



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 347A OF 2002

TOM MBOYA KOMBOAPPELLANT

AND

NAIROBI FRAME INDUSTRIES.....RESPONDENT

(Appeal from the judgment and order of the High Court of Kenya at Nairobi (Ang'awa, J)

dated 19th March 2002

in

H.C.C.C. NO. 732 of 1999)

JUDGMENT OF THE COURT

This is an appeal from the judgment of the superior court (Ang'awa, J) dated 19th March 2002 in High Court Civil Case No. 732 of 1999.

The appellant, Tom Mboya Kombo (*hereinafter Tom Mboya*), was a 25 year old machine operator at the time he was involved in an accident in 1996, whilst the defendant, Nairobi Frame Industries Ltd, (*herein after "the company"*), is a limited liability company.

The plaint in the superior court filed by Tom Mboya in HCCC No. 732 of 1999 aforesaid prayed for:-

- “(a) general damages for pain and suffering, loss of blood and amenities including future loss of earnings
- (b) special damages in the sum of Kshs.164,880/=
- (c) general damages for loss of earnings capacity and future earning capacity
- (d) costs of this case
- (e) interest
- (f) any other suitable relief which the court may deem fit to grant

The relevant paragraphs of that plaint state as follows:-

“3. At all material times, the plaintiff was employed by the defendant as a Machine Operator at its premises at its (sic) Kariokor Frame Factory in Nairobi, which constituted a factory within the meaning of the Factories Act.

4. On or about the 17th day of June, 1996 at about 3.30 p.m. the plaintiff in the cause of the said employment was removing wood frame from the machine when his left hand was suddenly caught by tanner arms (rollers) and severed his left arm

5. The said accident was caused by the breach

of statutory duty on the part of the defendant, its servants and agents.

PARTICULARS OF BREACH OF STATUTORY DUTY

(a) *The said tanner machine roller (gum mixer*

rollers) were a dangerous part of the said machine and the defendant failed to fence it securely or at all, contrary to the provisions of the Factories Act.

(b) *Failing constantly to maintain and keep in*

position and fencing or guard over the said gum mixer roller machine when they were in motion or in use, as required by the Factories Act, or all.

6.

7. By reason of the said matters aforesaid, the

plaintiff sustained severe injuries and has suffered

loss and damage.

PARTICULARS OF INJURIES

(a) *Amputation of left arm*

In addition the plaintiff suffered enormous blood loss (A detailed medical report shall be adduced at the trial)

8. Prior to the incident, the plaintiff was in good health and drawing monthly earning since he lost his employment and cannot sustain himself as he was left handed and now cannot secure any employment. He has suffered permanent incapacity of 60% and the plaintiff claims damages, including loss of future earnings”.

Paragraphs 3,4 and 5 of the plaint were denied in the defence dated 19th May, 1999. Paragraph 6 thereof reads:-

“The defendant further and without prejudice to the aforesaid states that if any accident occurred, which is herein denied, the same was caused by the negligence of the plaintiff and substantially contributed to by the plaintiff”.

Despite the above pleadings, the parties nevertheless entered into a consent order on liability in the following terms:-

“18.2.2002

Court as before

Advocate for the plaintiff present K.T. Githinji for the defendant present

Advocate – I have now filed an affidavit of service. We have a consent. By consent judgment be entered against the defendant on liability at 90% and the plaintiff to bear 10%”.

The parties also recorded a consent order on special damages as follows:-

“By consent, judgment be and is hereby entered against he (*sic*) defendant on special damages in the sum of Kshs. 2,840.00

Less 10% Kshs. 284.00

Net total Kshs. 2,556.00”

The suit was heard by Ang’awa, J who delivered a judgment dated 19th March 2002. A portion of that judgment reads:-

“Further I find that there be judgment for the plaintiff as established.

In summary

1. Industrial accident
2. Male adult aged 23 years in 1996
3. Machine operator whose left forearm was caught in a machine.
4. Injuries

Amputation from the wrist forward

5. Liability agreed 90% against the defendant
10% against the plaintiff

Quatention (*sic*) General Damages

Pain, suffering and loss of amenities Kshs.200,000/=.

Special Damages

- (a) Kshs.2,840/= (agross) (*sic*)
- (b) Loss of earnings – not paid

Total Kshs. 202,840/=

20,284/=

Kshs. 172,556/=

I award costs of this suit to the plaintiff. I award special damages from the date of filing suit and general

damages from the date of this judgment.

Dated this 19th day of March 2002 at Nairobi.

M. ANG'AWA

JUDGE”

The learned Judge declined to award general damages for “loss of earning capacity and future earning capacity”.

After the judgment, Mr. Ratemo Oira learned counsel for the appellant moved the superior court by a Notice of Motion application filed on 28th August 2002, seeking two main prayers namely:-

(b) “That this Honourable Court be pleased to amend arithmetical mistake in the judgment delivered on 19th March 2002 by Hon. Lady Justice Ang’awa.

(c) That this Honourable Court be pleased to amend the arithmetical mistake in the judgment dated 19th March 2002 to read Kshs.182,566.00 instead of Kshs.172,566.00”.

The application was heard by Mr. Ransley, Commissioner of Assize (as he then was), on 3rd October, 2002. He granted “Order as prayed in prayer of the Notice of Motion of 23.8.2002 under the sub-rule. Costs to the plaintiff”.

