



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NUMBER 500 OF 2009

BRASS & ALLIED WORKS LIMITED. APPELLANT

VERSUS

PHILIP KIOKO MUTUA. RESPONDENT

J U D G M E N T

The Appellant was an employer of the Respondent until 18th November, 2005 when in the course of his employment, and at work, he crushed his right middle finger, thus getting a serious injury. The Respondent filed a claim against the Appellant seeking compensatory damages for pain and suffering.

The suit went into a hearing during which the Respondent called two witnesses, while the Appellant called one witness who all testified. The trial Magistrate entered judgment for the Respondent/Plaintiff for Ksh.245,700/- after hearing the suit and making a finding that the plaintiff and defendant each bore some blame. The Defendant appealed to this court, raising several grounds both on facts and law.

I have perused the record of evidence carefully. The Plaintiff/Respondent testified that he had worked for the defendant for sometime as a fitter of timber and metal. That he got injured as he fitted a broken hand rail. He was using some force without knowing that the hand-rail had been earlier welded in two spots, which made it give way unexpectedly by curving in. That the work he was doing at the time was regular and normal, only he did not know the earlier welded weak spots. He also testified that the Defendant as an employer, did not warn him before hand of the weakness of the hand-rail steel bar. He also testified that he was not provided with protective gloves or clothing which could have minimized the injury or its impact.

The Plaintiff's witness Dr. Cyprianus Okoth Okere, also testified. He confirmed that the Plaintiff sustained a crushed right middle finger injury and had a deep-cut to the middle finger which carried a foreign body in it and that the injury was of a permanent nature, leaving permanent incapacity.

The court has examined the plaint filed by the Plaintiff in the lower court and confirms that it contained details and particulars of injury intended to be proved by him in paragraph 5 thereof.

On the other hand, the Defendant called a witness who confirmed that the Plaintiff was an employee of the Appellant as at the time of injury and that he indeed suffered the injuries sustained by him on the material date. He did not assert otherwise nor negate the fact that the Plaintiff had not been issued with protective clothing as required by the relevant statutory provisions.

The major complaint raised by the Appellant was that the Plaintiff failed to prove his claim on the balance of probabilities and in particular failed to adduce sufficient evidence to prove the damages awarded by the lower trial court.

I have carefully considered the many and repeated grounds of appeal by the Appellant. I am aware that this court's duty in this first appeal, includes the duty to assess and re-evaluate the evidence before the lower court upon which the judgment was based, bearing in mind that this court has neither seen nor heard the witnesses and should, therefore, make allowances for the same. I am also aware that this court must be sure that the findings of fact made by the learned trial magistrate are based properly on the evidence before that lower court and can only be disturbed if that court acted on wrong principles to reach its conclusions.

There is in my view, clear and sufficient evidence, that the Plaintiff was an employee of the Defendant as a steel fitter. At the material time, he was reconstructing a stair case. He was normally forcing a steel pipe into alignment when it unexpectedly gave way during the course of his regular job. He gave sufficient evidence to prove that he had not been warned that the steel pipe or bar he was working on, had been joined by welding in two places which made it risky if the Plaintiff laid his weight on it.

In my view, the Plaintiff by his evidence showed that he was injured by the negligent omission of the Defendant who, apart from not warning him of the weakness of the steel pipe, failed also to supply him with gloves or other protective clothing which could have minimized the extent of the injury that he eventually sustained.

Furthermore, I am persuaded that the Defendant had statutory obligation and also common law duty to supply the relevant protective clothing. Its failure to supply the same invoked the breach of duty of care and provided a casual connection between the parties as concerned the injuries sustained by the Plaintiff. The company knowing its obligation under a statutory or common law duty of care to supply protective clothing and/or to warn the Plaintiff of the potential risk, also failed to discharge the same.

In the above circumstances the court reached the conclusion that the breach of duty of care on the part of the Defendant/Appellant, was the cause of the accident that led to the injuries sustained by the Plaintiff. The lower court and here now this court, accordingly holds the Appellant responsible and liable. The lower court thought that some responsibility and liability of up to 30%, lay on the Plaintiff for failure to exercise personal care. This court finds that sharing of liability is reasonable and, upholds it.

On the issue of damages, this court can only interfere with the lower court findings if the award was either based on a wrong principle or in was inordinately high or low a to be wholly erroneous in estimate (See **Memfro Limited T/A Meru Express Services Vs Lubia and Another [1987] KLR 30**). This court finds no misdirection in the trial court's findings in which it hereby upholds.

The result therefore, is that this appeal has no merit, and is hereby dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi this 9th day of June, 2014.

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JUDGE