



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

Civil Appeal 170 of 2004

JOSEPH IBRAHIM ALASAU APPELLANT

AND

STEERING SHIP CONTRACTORS 1ST RESPONDENT

BAMBURI PORTLAND CEMENT LTD. 2ND RESPONDENT

(Appeal against part of a judgment of the High Court of Kenya at Mombasa (Tutui, Comm. of Assize) dated 7th July, 2003

In

H.C.C.C. No. 67 (RD) OF 1999)

JUDGMENT OF THE COURT

This is an appeal from the judgment of the learned Commissioner of Assize (Mrs. P.M. Tutui) delivered at Mombasa on 7th July, 2003 in which the learned Commissioner dismissed the appellant’s suit with costs in the superior court.

By a plaint dated 25th March, 1999, the appellant herein, Joseph Ibrahim Alasau, sued the 1st respondent, Steering Ship Contractors, seeking special and general damages and loss of earning capacity plus costs and interest arising out of an accident. The pertinent paragraphs of that plaint were as follows:-

“1.

2.

3. *At all material times to the suit herein, the plaintiff was in the employment of the defendant on casual basis.*

4. *It was a term of the said contract of employment between the plaintiff and the defendant and/or it was the duty of the defendant to take all reasonable precautions for the safety of the plaintiff while he was engaged upon the said work, not to expose the plaintiff to a risk of damage for injury of which it knew or ought to have known to provide and maintain adequate plant, tackle and appliances to enable*

the plaintiff carry out the said work in safety, to take all reasonable measures to ensure that the place where the plaintiff carried out the said work was safe and to provide and maintain a safe and proper system of working.

5. On or about the 25th day of May, 1998, at about 5.00 a.m., the plaintiff during and in the lawful course of his employment with the defendant was removing fluorspar material from conveyer belt Number 14 at Bamburi Cement Limited's premises at Mbaraki when while he was engaged, the motor to the said conveyer belt was suddenly started by a fellow employee one BENSON NZIVO and the plaintiff's right hand was drawn into taildrum of the conveyer belt; in consequence whereof the plaintiff sustained very severe and incapacitating injuries and has suffered loss and damage."

In the same plaint the appellant set out the particulars of injuries sustained and particulars of special damages. The particulars of negligence were also set out.

The 1st respondent, through its advocates filed an Amended Statement of Defence in which it was averred:-

"1.....

2.

3. The Defendant admits the contents of paragraph 4 of the Plaintiff but avers that it was an express or implied term of the said contract that the Plaintiff was to take all reasonable precautions for his own safety while engaged in his said work and not to expose himself to a risk of damage and/or injury which he knew or ought to have known and to follow lawful instructions as given by his Supervisor and/or foreman.

4. With reference to paragraph 5 and 6 of the Plaintiff, save that an accident occurred on the date and place stated therein, the Defendant denies all other allegations made therein and specifically denies that the said accident was caused due to the alleged or any negligence on the part of the Defendant and the Plaintiff is put to strict proof thereof. Consequently, all allegations of injuries, loss and damage are denied and the Plaintiff is put to strict proof thereof.

5. The Defendant further denies all and singular the particulars of negligence and/or breach of duty set out in paragraph 6 (a) to (f) of the Plaintiff and puts the Plaintiff to strict proof thereof."

The 2nd respondent was brought in pursuant to Third Party Notice and in its defence the 2nd respondent stated inter alia :-

"1.

2. The Third Party is a stranger to the contents of paragraphs 3 and 4 of the Plaintiff and it denies the same and puts the Plaintiff to strict proof thereof.

3. Further the Third Party states that it was the duty of the Plaintiff to take all reasonable precautions for his own safely (sic) whilst he was engaged upon the said work and not to expose himself to a risk or any risk and/or injury of which he knew or ought to reasonably have known.

4. The Third Party refers to paragraph 5 of the Plaintiff and denies that an accident occurred at the date and place as alleged or at all and that the Plaintiff suffered any injuries. The Third Party specifically denies all the particulars of injuries as alleged or at all and puts the Plaintiff to strict proof thereof.

5. The Third Party in answer to paragraph 6 of the Plaintiff denies that the said accident as alleged was caused by reason of negligence on its part or on part of its authorized servants and/or agents. The Third Party specifically denies all the particulars of negligence as alleged or at all and puts the

Plaintiff to strict proof thereof

When the trial commenced before the learned Commissioner on 21st June, 2001 the appellant gave evidence to the effect that he had been engaged by the 1st respondent on casual basis earning Kshs.24 per hour and that he would work for 8 hours. On 25th May, 1998 at about 5.00 a.m. the appellant was packing fluorspar material onto the ship using a conveyor belt at belt No. 10 when the supervisor, one Benson Nzivo asked him to switch off the belt as the lower belt had stopped. The appellant then went to clean the bottom end of the belt when someone switched on the belt. It was the appellant's evidence that it was the supervisor who switched on the belt. In the process the appellant's fingers were caught which led to his hand being crushed. The appellant screamed and the machine was switched off.

In his evidence the appellant stated that he was aged 21 years and that he blamed Mr. Benson Nzivo for this accident. The appellant produced receipts in respect of the treatment charges arising from this injury.

Dr. Hermant Patel (PW1) was the Surgeon who examined the appellant. In his evidence in chief Dr. Patel testified as follows:-

"I am a surgeon. I do remember examining the Plaintiff Joseph Ibrahim Alasau on 25/6/98. The Plaintiff had been involved in an accident on 25/5/98. He had suffered crush injuries on the Right arm, Right shoulder and arm was imputated from shoulder together with shoulder blade. At the time of accident he was 21 years of age. He suffered a permanent loss of right arm at shoulder level and was a casual worker. I charged for the Report Kshs.2,000.00 and I did prepare a report and my invoice. I produce them as EX1."