The appellant was dissatisfied with the finding of the superior court on quantum of damages, hence this appeal, where he cited seven grounds of appeal in his Memorandum of Appeal dated 20th December, 2002. These were:-

(1) “THAT the learned Judge erred in law in fact in failing to consider the monthly earning of Kshs. 5,290 as indicated in the form L.D 104/1 issued on 30th August 1996 by the Provincial Labour Officer, Nairobi Area and signed by the respondent.

(2) THAT the learned Judge erred in law and in fact by failing to consider that the appellant was assessed permanent disability of sixty percent 60% by both Kenyatta National Hospital and Dr. M. W. Wokabi.

(3) THAT the learned Judge misdirected herself when she accepted that the appellant can do work and earn a living after the industrial accident which rendered the appellant permanent disability of sixty percent (60%).

(4) THAT the learned Judge erred in law when the court failed to examine the evident (*sic*) adduce before the court in support of the case and arrived at a wrong decision.

(5) THAT the learned Judge erred in law when the court failed to consider our submission and the cases cited of similar injuries in respect of the same matter in question thereby not giving the appellant a right award.

(6) THAT the learned Judge misdirected herself when she did not state the reasons for which she felt the appellant was not entitled to be compensated fully.

(7) THAT it is proposed to ask the court for an order that the appeal be allowed and the judgment delivered on 19th March, 2002 be set aside and this Honourable Court of Appeal increase enhance the amount awarded”.

At the hearing of the appeal before us, Mr. Ratemo Oira, learned counsel for the appellant submitted that

the trial Judge erred whilst assessing damages. That the appellant was injured whilst working in a factory. At the time he was earning Kshs.5,290/=. That though the company did not issue pay slips, the appellant signed for his salary on a piece of paper every month, as he testified in the superior court. He requested the Court to use a multiplier of 20 years, and award the appellant general damages for pain suffering and loss of amenities, amounting Kshs.400,000/=, plus costs of the suit.

Mr. Mbichi Mboroki, learned counsel for the respondent conceded that 20 years was a reasonable multiplier. However, for pain, suffering and loss of amenities, he proposed a figure of Kshs.300,000/=, as the appellant was not technically trained in the job he was doing.

In a recent decision of this Court, in JOYCE MUMBI NGUGI (Administratrix of the Estate of CELESTINE MUGI MAINGI), deceased – vs – THE CO-OPERATIVE BANK OF KENYA LTD & OTHERS CIVIL APPEAL NO. 214 OF 2004, (unreported), the Court said,

“It is now trite law that it is a very hard thing for an appellate court to interfere with the findings of fact by a trial judge particularly if such findings are based on the demeanor of witnesses as observed by the Judge and his general appreciation of the evidenced in the case. But if a trial Judge has failed to appreciate the weight or bearing of circumstances admitted or proved, then an appellate court is entitled to interfere even with his findings of fact – see for example, PETERS vs SUNDAY POST LTD [1953] EA 423”.

The Court went further to say,

“we have no difficulty at all in coming to the conclusion and, with the greatest respect to the learned trial Judge in this case, holding that he wholly failed to appreciate the weight and bearing of the fact which were not clearly in dispute”.

In the present appeal, the appellant adduced evidence of his monthly salary and explained that he used to sign for it on a piece of paper every month, but was never left with any such signed paper. That evidence was not controverted as the defendant did not call any witnesses. Further the appellant testified that he was trained on the job as a machine operator, so he was competent to operate the machine, but suffered the injuries which ended in the amputation of his left had due to the negligence of the defendant, which he pleaded and particularized in his plaint at paragraph 6. In these circumstances, we come to the conclusion, with the greatest respect to the learned Judge, that she did not fully appreciate the weight and bearing of the evidence adduced before her. We find the figure of Kshs.200,000/= awarded to the appellant by the learned Judge for pain, suffering and loss of amenities to be too low as to amount to an erroneous estimate on that head and we accordingly substitute it with the figure of Kshs.400,000/=.

As for, “loss of earning capacity and future earning capacity,” we accept the multiplier of 20 years, which was agreed by both advocates, and the monthly salary of Kshs.5,209/= as given by the applicant. Thus we calculate damages under this head as follows:

- Kshs.5,290 x 20 x 12 = Kshs.1,269,600/=

This figure must be reduced by 10%, liability attributed to the appellant by consent. This gives a figure of Kshs.126,960/=. Special damages was agreed at Kshs.182,566/=.

We therefore assess damages due to appellant as follows:-

Damages for pain, suffering

and loss of amenities less 10% Kshs. 360,000.00

Damages for earning capacity and future earnings Kshs. 126,960.00

Agreed special damages Kshs. 182,560.00

This gives a total figure of

Kshs. 669,520.00

In view of the foregoing, this appeal is hereby allowed. The judgment of the superior court, is set aside to the extent shown above. Interest on special damages is to be calculated from the date the suit was filed, i.e. 9th April, 1999, whilst interest on general damages is to be calculated from the date of judgment, both till payment in full.

Dated and delivered at Nairobi this 9th day of October, 2008.

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. O. O’KUBASU

.....

JUDGE OF APPEAL

J. ALUOCH

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR