause of the accident which does not connote negligence. Third proposition, being an employer is required by law to provide safe working conditions of work in the factory.***

Mr. Maina further faulted the submissions by learned counsel for the appellant on quantum. His argument was that award of damages is a discretionary function of trial court which an appellate court cannot interfere with unless it has been shown there was an error, or misdirection in law and fact on the part of the trial magistrate.

Mr. Maina supported the finding and decision of the trial magistrate on both liability and quantum. He challenged the appellant contention that there exist grounds to interfere with the award of damages ordered by the trial magistrate. Mr. Maina contended that no evidence or legal principle has been placed before this court to fault the judgement of the trial court.

Analysis and Resolution:

This being a first appellate court, I am duty bound to re-evaluate and scrutinize the totality of the evidence on record in order to draw my own conclusions. The legal principles on how to discharge that have been set out herein below in the settled case of ***Selfe v Associated Motor Boat Co. Ltd [1968] EA***. The court held thus:

> **"An appeal to this court from 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 it's own conclusion, though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance to this respect in particular this court is not bound necessarily 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 inconsistence with the evidence in the case generally."**

As a first appellate court this task of weighing conflicting evidence and to draw own conclusions must be carried out diligently in both law and fact bearing in mind that I did not see nor heard the witnesses.

I have considered the memorandum of appeal and the submissions of both counsels. I have also considered the authorities referred to by each counsel to support their legal propositions in the matter. This court has further read and evaluated the record and evidence adduced thereto by the appellant.

The gist of this appeal is on two sets of issues on findings made by the learned trial magistrate deduced as follows:

(1) (a)Liability – whether the evidence given by the respondent shows the probable cause of the accident was due to negligence and breach of duty of the appellant.

(b)If the answer to the above is in the affirmative whether contributory negligence was proved on a balance of probabilities.

(2) Quantum – whether the trial magistrate award of Ksh.180,000/= merited the claim by the respondent.

I first commence to deal with the issue on liability. The action before me is grounded on negligence on employer's duty at common law to take all reasonable steps to ensure the employees safety.

What is the Law?

Section 107 and 108 of the Evidence Act provides that:

"Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove those facts exist."

Under this section it places an obligation to the party to show when called upon that there is sufficient evidence to raise an issue as to existence or non-existence of a fact in issue.

The burden of proof in civil cases is on the balance of probabilities. In civil cases the action is commenced by way of a plaint, which averments must disclose a cause of action together with any annextures, statements as to form part of it, that upon any assumption either express or implied allegations of facts in it are true.

It is therefore trite that the burden of proof is on the claimant who must satisfy on a balance of probabilities; that the claim is based on statutory breach of duty and acts of negligence. How that duty is to be discharged and what are the key elements is crystal clear in the following case law and texts; ***Hallsburys Laws of England 4th Edition Pg 662***.

"The burden of proof in an action for damages for negligence rests primarily on the plaintiff who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal connection must be established."

In ***Clerk and Lindsell*** on ***Torts 18th Edition pg 600*** paragraph 4. The legal scholarly works outlined the essentials on an action for breach of statutory duty as:

"(1) The claimant must show that the damage he suffered falls within the ambit of the statute mainly that it was of the type that the legislation was intended to prevent and that the claimant belonged to the category of persons that the statute was intended to protect. It is not sufficiently simply that the loss could not have occurred if the defendant had complied with the terms of the statute.

This rule performs a function similar to that remoteness of damages.

(2) It must be proved that the statutory duty was breached. The standard of liability varies considerably with the wording of the statute, ranging from liability in negligence to strict liability.

(3) As with other torts, the claimant must prove that the breach of statutory duty caused his loss, which he will fail to do if the damage caused would have occurred in any event.

(4) Finally there is the question whether there are any defences available to the action."

