REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

APPEAL NO. 111 OF 2021

(Formally Nairobi HCCA No. 141 of 2018)

Before Hon. Lady Justice Maureen Onyango

INSIGHT MANAGEMENT CONSULTANTS LIMITED.....APPELLANT

VERSUS

DICKSON GWARO MANDUKU.....RESPONDENT

(*Being an Appeal from the entire Judgment and Decree of the Chief Magistrate's Court at Nairobi*

(The Honourable D. O. MBEJA (Mr.) Senior Resident Magistrate delivered on 8th March 2018 in

***CMCC No. 8641 of 2016 – Dickson Gwaro Manduku v Insight Management Consultants Limited*)**

JUDGMENT

1. The appeal herein arises from the decision on Hon. D. O. Mbeja, Senior Resident Magistrate in Milimani Chief Magistrates Civil Suit No. 8641 of 2016. In the plaint dated 24th October 2016, Respondent (the Plaintiff therein) sought general damages for pain, suffering, loss of amenities and special damages of Kshs.3,000/-. The Respondent alleged that he developed breathing difficulties and allergic asthma in 2016 while working for the Appellant.

2. He attributed the same to exposure to extreme amounts of dust and chemicals due to negligence of the Appellant whom he alleges failed to take adequate precaution for the safety of the Respondent.

3. The Appellant filed a defense denying liability as alleged and in the alterative attributed negligence to the Respondent for failing to inform the Appellant that he was allergic to dust and occupational hazards.

4. In the judgment delivered on 9th March 2019, the Learned Trial Magistrate found in favour of the Respondent and attributed liability to the Appellant at 80:20 in favour of the Respondent and awarded general damages of Kshs.1,200,000/- special damages of Kshs.3,000/-, costs and interest.

5. The Appellant was aggrieved and filed the instant appeal vide its memorandum of appeal in which it raises the following grounds of appeal –

> *(i) THAT the Learned Trial Magistrate erred in law and fact in finding the Appellant 80% liable for the injuries sustained by the Respondent whereas the Respondent failed to prove his case to the required standards on a balance of probability.*
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> *(ii) THAT the Learned Trial Magistrate erred in law and in fact in not making an award which was within limits of already decided cases of similar nature.*
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> *(iii) THAT the Learned Trial Magistrate erred in law and fact in awarding the Respondent General damages of Kshs.1,200,000/= which award is inordinately high and excessive considering the injuries sustained by the Respondent being Difficulty in breezing, wheezing, cough, allergic Asthma.*
>
> *(iv) THAT the Learned Trial Magistrate erred in law and fact in failing to consider that the injuries sustained by the Respondent*

being Difficulty in breezing, wheezing, cough, allergic Asthma, is an allergic reaction caused by factors beyond the control of the Appellant as an employer and thereby arrived at an award that is inordinately high and excessive.

(v) THAT the Learned Trial Magistrate erred in law and fact in failing to consider current and relevant authorities and Submissions both on the issues of liability and quantum Submitted by the Appellant.

(vi) THAT the Judgment of the Learned Trial Magistrate is against the law and weight of the evidence on record.

6. The Appellant seeks orders as follows –

a) The Trial Court's Judgment be reviewed in favour of the Appellant.

b) The Appeal be allowed and the Judgment and Decree in CMCC no. 5722 of 2016 be set aside.

c) Costs of the suit in the lower Court and the costs of the Appeal be awarded to the Appellant.

7. The appeal was originally filed in the Civil Division of the High Court as High Court Civil Appeal No. 141 of 2018. Directions were taken for parties to file submissions and the file transferred to this Court only for purposes of writing judgment.

Appellant's Submissions

8. On liability, the Appellant submits that there was no evidence proving that the Respondent contracted the disease at the Appellant's premises as no causal link was established. The Appellant submits that the Respondent was working elsewhere, away from its premises.

9. It is further the submission of the Appellant that the Appellant's doctor, Dr. Mwaura, confirmed that exposure to dust is not the sole cause of asthma. That asthma is also caused by other allergens such as pollen, smoke, pollutants, strong fumes, scents and cold. That the doctor could not explain how he singled out dust from the other allergens.

