



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

APPEAL NO.51 OF 2017

MAHEE FLOWERS LIMITED.....APPELLANT

VERSUS

ALEX GITATA KIRAGU.....RESPONDENT

JUDGEMENT

1. The Appellant herein being dissatisfied with the judgment of Hon. M.K Mutegi delivered on 8th September, 2017 at Engineer Senior principal Magistrates Court under cause number SPMCC No. 164 of 2016 preferred this Appeal by way of Memorandum of Appeal dated 21st September, 2017 and filed through the firm of Nduati and Company Advocates. It comes out as follows;

- 1) That the learned trial magistrate erred in law and in fact in finding that the Appellant was fully liable for the accident.**
- 2) The trial magistrate erred in law and in fact in awarding manifestly excessive and undeserved general damages of Kshs. 200,000/.**
- 3) The learned magistrate erred in law by failing to consider the Appellant submissions in arriving at his judgment pronounced on 8th September, 2017.**
- 4) The learned Magistrate erred in law by failing to give concise statement of the case, a concise statement of evidence adduced by the parties, the points of determination and the decision thereon and the reasons of his judgment pronounced on 8th September, 2017.**

It prays for Orders That;

- a) This Appeal be allowed.**
- b) The lower court's findings on liability be set aside.**
- c) The lower court's Findings under the heading of general damages be set aside.**
- d) The assessment of the general damages done by the lower Court be set aside and the honorable court be pleased to do its own assessment.**
- e) The appellant be awarded costs of this Appeal.**
- f) Such other reliefs as this Honourable Court deems fit.**

Brief facts

2. The Respondent/claimant in the lower court case alleged that on 23rd September, 2015 while he was on duty, he was instructed to construct a Green house. While he was in the process of fitting ventilation, he slid and was hit by a metal on his right hip joint leading to dislocation of the said hip joint. He stated that he was taken by his colleagues to the company's clinic where he was given pain killers and an ointment and released to go home however on waking up the next day he was unable to walk and was taken to OL Kalou District Hospital

where an ex-ray of the said Joint was taken and the doctor confirmed that the hip joint had dislocated, he was treated and discharged and was granted 30 days' sick off to recuperate and later resumed work albeit on lighter duties. He blamed the accident on the Appellant herein who he alleges did not provide a safe environment for him leading to the accident. The Appellant on the other hand denied any liability and averred that it provided the Respondent with all safety gear and that the accident if any was caused entirely by the recklessness of the Respondent. The matter proceeded for hearing and judgment delivered for the Respondents as against the Appellant for damages of Kshs207,000/-, which the appellant was aggrieved and preferred this Appeal,

3. This appeal proceeded by way of written submissions with the Appellant filing on 27th April, 2021 while the Respondent filed on 2nd June, 2021.

Appellant's submissions.

4. The Appellant submitted that this Court being the first appellate Court is mandated to re-evaluate, re-assess and re-analyze the facts and evidence on record and then determine whether the conclusion reached by the trial court is to stand or not and give reason as was held in **Abok James Odera t/a A.J Odera and Associates –v- John Patrick Machira t/a Machira and co. advocates [2013] eKLR**.

5. It is submitted that the court in **Charles Oriwo Odeyo -v- Appollo Justus Andabwa and another [2017] eKLR** gave principles to be observed by an appellate court while assessing damages awardable in personal injury case which include; an award of damages is not meant to enrich the victim but to compensate such victim for injuries sustained, the award should be commensurate with the injuries sustained, previous awards in similar injuries sustained are mere guides and each case ought to be treated on its own, previous awards be taken into account to maintain stability of awards but factors such as inflation should be considered and the award should not be inordinately low or high.

6. Accordingly, it was submitted that the trial magistrate in its judgment did not take into account the principles above and awarded the respondent damages that were inordinately high as compared to the injuries sustained.