Hassan Mwinyi Mohamed (PW3) testified in support of the appellant's evidence . In concluding his evidence Mohamed said:-

"It is not possible that the Plaintiff could have switched on the machine as the switch is about 14 meters away. One cannot clean machine while it is on. When we were employed, we were warned not to try to put our hands on moving parts of belt when machine is on. We were also told not to lay on the belt. The person who switches on is the same one who switches off. Mr. Nzivo is no longer working for Defendant because it was said he contributed to an accident involving another supervisor. I was present when this happened."

When the appellant closed his case the 1st respondent's counsel indicated that he did not wish to call any witness.

The learned Commissioner considered the evidence and the submissions by counsel appearing for the parties and it was her view that the appellant had failed to prove his case. Accordingly she dismissed the appellant's claim.

The learned Commissioner then proceeded to assess damages she would have awarded had the appellant succeeded on the issue of liability. Having considered various relevant authorities the learned Commissioner arrived at the following awards:-

"(a) Damages for pain and suffering and

loss of amenities - Kshs.1,300,000.00/-

(b) Loss of future earnings - Kshs. 480,000.00/-

(c) Special Damages - Kshs. 3,050.00/-

Total - Kshs.1,783,050.00/-

Since the learned Commissioner dismissed the appellant's claim he (the appellant) now comes to this Court by way of appeal citing seven grounds of appeal in his Memorandum of Appeal filed by his counsel.

When this appeal came up for hearing before us on 16th July, 2008 Mr. R.M. Tindika appeared for the appellant while the 1st respondent was represented by Mr. Nyamboye and the 2nd respondent was represented by Mr. T. M. Njeru.

In his submissions Mr. Tindika stated that there was ample evidence adduced by the appellant and his witnesses. Mr. Tindika particularly pointed out that the learned Commissioner of Assize failed to consider the evidence of Hassan Mwinyi Mohamed (PW3). He further submitted that Mr. Nzivo who was an employee of the 1st respondent was not called to testify. Mr. Tindika was of the view that there was sufficient material on which to find the 1st respondent 100% liable.

On the issue of damages Mr. Tindika submitted that the learned Commissioner proceeded on the basis that the appellant had died. For that reason Mr. Tindika submitted that the appellant should have been awarded Kshs.720,000/- instead of Kshs.480,000/- heading of loss of future earnings.

On being called upon to address the Court Mr. Nyamboye simply stated that the appeal should be dismissed with costs.

Mr. Njeru on his part stated that the appellant and his witness put blame on the 1st respondent as there was no testimony against the Third Party (the 2nd respondent).

This being a first appeal it is our duty to re-evaluate the evidence, assess it and make our own conclusions and as we do so we must remember that we have neither seen nor heard the witnesses – see **SELLE V. ASSOCIATED MOTOR BOAT COMPANY LTD [1968] E.A. 123** at p. 126 and **WILLIAMSON DIAMONDS LTD V. BROWN [1970] E.A. 1**

It is for this reason that we set out in some detail the salient portions of the evidence given in the superior court. We have considered the evidence of the appellant and his witness Hassan Mwinyi Mohamed (PW3) that it was only Nzivo, an employee of the 1st respondent, who could have switched on the machine. Nzivo could, but was not called to deny the assertion by the appellant that it was him who switched on the machine. There was, accordingly, no basis upon which the learned Commissioner could have disbelieved the evidence of the appellant and Hassan Mwinyi Mohamed. With respect to the Commissioner, the appellant proved his claim of negligence against Nzivo and since the latter was an employee of the 1st respondent, the 1st respondent was vicariously liable to the appellant. It is our view that the appellant had proved his case on the issue of liability. Hence on the issue of liability we would hold the 1st respondent 100% liable. As regards the award of damages we think that the learned Commissioner had the correct approach save for assuming that the appellant had died. The assumption is apparent from the fact that the Commissioner deducted 1/3 from the damages on this head on the basis that the appellant would have spent that sum on himself and the sum would not have been available to his estate.

In **KEMFRO AFRICA LIMITED t/a MERU EXPRESS SERVICE GATHOGO KANINI V. A.M. LUBIA AND ANOTHER [1982 – 88] 1 KAR 777** at p. 730, Kneller, J.A said:-

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See Ilango v. Manyoka [1961] EA 705 709, 713; Lukenya Ranching and Farming Co-operatives

Society Ltd v. Kavoloto [1970] EA, 414 418, 419. This Court follows the same principles.”

The foregoing was cited with approval in this Court’s recent decision in **Arrow Car Limited v. Bimomo & 2 others (2004) 2 KLR 101.**

Applying the foregoing, we find no reason why we should interfere with the learned Commissioner’s assessment of damages. We therefore confirm the damages awarded save to correct the figure of **Kshs.480,000/-** to read **720,000/-** in view of the fact that the appellant was alive and not as assumed by the learned Commissioner that he had died. There was no cross-appeal against the quantum of damages.

In view of the foregoing, this appeal is allowed, the appellant is to be awarded damages as follows:-

(a) Damages for pain and suffering and

loss of amenities - Kshs.1,300,000.00/-

(b) Loss of future earnings - Kshs. 720,000.00/-

(c) Special Damages - Kshs. 3,050.00/-

Total - Kshs.2,023,050.00/-

This figure is rather on the higher side but in view of the fact that there was no cross-appeal we have no alternative but to award the damages as stated above.

The appellant will have the costs of this appeal and the costs in the superior court.

Dated and delivered at Nairobi this 7th day of November, 2008.

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.