10. It is further the submission of the Respondent that the said doctor also confirmed that the cause of infection narrows down to one's immunity. The doctor also explained that exposure to dust is not harmful. It is exposure to harmful levels of dust that is harmful.

11. It is submitted that the Respondent did into submit evidence from an occupational health specialist, and the Respondent's evidence and medical report were insufficient to prove the Respondent's case. Further that the Respondent failed to prove exposure to harmful levels of dust.

12. It is also the submission of the Appellant that the Respondent did not notify the Appellant of his allergic condition.

13. The Appellant relied on the case of **Raiplywoods (K) Limited v Ambrose Andatt [2006] eKLR** where the Court stated that

"An employee who does not disclose his medical condition to his employer at the time when he is recruited cannot expect his employer to take any precaution to guard against the aggravation of his condition. The same principle will apply if while in employment, an employee falls sick, but fails to disclose his ailments to his employer. An employer cannot be expected to guard his employees against the unknown."

14. The Appellant also relied on the case of **Afro Spin Limited v Peter Wagumo Obiero [2005] eKLR**, where the Court held that

"Exposure to dust and cotton fluff per se cannot amount to an act of negligence or breach of statutory duty, it is exposure to injurious levels of dust or fumes or other impurities which amounts to breach of statutory duty as per Factories Act Cap 514 Laws of Kenya."

15. That the Court further held that presence of dust at a work place is an occupational hazard of the job and not proof of negligence. The Plaintiff must go a step further and prove that the high level of dust exceeded acceptable levels of dust and was injurious. Such evidence can only be provided by an occupational health specialist and not by a general practitioner.

16. That the Respondent however failed to prove that the Appellant exposed him to such high levels of dust and fluff that are unacceptable in a factory such as that of the appellant and also failed to establish that it is that exposure which caused his ailment.

17. The Appellant further relies on the case of **Capwell Industries Ltd v Nerbert Njue Njuki [2016] eKLR,** where the High Court apportioned liability in the ratio of 50% to 50% on the basis that no expert in occupational diseases had tendered evidence in Court and that plaintiff's illness was not solely as a result of the dust and chemicals from his work place but could also have been caused by other factors such as cold.

18. The Appellant urged the Court to set aside the trial Court's finding on liability and dismiss the suit on the following grounds: -

a) The Respondent failed to prove he was an employee of the Appellant;

b) The Respondent failed to prove that he had disclosed his allergic condition to the employer at the point of recruitment and the

employer failed to take remedial action.

c) The Respondent failed to discharge the burden of proving that the dust level at the Employer's premises were beyond the acceptable limits in such enterprise and therefore exposing him to such high levels of dust was what caused the sickness and not otherwise.

d) The Respondent failed to prove that the Asthmatic Condition was caused by dust and chemicals only and no other known factors such as pollen, smoke, pollutants, strong fumes, scents and cold.

19. On quantum the Appellant submitted that the law regarding General Damages was settled by the Court of Appeal in the case of **Nyambura Kigaragari v Agrippina Mary Aya (1982-1988) 1 KAR** where it was observed as follows:

"I would express firmly the opinion that awards made in this type of cases or in any other similar ones must be seen not only to be within the limits set by decided cases but also to be within what Kenya can afford. That must bear heavily upon the court. The largest application should be given to that approach. As large amounts are awarded they are passed on to members of the public, the vast majority of whom cannot just afford the burden, in the form of increased costs for insurance cover..."

20. It is further submitted that it is trite law that general damages must be awarded within reasonable bounds and compensation must be fair in line with recent authorities of comparable injuries. To buttress this position, the Appellant relies on the Court of Appeal decision in the case of **Rahima Tayah and Another v Anna Mary Kinaru [1987-88] 1 KAR 90** where it was stated:

*"I would commend to trial judges the following passage from the speech of Lord Morris of Borth-y-Gest in the case of **West (H) & Son Ltd v. Shepherd [1964] A.C. 326** at page 345:-*

"But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional."

21. The Appellant submits that the Trial Court's award of Kshs.1,200,000/- was excessive, inordinately high and erroneous estimate of the damages. It is astronomical compared to the injuries sustained by the Respondent. The award was not in line with recent authorities for comparable injuries. That the Respondent's injuries were particularized in the plaint as

a) breathing,

b) wheezing Cough,

c) Allergic asthma.

22. That an award of Kshs.100,000/- was commensurate general damages. The amount is based on comparable awards, for similar injuries, delivered around the same time the trial Court delivered its judgment.

23. The Appellant relies on the following decisions –

(a) **George Morara Masitsa v Texplast Industries Limited [2015] eKLR** where the Court awarded a claimant a sum of Kshs.100,000/= for infection such as allergies, chest pains, coughs, rhinitis and even pneumonia.

(b) **Everflora Limited v Raphael Mwenda Mugwika [2017] eKLR**, which was decided in the year 2017 the Court confirmed an award of Kshs.70,000/= to a claimant who had sustained bronchitis and chest infection from allergic exposure to fumes.

(c) **Capwell Industries Ltd v Nerbert Njue Njuki [2016] eKLR** which was decided in the year 2016 and involving more severe injuries including lung damage the Court made an award of Kshs.250,000/= to a claimant who had more severe injuries.

(d) **Kenya Paper Mills Ltd v Anthony Kimani Mbugua [2019] eKLR**, where the Court dismissed the claim because medical report did not exclude other causes of lung diseases such as pollen and assessed general damages at Kshs.250,000/- to a claimant who had severe injuries including breathing problems and bronchitis.

(e) **Primarosa Flowers Limited v Diana Mwende Kimani [2019] eKLR** where the high Court confirmed an award of Kshs.200,000.00 general damages in respect of severe respiratory infections.

Respondent's Submissions

24. The Respondent submits that his evidence to the effect that he worked for the Appellant from 2014 to 2016 as a casual in different companies where the Appellant sent him to carry out outsourced work on behalf of other companies has not been contested or controverted. That for that period he worked at Synoplast Limited packing chemicals without protective gear, that is, face masks.

25. It is the Respondent's submission that it is the employer's duty to keep and produce records under Section 10 of the Employment Act. Further, that the employer has a duty under Section 101(1) of the Occupational Safety and Health Act to provide employees who are employed in processes involving exposure to wet or any injurious or offensive substance adequate, effective and suitable protective clothing and appliances, including where necessary, suitable gloves, foot wear, goggles and head covering.

26. That under Section 6(2) of Act, the Appellant was under a duty to provide and maintain a working environment that is safe, without risk to health and adequate facilities and arrangements for employees' welfare.

27. The Respondent relies on the decision of Gichuhi, Nyarangi & Gicheru JJA in **Civil Appeal No 16 of 1989** sitting in Mombasa where the Court held as follows;

> *"It is an implied term of employment that an employer will make the conditions of employment to his employee absolutely safe and will not expose his employees to any danger to avoid any negligence but will not be responsible of the employee's own negligence in execution of such employment the employer was aware of the danger that the employee was subjected to and it failed to do what was required of it and for that reason it was negligent. Just because an employee accepts to do a job which happens to be inherently dangerous is no warrant or excuse for the employer to neglect to carry his side of the bargain and to ensure the existence of minimum reasonable measure of protection."*

28. The Respondent also relied on the case of **Makala Mailu Mumende v Nyali Golf Country Club [1991] KLR 13** where JA Nyarangi held:

> *"No employer in the position of the defendant would warrant the total continuous security of an employee engaged in the kind of work the Plaintiff was engaged in, but inherently, dangerous. An employer is expected to reasonably take steps in respect of the employment, to lessen danger or injury to the employee "it is the employer's responsibility to ensure safe working place for its employees".*

29. The Respondent submits his evidence was unchallenged and uncontroverted as the Appellant did not offer any evidence. He relies on the decision in **D.T. Dobie & Company (K) Ltd v Wanyonyi Wafula Chebukati (2014) eKLR** where the Kasango J. quoted with approval the holding by Odunga J. whilst discussing the effects of not calling evidence in the case of **Linus Nganga Kiongo & 3 others v Town Council of Kikuyu [2012] eKLR** stated thus –

> *"What are the consequences of a party failing to adduce evidence? In the case of **Motex Knitwear Limited v Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002** Lesiit J. citing the case of **Autar Singh Bahra and Another v Raju Govindji, HCCC No. 548 of 1998** stated:*
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> *"Although the Defendant has denied liability in an amended Defence and Counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st Plaintiffs case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail."*
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> *That the case of **Trust Bank Limited v Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001** where the Learned Judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged.*
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> *The case of **Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007** Ali-Aroni, J. citing the decision in **Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997***
>
> *said:*
>
> *"In this matter, apart from filing its statement of defence*
>
> *the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations ... Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence."*

30. He submits that he was examined by Dr. G. K. Mwaura who prepared a medical report provided as an exhibit. That he further produced a medical certificate from St. Mary's Mission Hospital and a medical report from Avenue Healthcare which confirmed the injuries sustained by the Respondent.

31. He submitted that the doctor opined that the injuries he suffered are grievous harm in nature and was caused by dust, pollen, smoke, scents and colds. That Dr. Njathika from Avenue Healthcare was of opinion that the Respondent should not work in an environment where he was exposed to the said hazards.

32. It is the Respondent's submission that the Appellant cannot contest the injuries sustained by the Respondent as it did not offer any evidence or opinion to the contrary.

33. On quantum of damages, the Respondent submits the Trial Magistrate did not make any error in awarding him damages and the same should be upheld. He relies on the decisions in

(a) ROSE NDUKU KINGOO -VS- CIRIO DELMONTE (K) LTD HCCC NO. 62 OF 2002 NYERI

The plaintiff sustained injuries on her respiratory system due to inhalation of toxic gases and an award of Kshs. 1,900,000/=.

(b) JOYCE MWIKALI METHO -VS- CIRIO DELMONTE (K) LTD HCCA NO.63 OF 2002 NYERI

The plaintiff sustained abdominal pain, lung injury and painful menstrual cycle. General damages for pain suffering and loss of amenities was assessed at the sum of Kshs.1,743,600/=.

Determination

34. Having considered the record, the grounds of appeal and the submission of the parties, the twin issues for determination are whether the Trial Court erred in law and in fact in finding the Respondent liable for the occupational diseases suffered by the Respondent and whether the award of general damages was so high as to warrant interference by this Court.

35. The duty of an appellate court on first appeal as in the instant suit is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the Trial Court are to stand or not and give reason either way. See **Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira an Company Advocates [2013] eKLR**.

Liability

36. The Court record reflects that the Appellant did not file any documents with its defense. The Appellant further did not file any witness statements.

37. At the hearing the Respondent called Doctor George Kungu Mwaura as PW1 and Dickson Manduku, the Respondent, as PW2. The Appellant closed its case without calling any witness but participated in the proceedings and cross examined both witnesses called by the Respondent.

38. On its part the Respondent produced treatment records for Avenue Health Centre and St. Mary's Mission Hospital, in addition to the medical report produced by PW1.

39. PW1 testified that his findings were that the Respondent's healing was incomplete, that he was still on treatment and suffered from episodes of whizzing and difficulty coughing. He testified that the condition was not curable and the Respondent must keep away from allergies.

40. The Appellant having failed to adduce any evidence, I find that the Trial Magistrate was right in making a finding that the Appellant was liable and in apportioning liability at 80:20 as he did based on the evidence on record.

41. The arguments of the Appellant that the Respondent did not call an occupational safety specialist is without merit, having failed to adduce any evidence to rebut the evidence adduced on behalf of the Respondent. It was at liberty to call such expert witness.

42. Section 6(2) of the Occupational Safety and Health Act provides as follows –

> **(2) Without prejudice to the generality of an occupier's duty under subsection (1), the duty of the occupier includes—**
>
> **(a) the provision and maintenance of plant and systems and procedures of work that are safe and without risks to health;**
>
> **(b) arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;**
>
> **(c) the provision of such information, instruction, training and supervision as is necessary to ensure the safety and health at work of every person employed**
>
> **(d) the maintenance of any workplace under the occupier's control, in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks to health;**
>
> **(e) the provision and maintenance of a working environment for every person employed that is, safe, without risks to health, and adequate as regards facilities and arrangements for the employee's welfare at work;**
>
> **(f) informing all persons employed of –**
>
> > **(i) any risks from new technologies; and**

(ii) imminent danger; and

(g) ensuring that every person employed participates in the application and review of safety and health measures.

