



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**APPEAL NO.49 OF 2017**

**MAHEE FLOWERS LIMITED.....APPELLANT**

**VERSUS**

**PETER IRUNGU KURIA.....RESPONDENT**

**JUDGEMENT**

1. The Appellant herein being dissatisfied with the judgment of Hon. M.K Mutegi delivered on 6<sup>th</sup> September, 2017 at Engineer Senior principal Magistrates Court cause number SPMCC No. 162 of 2016 preferred this Appeal by way of Memorandum of Appeal dated 21<sup>st</sup> 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 6<sup>th</sup> 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 6<sup>TH</sup> 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 20<sup>th</sup> January, 2015 while he was on duty, he was assigned to work at the green house and while he was carrying on his duties he slide due to the wet condition of the ground and on trying to support himself with his left hand he fractured his left wrist which he still suffers great pain and therefore sued the Appellant seeking for compensation of the injured wrist. 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 recklessness of the Respondent. The matter proceeded for hearing and judgment delivered for the Respondents as against the Appellant for damages of Kshs. 227,000/-, which the appellant was aggrieved and preferred this Appeal,

3. This appeal proceeded by way of written submissions with the Appellant filing on 27<sup>th</sup> April, 2021 while the Respondent filed on 2<sup>nd</sup> 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 that 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 Respondent. Further that 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 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 was a fracture of a single wrist and the Court awarded him Kshs. 200,000/- which figure is inordinately high. He cited the case of **Isaac Mwenda –v- Mutegi Mutango [2004] ekr** where the claimant had sustained wound on scalp, fracture of tibia and fibula and a cut wound on the knee and he was awarded Kshs 100,000/ while in **Johnson Mosse Nyaundi (Suing as a minor through next friend Wilfred Wadibe Nyaundi) –v- petroleum industries limited [2014] eklr** the plaintiff who sustained bruises on the face, chest and contusions, cerebral concussions, bruises on the elbow and fracture of the right tibia and Fibula and was awarded Kshs. 180,000/ for general damages. 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 and not disturb the trial Court decision.

11. On damages it was submitted that the Court relied on the case of **Simon Mutisya Kavii –v- Simon Kigutu Mwangi [2013] eklr** where the plaintiff had suffered several bruises with a fracture and the court awarded Kshs. 200,000/- as general damages. Also that in **Risper Kazungu –v- Central furniture stores and another Civil Appeal Number 78 of 1991 Mombasa**, the Court awarded the Plaintiff Kshs. 180,000/- for Soft tissue injuries and Colles Fracture of the wrist. Therefore he submitted that the award is commensurate to awards given by the court to persons that sustained similar injuries as his.

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

13. From the record of the lower court the evidence is that the plaintiff-respondent was at work serving the appellant respondents herein. He was assigned duties at the green house. He contended that he slid due to the slippery and wet condition of the ground and as he was supporting himself with the left hand, he got injured on the wrist and suffered loss and damages.

14. The plaintiff contended that he was not provided with a safe working condition and this is what led him to fall and injure himself. The medical report produced in court showed that he respondent suffered a fracture of the left wrist joint.

15. The respondent in their evidence denied the plaintiff's case. They even denied that the plaintiff was their employee and that he suffered injury while working for them. They denied any negligence on their part.

16. They averred in the alternative that if there was any evidence, the plaintiff was the author of his own misfortune as he performed his duties recklessly and without any regard to his own safety. They aver that he exposed himself to the injury and failed to adhere to any safety regulation and instruction given by the defendant and also failed to wear any protective gear provided by the defendant.

17. From the evidence above, the plaintiff proved he was injured at work. He indicated that he was working at the irrigation area which was

water logged when he slipped. He averred that the gumboots given to him were worn out and so could not hold him.

18. The defendant never called any evidence during the hearing at the lower court. As the record stand, the plaintiff was indeed injured at work and this is corroborated by the doctor PW1 who gave evidence, during the hearing. The respondents aver that the plaintiff refused to take in safety instruction and even refused to wear protective gears.

19. The respondents did not however give any evidence to the effect that they had supplied the plaintiff with any protective gear nor they had issued him with any instructions.

20. It is therefore apparent that the plaintiff's case remained uncontroverted. The trial court reaching at the finding that the defendant was 100% liable would in the circumstances be the true position as the defendants never submitted any evidence before court.

21. As to the quantum of damages awarded, it is also apparent that the trial court based it's findings on the authorities submitted before the court as the defendant never submitted any evidence before it.

22. I find the Judgment of the lower court was arrived at in the circumstances based on correct facts of the law and I find no plausible reason to disturb it.

23. I therefore find the appeal lacks merit.

24. I dismiss this appeal with costs to the respondents.

**DATED AND DELIVERED IN OPEN COURT THIS 21<sup>ST</sup> DAY OF JULY, 2021.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

No appearance for parties

Court Assistants – Fred and Wanyoike