



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Appeal 66 of 1995

RIVATEX LIMITED APPELLANT/DEFENDANT

-Verse-

PHILIP MOCHACHE NYABAYO RESPONDENT/PLAINTIFF

JUDGEMENT

The respondent herein sued the appellant in the lower court seeking damages for injuries sustained in an accident while in the cause of his employment with the appellant which accident was due to negligence particularized and attributed to the appellant or other employees and which negligence was in breach of an implied term of contract of employment whereby the appellant undertook to provide a safe system of work. In consequence thereof the respondent suffered damage and loss for which he seeks both Special and general damages as pleaded.

The appellant filed a defence to that claim averring that it was a term of the said contract or that it was the duty of the plaintiff/respondent to take all necessary and reasonable precautions for his own safety while engaged to the said work, not to expose himself, to any risk of damage or injury which he knew or ought to have known and to handle any machine or tool with care and attention, they denied allegation of negligence and breach of contract attributed to them, that the said accident was wholly caused or substantially contributed to by the plaintiff and gave particulars of negligence relied upon by them. In consequence thereof they prayed for the suite to be dismissed with costs;

The case was heard interparties and the lower court ruled in favour of the respondent/plaintiff whereby he was awarded Kshs.180, 000/= as general damages for pain and suffering plus special damages of Kshs.720/= plus costs and interest.

Being aggrieved with that order the appellant has appealed to this court citing 3 grounds of appeal in the supplementary memo of appeal namely that the learned trial magistrate erred in law and fact in not appreciating the fact that the injury suffered by the respondent was modest and that the respondent had fully recovered there from and his award of damages of Kshs.300,000/= was inappropriate, that the award of Kshs.300,000/= made was grossly high and unjustified, that it has resulted in the miscarriage of justice and the same ought to be reviewed, the learned trial magistrate erred in not taking into account the sum paid to the respondent under Workmen's Compensation Act which sum is deductible from any award made for general damages;

In his submissions in court counsel for The appellant reiterated the grounds of appeal and stressed the

following points:-

1. That they appeal against quantum only. The respondent suffered only one injury supported by the medical document which injuries did not deserve an award of Kshs.300,000/= before contribution and it merits interference.

2 That this court has power to interfere in the case of an excessive award and in his opinion an award of Kshs.50-60,000/= before contribution would have been appropriate as shown by the awards in the cited authorities which injuries were in fact more serious and had more side effects than those sustained by the respondent herein

3 They appreciate that the court is entitled to take into account the issue of inflation but even if that were to be considered an appropriate award would have been not more than Kshsa80,000/. In the circumstances of this case when all the relevant factors are taken into consideration that decision was on the high side and the same should be interfered with.

4 That it was wrong for the court not to take into consideration the award made under the Workmen's Compensation Act which this court should take into consideration and seduce the final award after taking into consideration the award under Workmen's Compensation.

Counsel for the respondent opposed the appeal on the grounds that the respondent suffered serious injuries, he was in hospital for 7 days and he had a plaster for two and a half months that he, limps, does not walk properly and cannot put on heavy shoes.

This court cannot interfere with the award as it has not been shown that there has been an erroneous estimate considering the nature of the injuries sustained; It is their stand that the court did not misdirect itself and that it followed the correct principles on the basis of the authority relied upon by the court.

3. That payment under Workmen's Compensation was exgratia and it should not be taken into consideration.

4; That the court to re-examine the issue of liability which he feels that it should not have been apportioned.

In reply counsel for the appellant stated that:-

1. There is no cross appeal and so the question of re-examining the issue of liability does not arise;

2 That the respondent talked of one injury only and he is bound by his own evidence and they still maintain that the award made by the lower court is inordinately high and the same should be upset.

This being an appeal the duty of this court is to re-evaluate the conclusions reached by the lower court on quantum and determine whether the same is to stand or not. As submitted by the, appellant's counsel the appellant appealed against quantum only and if the respondent wished to contest liability he should have cross appealed. As of now this court will confine itself to the issues of quantum only.

The lower court assessed the evidence before it and apportioned liability at 60% as against the defendant and 40% as against the respondent. On the basis of the injuries assessed gave an award of Kshs.300/000/= less contribution bringing it down to Kshs.180, 000/= which award the appellant seeks to upset. The principles to be applied are well known and they are that an appellate court can only interfere with an award of damages if:-

1. The same is inordinately high or too low.

2. It is based on wrong principles^
3. It is an erroneous estimate.
4. It is not commensurate to the injuries suffered.
5. It is meant to enrich a party but not to compensate him for the injuries suffered.

Applying the above principles to the facts of this case I find that in his own evidence the respondent stated that the machine jammed and fell on his left leg. He had a fracture of the metatarsal bones. It is correctly submitted by the appellant's counsel that only one injury was mentioned. That notwithstanding the lower court had to bear in mind the medical report submit

It was produced as exhibit 2. The report notes bruises on the right leg and a fracture of the first toe metatarsal bone. As at the time of assessment the complaints were that he could not wear leather shoes due to pains on the fractured toe. He is forced to wear rubbers shoes. He cannot stand or walk well due to pains on the toe. He feels numbness at the affected toe. In his conclusion the doctor observed that he suffered pain following the injury. He is unable to stand or walk well. This has restricted his movements and his ability to perform normal duties. As at the time of trial he could not stand or walk any reasonable distance. He also complained of inability to wear shoes on the left foot. The learned trial magistrate was referred to the case of LILY BECHER BACLAY -V- KIRIMA KAMAU NAIROBI HCCC.NO.2037 OF 1988 DECIDED ON 5TH JULY 1993 where the plaintiff sustained injuries when she was run down by the defendant's motor vehicle. She sustained a direct crush injury to the left foot with associated fracture for the 3rd, 4th and 5th metatarsal bones of the left foot and crack fracture of the head, of the first metatarsal, bruising of both knees, mild concussion and injury to the spine (lumber region), she would require an operation to correct the severed foot deformities. The plaintiff now finds difficulties in walking and is unable to pursue her usual social activities such as dancing, playing tennis, skiing and long walk. General damages for pain suffering and loss of amenities assessed at Kshs.200,000/=.

The defendant's counsel referred to two authorities whose copies were not availed for the court's perusal.

I have been referred to the case of STANLEY ORMAR NYAWA -v-ALUMINIUM WORKS LIMITED MOMBASA HCCC.NO.6620 OF 1987 where the plaintiff was a labourer aged 24 years at the time of trial. He sustained a cut severed Achilles Tendon. He was admitted in hospital for one day and the tendon was sutured. The stitches were removed after one month. According to the doctor? Achilles tendon controls the movement of the foot and the ankle joint. It also balances the body as the front muscle of the foot must balance with the back muscle (Tendon).

The plaintiff's injury healed with a limping gait, he now walked with a walking stick; He feels pain in the left heel, difficulty in walking and inability to run; He had a swelling over the distal(lower) part of the left tendon; Achilles which was painful on palpation. The court awarded Kshs.150,000/= as general damages. The decision was made in 1990.

The case of KHAMIS JUMA -V~ KENYA CARGO HANDLING SERVICES LIMITED, MOMBASA HCCC.NO;140 OF 1989 DECIDED ON 4TH JANUARY 1992 where the plaintiff's age is not stated was working for the defendant as a motor mechanic. He was trapped in a manhole at the defendant's toilet where he slipped and suffered a fracture of the first metatarsal of left foot. General damages for pain suffering and loss of amenities assessed at Kshs.40,000/=.

The case of SAIDI HAMISI MADINDIMA -V- ISLAM MAGLAM MOMBASA HCCC.NO.446 OF 1984 DECIDED ON 3RD JULY 1987 where the plaintiff a turn-boy aged 25 years at the time of accident. He sustained a crush injury to the right foot with resultant loss of 2 toes, the outer lateral foot excised and the remaining toes were deformed and dislocated. He was hospitalized for about 3 months and thereafter continued treatment as an out-patient. The foot was greatly deformed, could only walk

slowly with a danger of breaking down of the wound with pain on and off for the rest of his life. The foot developed osteoarthritis. He could still work as a turn boy or any other job which did not involve walking distances or lifting heavy objects. The court awarded general damages for pain suffering and loss of amenities assessed at Kshs.120,000/=, loss of future earnings by a multiplies of 8 Kshs.43,000/=.

The case of TAWKAL BUS SERVICES LTD. -V- NYABWANA SHALI MOMBASA CIVIL APPEAL NO.25 OF 1989 where the respondent was aged 35 years at the time of accident. She sustained a crush injury to the left big toe which had to be amputated through an operation. The foot healed with natural disability to the foot including disfigurement to the respondent as a woman and difficulties in wearing shoes.

General damages for pain suffering and loss of amenities assessed at KshS.55,000/=.

From the evidence and the medical report indeed the plaintiff suffered 2 injuries one was bruises which had healed. The fracture injury still had side effects on him and had in fact altered his life styles it cannot be said that they were minor injuries when he has to walk with difficulties which factor has altered his life style as his movements are restricted and he is unable to perform his normal duties. The medical report does not say that that situation can be reversed. It means that the respondent has to live with that injury for the rest of his lifetime.

That aside a cardinal principle to be borne in mind when making an assessment of damages is that they must measure up to the injuries suffered and they should not enrich a victim but to restore them to the position they were in before the injuries were suffered.

Considering the authorities cited I find that the authorities cited by the plaintiff in the lower court had more serious injuries than those sustained by the plaintiff while those cited by the defence had relevant injuries. It is correct that the court was entitled to take into consideration an element of inflation. However, I still find that the estimate was on the high side but not too high.

As for the workmen's compensation the rule is that it must be reduced from the final award It is not ex gratia as submitted by the respondent's lawyer.

When all the relevant circumstances are taken into consideration I find that an award of Kshs.240,000/= would have been an adequate recompense for the injuries suffered taking into account the age of the authorities cited and the value of the Kenyan Shilling.

1. I therefore allow the appeal partially set aside the lower court's award and substitute thereto an award of Kshs.240,000/= for pain suffering and loss of amenities. This will be reduced by 40% which comes to Kshs.96,000/= leaving a balance of Kshs.144,000/= less Workmen's Compensation of Kshs.16,972/= which comes to Kshs.127,028/=

2. The amount will carry interest at court rates from the date of judgement in the lower court until payment in full.

3; The appellant has not substantially succeeded in the appeal and he will have 1/4 of costs. The costs to the respondent both in the lower court and on appeal will be reduced by one quarter (1/4).

4. The costs will also carry interest at court rates; those in the lower court from the date of judgement in the lower court and those on appeal from the date of judgement on appeal

Dated at Eldoret this 23rd day of June 1999.

Read and delivered at Eldoret this 5th day of October. 1999.

R. NAMBUYE, JUDGE