The relevant Act in this case being the ***Occupational Safety and Health Act Cap 514 and the Factories Act***. In ***M (A Minor) v Amullenga & Another [2001] KLR*** the court held thus:

> **"In order to succeed in an action for negligence the plaintiff must prove:**
>
> **(a) That the defendant owes the plaintiff a legal duty.**
>
> **(b) That the defendant was in breach of that duty.**
>
> **(c) That as a result of the breach of that duty the plaintiff suffered damage."**

In ***Van Daventer v Workmen's Compensation Commissioner [1962] 4 SA G Boshof J*** held as follows:

> **"An employer owes a common law duty to a workman to take reasonable care for his safety. The question arises in each particular case as to what reasonable care is required. This is a question of fact and depends upon the circumstances in each particular case. A master is in the first place under a duty to see that his servants do not suffer through his personal negligence, such as failure to provide a proper and safe system of working and a failure to provide proper and suitable plant.**
>
> **If he knows or ought to have known of such failure, he is not bound to give personal superintendence to the conduct of his workings and there are so many in which it is in the interest of the workman that the employer should not personally undertake such superintendence. He may for instance be not sufficiently qualified to do so. In that event the master would be liable for the negligence of persons so acting on his behalf. If a servant is employed on work of a dangerous character, the employer is bound to take all reasonable precautions for the workman's safety. This may entail provision of a proper and safe system of work……"**

Wilson Clyde Coal Co. Ltd v English [1937] 3 All E.R 68. What the authorities elucidate in the doctrine of duty of care can be summarized as follows:

> **"(i) Is there a relationship of proximity between the parties?**
>
> **(ii) Was the injury to the claimant foreseable?**
>
> **(iii) Is it fair, just and reasonable to impose a duty?"**

In applying the above legal principles to the evidence, the following facts emerge; that respondent was a servant of the appellant. On the 5/1/2012 he was on duty at the appellant premises working on tasks assigned to him of packaging flowers. The premises of the appellant consist interalia; a staircase with a piece of metal. On his way back the metal fell on the respondent.

On cross-examination that piece of evidence on safe and proper system of the plant was not challenged. There was need for the appellant to exercise due care and vigilance by executing a maintenance work to ensure personnel are not injured at work.

In his statement dated 5/6/2012 one **DAVID ODEKE WASIKE** on behalf of the appellant had stated that respondent fell down suddenly. As a result of the fall, he sustained injuries to the right hand, wrist and concussion. It is evident from the statement that the respondent was an employee of the appellant's company. The learned magistrate did not doubt the credibility of the respondent that there existed master servant relationship between them.

According to the claimant (respondent), the case against the appellant was failure to take adequate precautions for his safety while engaged at work. Secondly, the appellant the failure to provide safety gear and equipment knowing that without them he was exposed to risk of injury. Thirdly, failure to take adequate measures to ensure that the place where respondent carried his work was safe. Fourth, failure to maintain safe and proper system of work.

It is worthy noting that the obligations by the employer, (appellant) herein was to provide safe premises or safe machinery and tools is anchored on the principle of reasonableness so what can be said to define the phrase reasonableness.

The criteria reasonable person and reasonableness found its way in scholarly works of ***JC Van Derwalt & JR midgrey***, *on principles of* ***delict 3rd edition at pg. 121,*** remarks as follows on the concept of reasonable person, and such person attributes:

> **"The criterion of the reasonable person is the embodiment of an external and objective standard of care. The qualities, experience, idiosyncrasies and judgment of the particular actor are in principle not relevant in determining the qualities of the reasonable person. The law requires adherence to a generally uniform and objective degree of care. The reasonable person is the legal personification of the ideal standard to which everyone is required to confirm such a person represents an embodiment of all the qualities which are require of a good citizen.**
>
> **The concept denotes a person exercising those qualities which society require of its members for the protection of their interests. The reasonable person is therefore the legal personification of the ideal standards of care which the community desires its members to exercise in their daily actions and contact……..**
>
> **The particular attributes or qualities of this mystical figure have an important bearing upon whether harm was foreseable and whether or not steps have been taken to prevent harm."**

What the authorities tells us is that an employer has a duty of care towards the employees by providing safe environment of work and protective gear. However, the employer's duty of care does not include baby sitting or overseeing them constantly.

In execution of their tasks what is expected from the employer is to reasonably take steps in respect to that duty of care to lessor injury or danger to the employees.

From the evidence by the respondent it can be inferred that the measures which the appellant took were insufficient to ensure a safe working environment existed.

I agree with the respondent's counsel that in view of the evidence at the trial against the appellant, he was under a duty to lead evidence on his part to connote that negligence was not the probable cause of the accident. I further agree with the respondent's counsel that appellant rebutted no evidence that the alleged accident occurred due to the circumstances not within their control. The respondent having placed statutory breach of duty and negligence together with the evidence placed the appellant to answer to the claim to controvert the same.

In my view, looking at the evidence of the respondent and material on record the trial court could not have come to find that appellant was liable. The only question linked with liability in this case is whether respondent contributed to the failure of statutory breach or acts of negligence. In reappraising the record, the trial magistrate exercised discretion and apportioned liability at 15%:18% in favour of the respondent. On appeal the learned counsel for the appellant submitted that the finding was not based on evidence. The respondent's counsel did not submit on the issue specifically.

Before I delve into this issue being as an appellate court I am guided by the principles in Court of Appeal case of ***Nkube v Nyamiro [1983] 403***. The court stated as follows:

> **"A Court of Appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."**

The law of contribution negligence as I understand it on the part of the plaintiff/applicant herein in this case is a partial defence to an action for breach of statutory duty. In the persuasive case in ***Caxwell v Powell Duffryn Collieries Ltd [1940] AC 152 – 178*** ***Lord Wright*** laid down the authoritative guidance in the case of workmen that I find useful arising from the facts of this appeal it was held interalia:

> **"Due regard to the actual conditions under which men work in a factory or mine, to the long hours and the fatigue, to the slackening of detention which naturally comes from constant repetition of the same operation, to the noise and confusion in which the man works, to his pre-occupation in what he is doing at the lost perhaps of some inattention to his own safety."**

In the case of ***Stakeley Iron and Chemicals Co. Ltd v Jones [1956] AC 627*** ***Lord Tucker*** observed in Factory Act cases:

> **"The purpose of imposing the absolute obligation is to protect the workmen against those very acts of inattention which are sometimes relied upon as constituting contributory negligence so that too strict a standard would defeat the object of the statute."**

It must be remembered that the burden of proof in all this case is on the plaintiff to prove his or her case on a balance of probabilities that the breach of duty materially occasioned his or her injury. Secondly that in causation and blameworthy, he did not contribute to any of the omission or negligence.

What I can deduce from the above principles, the respondent has a duty to provide a system which should minimize the danger of a workman's own foreseeable carelessness. There should be also compliance with safety precautions within the working environment set up by an employer.

I have perused the record by the trial court. The only testimony is that of the respondent. He gave an account on occurrence of the accident and how he was treated for the injuries on the same day at Isinya Health Centre. On examination he was found to have suffered semi-concussion and head injury.

The testimony by the respondent is consistent on what transpired. It was the basis of respondent's evidence that the trial magistrate made a finding on liability. The respondent adduced evidence on oath that he was injured while working for the appellant. The learned trial magistrate believed his testimony in support of his case on the material day at the appellant's premises.

In establishing the existence of employment relationship the principle applicable is not common law. That averment shifted the burden to the appellant to disapprove respondent's assertion that he was not their employee.

The appellant's submission on this issue is at variance with the statement of facts filed in court by one **DAVID WASIKE** on 5/6/2012. The statement of facts which is part of the record does not dispute respondent was an employee. I disagree with the appellant's counsel that respondent was required to prove a fact not in dispute. The appellant despite filing the witness statement of **DAVID WASIKE** opted not to call him at the trial. The witness statement was no retracted or disowned on the facts of employment contract with the respondent.

On contributory negligence before the learned trial magistrate apportioned at a ratio of 15% for the respondent and 85% for the appellant she was bound to consider the evidence. There is only one version how the accident occurred. The appellant called no witness to counter the testimony of the respondent. There is no material either at submissions or from the record which reasonably an inference of contributory negligence could be apportioned.

I am of the holding that the decision on this issue was made without any evidence or legal proposition to

warrant such a finding. Why was the degree of contributory negligence equated at a higher ratio to the appellant as against the respondent? The reading of the entire record reveals no iota of evidence to the finding.

In absence of evidence from either the appellant or respondent how contributory negligence was arrived at, I am of the view that it is not sustainable in law. On this ground under the principle of misdirection in law as laid in ***Nkube (Supra case)***, I set aside the decision on contributory negligence. I do substitute it with 100% liability as against the appellant for the accident which occurred on 5/1/2012.

I now turn to the issue on quantum. The respondent was awarded Ksh.183,000/= less 15% contributory negligence with a total net award of Ksh.155,150/= plus costs and interest.

The plaintiff adduced evidence on the circumstances of the accident who injury sustained. He was seen by Dr. Kinuthia. The evidence used to prove general damages was the medical report by Dr. Kinuthia, treatment notes from Isinya Health Centre. These documents were admitted by consent of both parties as evidence on 24/10/2012 without calling the maker. It is trite that a consent order has contractual effect and can only be set aside on grounds which would justify setting aside a contract, or if certain conditions remain to be fulfilled which are not carried out.

I am guided by the principle in the case of ***Hirani v Kassim [1952] EACA 131.*** *In* ***Section*** *on* ***Judgments and Orders 7th edition Volume I pg. 124*** it stated as follows:

> **"Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them."**

Mr. Mbigi submitted that the admission of the documents by consent was to facilitate expeditious delivery and adjudication of cases. I am happy that he anchored that proposition in law. The same law also prohibits the appellant's counsel to set aside the consent whimsically. This court cannot interfere with the order unless there is evidence of mistake, error or fraud proved as against the parties.

The principles upon which this court will interfere with the award of damages are well settled in the case of ***Buttler v Buttler CA 49 of 1983.*** The court held as follows:

> **"An appellate court cannot interfere with an award on damages by a lower court unless it has shown:**
>
> **(1) That the court acted on wrong principles.**
>
> **(2) That the court has awarded so excessive or so little damages that no reasonable court would allow it to stand.**
>
> **(3) That the court has taken into consideration matters he ought not have considered, or not taken into consideration, matters he ought not to have considered, and the result arrived at a wrong decision."**

The Court of Appeal in ***Robert Msioki Kitavi v Coastal Bottles Limited [1985] 1KAR 891*** *at* ***895*** further held:

> **"The Court of Appeal in Kenya, then should as its forerunners did, only disturb an award of damages when the trial judge has taken into account a factor he ought not to have taken into account or failed to take into account something he ought to have taken into account or the award is so high or so low that it amounts to an erroneous estimate."**

See ***Singh v Singh & Handa [1955] EACA 125*****.** The respondent in this case suffered blunt trauma to the volar aspect right wrist joint. There were no fractures. The learned trial magistrate in her judgement took into account the prognosis that the injuries have further predisposed respondent to post traumatic

osteoarithesis of the right shoulder and wrist joint.

I have considered the submissions by both counsels regarding this issue. The respondent suffered harm at the age of 23 years. The medical examination is clear that no fractures were involved except for tenderness of the volar right wrist joint. This report was prepared by Dr. Kinuthia on 18/2/2012.

The appellant's counsel submitted that the award of general damages was manifestly excessive based on soft issue injuries suffered by the respondent. The respondent's counsel submitted that the award by the trial court was reasonable and the same should be upheld.

In the submissions by the appellant a proposal of Ksh.40,000/= was made as the appropriate as compensation in favour of the respondent. I have considered the said authorities and the evidence of the respondent including the medical opinion relied upon by the learned trial magistrate on appeal. The appellant has not established that the learned trial magistrate took into account wrong principles in assessing damages.

I bear in mind that award of damages by the trial court is a discretionary function underpinned under legal guiding principles and case law. Taking into account the injuries, the long term effect envisaged by Dr. Kinuthia in his medical report and the inflationary trends affecting the value of money. There is no error of principle to interfere with discretion of the learned trial magistrate. I find the award of Ksh.155,000/= was reasonable in the circumstances for pain and suffering.

DECISION

Consequently, I allow this appeal in the following terms:

(1) That the appeal on liability succeeds and contributory negligence of 85%:15% by the trial court set aside and substituted with liability of 100% to be borne by the appellant in this appeal.

(2) The judgement of the lower court in so far as it relates to assessment of damages is hereby affirmed to Ksh.155,000/=

(3) The appellant to meet the costs of this appeal.

(4) The interest on damages to abide the lower court decree.

Dated, delivered in open court at Kajiado on 7th day of October, 2016.

……..

R. NYAKUNDI

JUDGE

Representation:

The advocates were notified through their mails. They have not attended. The judgement marked as read and be send to their respective mails. Deputy Registrar do follow up acknowledgement.

Mr. Mateli Court Assistant.