REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Civil Appeal 70 of 2010

KENYA MARINE CONTACTORS (EPZ) LTD.....APPELLANT

VERSUS

MBITI MWINGA.....RESPONDENT

Coram:
Mwera, J.
Nanji for Appellant
N/A for Respondent

R U L I N G

The record of this appeal was filed in court on 11th May, 2011. The appeal itself arose from the lower court judgment delivered on 16th March, 2010 following trial of a claim for damages. It was pleaded in the plaint that on 9th January, 2007 when the plaintiff/respondent was working atop a scaffolding while on duty as detailed by the defendant/appellant, a plank of timber broke occasioning the respondent to fall. He sustained a fracture of two ribs as well as some soft tissue injury. The respondent claimed that all that came to be on account of the negligence of the appellant's servant/agent.

A defence was filed denying the claim and in turn accusing the respondent of being wholly or partially negligent himself. After trial the learned trial magistrate awarded Shs. 350,000/= for general damages and Shs. 3,000/= special damages.

The appeal was laid out in eleven grounds principally against the finding that the appellant was guilty of negligence and therefore liable. The defect in the plank of timber was not known to the agents of the appellant. Apportioning only 10% liability to the respondent was in error. That the learned trial magistrate did not well appreciate the evidence adduced on behalf of the appellant or the submissions put forward.

As for the fracture of the ribs it was contended that there was no evidence duly adduced. Accordingly, the sum awarded for general damages was considered unwarranted and thus inordinately high and is proportionate to the damage/injury sustained. Essentially this appeal is about liability and the quantum of general damages.

Directed to submit, Mr. Nanji began with the quantum of damages as related to the kind of injuries claimed to have been sustained. Counsel focused on the medical reports/evidence of Dr. Ajoni Adede and Dr. Hussein on the fracture of the 7th and 8th ribs. That Dr. Hussein examined the respondent on the same

day of the accident, 9th January, 2007 and on 11th January, 2007 and appeared to be in doubt whether there was injury to the two ribs on the left side. Dr. Hussein then referred the respondent to Dr. Umara who issued an x-ray report. Dr. Umara of Mewa Medical Centre made reference to a line in the left anterior 3rd rib, but concluded that the chest x-ray was a normal one.

Another x-ray report dated 25th January, 2007 from Aga Khan Hospital Mombasa was also referred to. That it was therein stated that no obvious rib fracture was noted and the chest x-ray was normal. And that Dr. Hussein's last report of 6th February, 2007 stated that the respondent was suffering from *"S.T.I. chest wall only"*. Learned trial magistrate ought to have found that there was no fracture of the ribs at all.

Turning to Dr. Adede's evidence, Mr. Nanji submitted that this doctor did not see the x-ray reports referred to above and the respondent himself had testified that the hospitals he visited had reported that his chest was normal. Accordingly, it was concluded, there was no basis to find that ribs were fractured.

Further, the court was referred to another x-ray report (Exhibit P7) from Dr. A. M. Salyani. That report was said to be suspicious and so not reliable because the respondent had testified that the x-ray was *"taken elsewhere and report prepared elsewhere"*. It was added that this x-ray was taken on 17th January, 2007; it showed fractures of the two ribs while the x-ray taken on 11th January, 2007 (Mewa) and on 25th January, 2007 (Aga Khan) revealed no fractures. That report's authenticity was thus discounted. All put together, Mr. Nanji concluded, demonstrated that the respondent never sustained rib injuries in the subject accident. His was a blunt object to the chest and no more.

Finally, on the award, the court was told that if no rib injury was suffered, a sum of Shs. 60,000/= to 70,000/= would do while a sum between 120,000 – 150,000/= would be reasonable if the court concluded that the respondent suffered rib fracture.

On the question of liability, Mr. Nanji recited from the learned trial magistrate's judgment that he had stated that the respondent had nothing to do with ensuring that the wooden plank he stood on was not safe. That the learned trial magistrate stated that that was the duty of the appellant. Then turning to the evidence of the respondent, he had told the learned trial magistrate that the scaffolding looked alright and that it had been in use for a week without problem; it had been checked on the morning of the material day. Accordingly, the learned trial magistrate should not have attributed the accident to the negligence of the appellant or its breach of contractual duty. The plank broke due to the latent defect which the appellant's agent could not know of. However, in the event the finding of liability held, then the respondent should have been apportioned a higher ratio of the same. He had done the same work from that position since 2005 and so his contribution should have been as much as 40% - not the 10% as apportioned.

There was no submission from M/S Kipsang Murugi Mugo & Company Advocates despite the fact that Ms. Kipsang knew of the date to submit initially on 21st June, 2012, which was pushed back to 22nd June, 2012 and was duly notified. But be that as it may, perusal of the lower court record, the appeal and the submission from the appellant will do.

Beginning with liability, for this is what leads to the quantum of damages, this court finds as the learned trial magistrate did that it was incumbent on the appellant to ensure that equipment, safe and in good working condition was provided to its workers, like the respondent, to work without apprehension or accident. The scaffolding in question here was said to have been used by the respondent before and he had experience in working in such conditions. It is even in evidence that, to the respondent, the scaffolding looked alright and it had even been inspected on the morning of the accident. But that is all that an accident is about – a happening without being anticipated or planned. The appellant's agent inspected the equipment to satisfy himself that it was safe to be used. That inspection meant that the appellant's staff knew that the scaffolding could also be unsafe. But that when it was in use, it gave way. The respondent fell and was injured. Not that he was jumping and playing with it or doing such acts as were inconsistent with his duties from atop a scaffolding. The appellant had a duty to ensure that the scaffolding was safe all the time. If it failed for a reason known or unknown, it was a question of the thing

speaking for itself and here it did – the fall. Thus, the appellant was liable. The learned trial magistrate apportioned the liability but without assigning the basis of that in the circumstances. This court sees no reason for that apportionment and lays all at the feet of the appellant.

The more vexing point in this appeal is the level of injuries and the award. In the plaint, it was pleaded that the respondent's injuries were:

(a) Soft tissue injury with tenderness to the chest muscle and lung tissue;

(b) Fracture of the 7th and 8th ribs.

Focus here was been on the fracture of the two ribs – apparently, the more serious of the injuries. Of course, the more serious the injury, the higher award it draws in damages.

While addressing the issue of quantum, the learned trial magistrate delivered himself:

"On quantum, the plaintiff suffered blunt object injury to the chest and fractures of the 7th and 8th ribs. He healed but suffers paid on the side. The doctor plaintiff witness one (PW 1) says that he suffers permanent partial disability because the point at which union of the bones formed will be a weak point to the rest of the plaintiff's life.

No contrary evidence was presented to counteract the doctor's opinion. I accept it."

In his evidence Dr. Ajoni Adede (PW 1) told the learned trial magistrate that he examined the respondent on 6th February, 2007 – about a month from the date of the accident – 9th January, 2007. PW 1 perused the treatment notes from Coast General Hospital, saw some x-rays and concluded that the respondent suffered permanent partial disability of the 7th and 8th ribs. The doctor expected union of this injured ribs but could foresee a weak point at the fracture point. PW 1 did not see Dr. Umara's x-ray report of 11th January, 2007 – two days after the accident at the time of his report. But shown to the witness during the cross-examination he noted that it did not mention the two ribs which had been stated in the treatment notes and other x-rays. PW 1's own report was Exhibit P1.

The respondent (PW 2) said that after the fall he visited Mewa Hospital, Coast General Hospital (C.G.H.), Likoni Dispensary and Aga Khan Hospital. He told the learned trial magistrate that at Coast General Hospital:

"….it was found that I had been injured inside. My ribs were broken."

While at Mewa he was told that he was injured on the chest but there were no fractures. The respondent produced the relevant reports. He did not see the x-rays from Mewa and Aga Khan. The respondent still felt pain and he did not know whether the bones united completely.

The Mewa report was made by Dr. Umara on 11th January, 2007 (Exhibit P5). What was termed radio lucent line was noted in the mid part of left anterior 3rd rib. There was a question mark on that observation, though. But there was no reference to 7th and 8th ribs. Notes from Dr. Hussein giving the respondent off duty were exhibited. He was not a witness in the lower court. The notes referred to: **"SFI chest? Rib#"** Nobody seemed to decipher this to the learned trial magistrate. In the note of 6th February, 2007 it stated **"S.F.I. chest wall."** And in the x-ray request from Aga Khan Hospital dated 25th January, 2007, it was noted, *inter alia*,

"No obvious rib fracture is noted. Normal chest."

However, Dr. A. M. Salyani in his x-ray report of 21st January, 2007 (Exhibit P7) said of the ribs:

"(L) ribs 7th, 8th fractured on anterior, near axilla. 7th rib has multiple fractures."

And it is this report (Exhibit 7) of which the respondent said that he was x-rayed elsewhere and the report made else-where. And although in what looked like treatment notes, it was not said by who, a note read:

"….7th and 8th left ribs ….. as per x-ray taken on 27th January, 2007,"

Not much else featured there. And the x-ray report of 27th January, 2007 is Exhibit P7 (above) whose source and preparation, was shrouded in doubts.

On this court's own evaluation of the sets of medical reports and evidence recorded – some speaking of broken ribs others of no obvious rib fracture and normal chest (Aga Khan, Mewa) or even reference to 3rd rib (Mewa), the end result should be that there was no conclusive evidence that the respondent suffered rib fractures. Blunt object injury to the chest, yes, but none else.

The rib injury with permanent disability no doubt persuaded the learned trial magistrate to give general damages award of Shs. 350,000/=. But this court having found that there was no conclusive medical evidence to support such an injury, that award should be disturbed. And it is disturbed to the extent that it is set aside and substituted with one Shs. 70,000/= for the blunt object chest injuries the respondent sustained.

The appeal is allowed with costs.

Delivered on 3rd July, 2012.

J. W. MWERA

JUDGE