7. On liability, it was submitted that the trial court erred in finding the Appellant 100% liable for the accident when the Respondent failed to take any precautions to avert the said accident when he had worked as a general worker for so many years with the Respondents. The Respondent blamed the Appellant for the accident but failed to adduce any evidence to affirm the alleged negligence on the part of the Appellant. He argued further that the claim by the Respondent was not proved to the required standard. He cited the case of **Gideon K. Kemboi –v- Nyayo Tea Zone Development Corporation [2015] eKLR** where the Court held that the duty of an employer to ensure the safety of an employee is not absolute, the law requires an employer to exercise reasonable care against foreseeable risks or risks that can be avoided by reasonable care.

8. It is the Appellant's submissions that the injury suffered by the Respondent were soft tissue injuries that led to dislocation of the Left Hip joint and the Court awarded him Kshs. 200,000/- which figure is inordinately high. He cited the case of **Maji Mazuri Flowers Ltd –v- Bethwel Kiplagay Bwaley [2015] eKLR** where the claimant had sustained swollen and tender right shoulder and dislocation of the right acromio clavicular and the Court awarded him Kshs. 100,000 and in the case of **Hantex Garments EPZ Ltd –v- Haron Mwasala Mwakawa [2017] eKLR** where the plaintiff had sustained bruises, blunt trauma swelling and tenderness on the right leg and the court awarded general damages of Kshs. 100,000/-. Therefore he argued that the damages awarded to the Respondent is not commensurate to the injury suffered and the trial court did not consider similar authorities in coming up with the said damages.

9. It therefore prayed that the appeal be allowed as prayed.

Respondent's Submissions

10. The respondent on the other hand submitted that the Appellant failed to provide him with safety apparel which could have averted the said accident and argued that the Appellant did not revert his case therefore they were held 100 % liable and he equally urged this Court to find similarly in his favour.

11. On damages it was submitted that the Court relied on the case of Veronica **Mkanjala Mnyapara –v- Patrick Nyasinga Ameyia [2021] eKLR** where the plaintiff had suffered contusion to the head and the chest, bruises on both hands and legs and dislocation of the hip joint and was awarded Kshs 300,000/- and the case of **Leonard Mutua Muthama –v- John Gichibi and 3 others HCCC No. 3176 of 1987 Nairobi** where the Plaintiff was awarded Kshs. 200,000 for dislocation of hip joint and bruises to the skin.

12. Therefore, he submitted that the award is commensurate to awards given by the court to persons that sustained similar injuries as his and prayed that the Appeal be dismissed with costs.

13. I have considered the submissions and averments of the parties herein. As submitted by the appellant, this court being the court of 1st instance to consider this appeal, it must re-evaluate the evidence and submissions before the lower court appeal and make a finding on the case.

14. From the record of the lower court, the plaintiff testified that he was an employee of the respondent but was injured while on duty as he repaired a tent in the green house. He avers that he slipped and fell and was hit by a metal bar on his leg leading to dislocation of his hip joint. He produced the treatment notes as exhibit.

15. The defendant offered no evidence at the hearing at the lower court but only made their submissions asking the court to award the plaintiff 100,000/= as damages.

16. Due to the fact that the defendant offered no evidence at the lower court, my finding in the plaintiff's case remained uncontroverted. It is proved that the plaintiff suffered injury and while at work and there is no evidence that he had been supplied with protective gear or given safety instruction.

17. In determining the quantum of damages, the trial court considered the submissions before it and authorities relied upon by the parties.

18. In the case of **Leornard Mutua Muthama VS John Gichibi & 3 others HCCC No. 3176 of 1987 NRB**, Mwera J on 10/8/93 awarded 200,000/= as damage for dislocation of hip joint and bruises on the skin.

19. The injuries in the current case are similar to what was awarded above and given the issue of inflation and age and period of the injury I find the award of 200,000/= was reasonable in the circumstances.

20. I find no reason to disturb the Judgment of the lower court.

21. I find the appeal without merit and dismiss it accordingly with costs to the respondents.

Dated and delivered in open Court this **21st day of JULY, 2021.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for parties

Court Assistants – Fred and Wanyoike