43. Section 101 of the said Act further provides that –

101. Protective clothing and appliances

(1) Every employer shall provide and maintain for the use of employees in any workplace where employees are employed in any process involving exposure to wet or to any injurious or offensive substance, adequate, effective and suitable protective clothing and appliances, including, where necessary, suitable gloves, footwear, goggles and head coverings.

(2) The Director shall register safety consultants to assess the suitability and effectiveness of protective clothes and appliances.

44. The Appellant was thus under an obligation to provide a safe working environment for the Respondent and to provide all necessary safety gear. The Appellant did not adduce any evidence to prove that it provided the safe working environment or to rebut the averments of the Respondent that he contracted the occupational disease as a result of the appellant's failure to provide a safe working environment.

45. On quantum, I have considered the injury suffered by the Respondent being difficulty in breathing, wheezing cough and allergic asthma. I have considered comparable awards for similar injuries in the cases referred to by the Appellant and the Respondent.

46. The cases cited by the Respondent were actually in the same judgment but in respect of three consolidated suits. The injuries suffered by the employees therein were much more severe compared to those in the instant suit. Lucy Mweru Kibaki developed severe epigastria pain following which she collapsed and started vomiting. She was admitted to Central Memorial Hospital where she experienced headache, diarrhea, abdominal spasm and fullness of the abdomen. She is said to have miscarried a fifth month pregnancy after about two weeks although this was disputed. She continued bleeding and had reduced menses. She sustained peptic ulcer a disease she continues to have and it was said the ulcer may require future surgery and early menopause be a possible complication there by resulting in a lot of distress of infertility. Lucy Mweru was awarded as follows: -

(a) Special damages pleaded and

proved at Kshs.7,400

(b) General damages for pain and suffering and loses of amenities, loss of foetus and future medical costs Kshs.2,340,000

Total Kshs.2,347,400

47. With regard to the Second Plaintiff Joyce Mwikali Metho the Court found there was evidence that the Second Plaintiff suffered injuries as a result of the factory accident and as a result she ended up in hospital. Doctors agreed she suffered significant emotional disturbances and that toxic gasses can have long term effects on respiratory system. They agreed that the plaintiff's condition would require continuous medical case. In the circumstances damages were assessed for the Plaintiff against the Defendant as follows:-

(a) Special damages Kshs.3,500

(b) General Damages and loss of amenities and future medical costs Kshs.1,900,000

Total amount to be paid to the second plaintiff at 95% is therefore Kshs.1,805,000

In addition, the Defendant to pay costs of the suit to the Second Plaintiff.

48. The Third Plaintiff, Rose Nduku Kingori suffered abdominal pain, lung injury and painful menstrual cycle. Damages were assessed in favour of the Third Plaintiff against Defendant as follows;

(a) Special damages Kshs.3,600

(b) General damages for pain and suffering

and loss of amenities and future medical

costs Kshs.1,743,600

The total amount to be paid to the third Plaintiff at Kshs.95% is therefore Kshs.1,656,420

49. It is my view that the authorities cited by the Appellant are more relevant as the awards were for similar injuries as those sustained by the Respondent.

50. Taking into account the totality of the evidence available before the Learned Trial Magistrate, it is my view that the award was excessive and that this Court is justified in interfering with the same.

51. The circumstances under which an appellate court can interfere with the assessment of general damages awarded by a Trial Court were well articulated in the case of **Kemfro Africa Limited T/A Meru Express Services & Gathongo Kanini Vs A.M. Lubia & Olive Lubia (1982-88) I KAR 727 at page 730,** where Kneller J.A. stated:

> *"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 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 [1967] E.A. 705, 709, 713; Lukenya Ranching and Farming Cooperative Society Limited Vs Kalovoto [1970] E.A. 414, 418, 419****. This court follows the same principles."*

52. In my view an award of Kshs.250,000/- is more realistic in this case. I therefore make the following orders:

> **(i) The award of general damages of Kshs.1,200,000/- is set aside and in place thereof I award the Respondent general damages in the sum of Kshs.250,000/-.**
>
> **(ii) The rest of the award remains as per the judgment of the Trial Court.**
>
> **(iii) Each party to bear its costs.**

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF FEBRUARY 2022

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE