REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

APPEAL NO. 37 OF 2020

(Formerly Machakos HCCA No. 10 of 2018)

Before Hon. Lady Justice Maureen Onyango

TILE AND CARPET CENTRE LIMITED...APPELLANT

VERSUS

GEOFFREY KIPKORIR LANGAT...RESPONDENT

(Being an Appeal from the Judgment of the L. Kassan Senior Principal Magistrate (SPM)

delivered on the 30th day of January 2018 in CMCC No. 1143 of 2015 at Mavoko)

JUDGMENT

Background

1. This is an appeal from the decision of L. Kassan, Senior Principal Magistrate, Mavoko in CMCC No. 1143 of 2015.

2. On 16th December, 2015, Geoffrey Kipkorir Lang'at, the Respondent herein, filed a Claim seeking the following orders: -

a. Special damages Kshs.3,000/=.

b. General damages for the pain and suffering for breach of contract.

c. Costs of this suit

d. Interest on (a), (b) and (c) at Court rates.

e. Any other relief that this Honourable Court may deem fit and just to grant.

3. The Respondent's basis for filing **Mavoko PMCC No. 1143 of 2015** was that around 27th October, 2015, while in the course of employment at the Appellant's Company, a crane malfunctioned and dropped a heavy metal rod which fell on him and caused him to sustain serious injuries. He alleged that the injuries suffered were attributed to the negligence of the Appellant and/or its agents and servants.

4. The Appellant filed its defence on 24th August 2016 which majorly consisted of denials. In particular, the Appellant denied the existence of an employment relationship between it and the Respondent or that the Respondent was injured while in its employ. The Appellant also denied any negligence on its part and contended that the injury was solely attributable to the Respondent's negligence and prayed for the suit to be dismissed with costs.

5. The Respondent's case was heard on 4th October, 2017 where the Respondent called two witnesses, being, himself and Dr. Titus Ndeti Nzina who had examined him and prepared a medical report. The Respondent did not call any witnesses to testify on its behalf. However, by consent of the parties, a Medical Report of one Dr. Wambugu was admitted. Dr. Wambugu examined the Respondent at the Appellant's behest and the said report was adopted by the trial Court as evidence in support of the Appellant's defence.

6. Judgment was delivered on 30th January, 2018 wherein Judgment was entered for the Respondent as follows–

a. General damages – 1,500,000

b. Special damages; KES 3,000 for medical report and KES 8,000 for Court attendance

c. Liability at 100% against the Respondent (Tile & Carpet Centre Limited)

d. Costs to the Claimant

7. Aggrieved by the Judgment, the Appellant filed the instant appeal as **Machakos High Court Civil Appeal No. 10 of 2018** which was later transferred to this Court pursuant to the Ruling of the Kimei J. delivered on 4th February 2020. The grounds of appeal are the following –

1. The Learned Magistrate erred in law and fact in entering judgment against the Appellant and finding that the Appellant was 100% liable when considering the evidence on record and trial, the same had not been proved.

2. The Learned Magistrate erred in law and fact in failing to appreciate and find that the Respondent had not proved his case on a balance of probabilities.

3. The Learned Magistrate erred in shifting the burden of proof to the Appellant when the same was never discharged by the Respondent.

4. The Learned Magistrate erred in law and fact in reaching a conclusion that was contrary to the evidence placed before him and therefor finding the Appellant liable.

5. The Learned Magistrate erred in law and fact in failing to find the Respondent contributed to the injuries he sustained.

6. The Learned Magistrate erred in law and fact in awarding a total of KES 1,500,000 for general damages to the Respondent which was inordinately high taking into account the evidence placed before him and the judicial authorities submitted by the Appellant.

7. The Learned Magistrate erred in law and fact in awarding Doctor's Court Attendance Cost of KES 8,000 as the same was not pleaded as required in proof of special damages.

8. The Learned Magistrate erred in the assessment of damages awarded to the Respondent as the same was based on a wrong principle and the amount arrived at was inordinately high and injustice would be occasioned.

8. The Appellant sought orders that: -

a. The Appeal herein be allowed and the Judgment of the Subordinate Court be dismissed with costs.

OR IN THE ALTERNATIVE

b. The Judgment on liability be varied and reduced to the extent that this Honourable Court deems fit.

c. The Costs of this Appeal be awarded to the Appellant in any event.

9. By consent, the parties canvassed the Appeal by way of written submissions. On 24th September, 2019, the Appellant filed its written submissions dated 20th September 2019. The Respondent in opposition to the Appeal filed his written submissions dated 9th October, 2019 on 14th October, 2019.

Analysis and Determination

10. At the onset I wish to re-iterate the findings in a long list of precedents by this Court and the Court of Appeal on the role of a Court sitting on a first appeal. In the case of **Sumaria & Another v Allied Industrial Limited [2007] 2 KLR** the Court of Appeal held as follows: -

"A Court of Appeal would not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principle in reaching the finding he did".

11. Similarly, in the case of **Peters v Sunday Post Limited [1958] E.A**, the Court held as follows: -

"whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight of bearing of circumstances admitted or proved, or has plainly gone wrong, the

appellate court will not hesitate so to decide".

12. The obiter derived from the said cases is that a Court sitting on a first appeal can only interfere or reverse a decision of the trial Court if it is satisfied that the decision was not based on any evidence or it was based on a misapprehension of the evidence or was based on wrong legal principles.

13. I have carefully considered the grounds of appeal, the contents of the Record of Appeal, including the pleadings and evidence annexed thereto and parties' submissions with respect to the Appeal and find that the issues for this Court's determination are –

a. Whether the Learned Magistrate erred in law and in fact by holding that there was an employment relationship between the Appellant and the Respondent;

b. Whether the Learned Magistrate erred in law and in fact by finding the Respondent had proved his case beyond a balance of probabilities thereby finding the Appellant wholly liable and failing to find the Respondent contributed to the injuries he sustained;

c. Whether the award of KES 1,500,000 in general damages was inordinately high;

d. Whether the Learned Magistrate erred in awarding special damages in the sum of KES 8,000 for Court attendance of a Doctor;

e. Whether the orders sought by the Appellant should be granted.

14. The Appellant submitted that although the Respondent in his pleadings and during his testimony at the hearing indicated that he was an employee of the Appellant, he did not produce any proof of his employment. Further, that while the Respondent indicated he was a casual worker, which was not pleaded, he did not call any of his previous colleagues as witnesses to corroborate his evidence.

15. The Appellant relied on the case of **Nandi Tea Estates Limited v Eunice Jackson Were [2006] eKLR** where the Court reinforced the legal principle that he who alleges must prove. The Court in the said matter held that the burden of proof was on the Plaintiff to prove that she was on duty on the material day and provide evidence that she was paid for her service on that day. The Court held further that the Plaintiff ought to have also called an eyewitness who saw her fall at the Defendant's work premises.

16. The Respondent on the other hand submitted that the Appellant did not avail any witnesses, documents or evidence in Court to controvert the Respondent's testimony regarding his employment by the Appellant.

17. The Respondent in his written statement filed together with the Plaint on 16th December 2015 at page 7 of the Record of Appeal averred that he was employed as a casual worker and reiterated the same during his testimony at the hearing.

18. The Appellant's singular form of evidence was a medical report prepared by Dr. Wambugu P.M. In the said report, the history of the Respondent indicates that he was involved in an industrial accident while employed by the Respondent. I have also noted from the Respondent's testimony in the lower Court and the evidence produced that he was hospitalised between 27th October, 2015 and 19th November, 2015. He testified that all his medical expenses were paid for by the Respondent as the accident occurred while in the employment of the Respondent. This evidence was not controverted by the Appellant. Nothing would have been easier than for the Appellant to call a witness to rebut the evidence of the Respondent.

19. **Section 74** of the Employment Act, 2007 requires an employer to keep records of all its employees. Under Section 10(5) and (6) of the Act, the burden thus shifted to the employer to provide the record of all his employees to ascertain that the Respondent was not employed by the Appellant on the material day or at all.

20. The Respondent named his supervisors as one Mr. Raju and Victor. He described the various odd jobs that he carried out in the work place.

21. The Appellant engaged Dr. Wambugu, through General Accident Insurance Company Limited to examine the Respondent and provide a report as its sole piece of evidence. Further the Respondent was hell bent on denying employment of the Respondent and comprehensively submitted on the contributory negligence of the Respondent.

22. I thus find there was no error in the Trial Magistrate's finding that the Respondent was employed by the Appellant.

23. With regard to whether the Respondent proved his case on a balance of probabilities, I have had occasion to peruse the Record of Appeal and find that the particulars of injuries set out in the Plaint are commensurate with those adduced in evidence by the Respondent and corroborated by PW1 – Dr. Titus Ndeti. The medical report produced as the sole evidence by the Appellant further confirms the injuries were indeed sustained by the Appellant.

24. This Court is satisfied that the Respondent had adduced evidence that he sustained injuries and that he proved his case on a balance of probabilities.

25. On whether the liability was properly apportioned at 100% by the trial Court, the Appellant submitted that the duty of an employer to ensure the safety of an employee is not absolute. Further that the duty is one of reasonable care against a foreseeable risk and that the malfunction of the crane was not foreseeable. In support of these submissions the Appellant relied on the case of **Mwanyule v Said Juma t/a Jomvu Total Service Station [2004] 1 KLR 47** and the case of **Eastern Produce (K) Limited v Allan Okisai Wasike [2014] eKLR**.

26. The Appellant further submitted that the Respondent contributed to the injuries he sustained. It was the Appellant's submission that the Respondent did not take any steps to ensure his safety. That the Respondent was not truthful in alleging that he could not hear the crane moving as it was powered by electricity.

27. Further, the Appellant submitted that the Respondent by conceding to work without any safety apparel such as helmets and reflectors means that he willingly placed himself in a position of risk. The Appellant invoked the provisions of **Section 13(1)(a) of the Occupational Safety and Health Act** which requires every employee to ensure his own safety at work.

28. It was the Appellant's further submission that the Respondent took a risk which a reasonably prudent man in his position would not have taken and was thus guilty of contributory negligence. In support of this submission, the Appellant relied on the case of **Mohamed Farrah v Kenya Ports Authority [1988-1992] 2 KAR 283.**

29. The Respondent on the other hand submitted that the Appellant owed him a duty of care and that the said faulty crane which malfunctioned was not in the control of the Respondent and he did thus not contribute to the occurrence of the accident.

30. The Respondent submitted further that the Appellant failed to provide protective gear which might not have averted the accident but would have reduced the impact of the accident.

31. It is not in dispute that the Respondent was injured. This is confirmed by the Medical Report of Dr. Wambugu produced by the Appellant in the Trial Court. The issue of whether the injury was occasioned entirely by the negligence or improper conduct of the Appellant or whether the Respondent contributed to the misfortune was a matter of evidence before the Trial Court.

32. Did the Appellant lay any evidence before the Trial Court to rebut the Respondent's evidence that he was injured by a machine while in the course of his duties at the Appellant's work premises? Did the Appellant lay any evidence that it exercised its statutory duty of care and ensured that there was adequate safety apparel at the workplace? Did the Appellant lay any evidence that the Respondent was advised of any heavy machinery that was to transport items near his working area, was he given any directions that he did not follow to warrant his contribution? Was there any evidence to rebut the Respondent's testimony that the accident occurred due to a faulty crane operating at the work premises? From my reading of the proceedings and evidence tendered, the answer to all the above is no.

33. Nyakundi J. aptly captured the legal principles applicable in his determination sitting on a first appeal in the case of **Peter Benard Makau v Prime Steel Limited [2018] eKLR** where he held thus: -

> *"I hold the view that in cases involving an employee-employer relationship specifically where the claim is for breach of statutory duty the court should exercise discretion in a slow manner to attribute contributory negligence to an employee. This approach is anchored on the fact that the employees' sense of danger will have been impaired by familiarity, repetition, noise, confusion, fatigue and preoccupation with work. In order for contributory negligence to accrue the plaintiff's fault must be a legal and factual cause of the harm suffered.*
>
> *It is true that there are two possible ways a court can apportion liability for negligence. One is on causation, secondly, on blameworthiness. The appellant sued the respondent on negligence acts based on a breach of care owed as a term of employment it is best that a trial court makes it clear what the appellant negligence entails: Does it involve the events which caused the injury or the severity of the injury? These questions must be answered if no provisions exist in the statute.*

*The **Scholarly English Text by Winfield and Johowicz on the 19th Edition Sweet & Maxwell 2014** at 703 paragraph 23-042 states as follows:*

> *"The lack of care that will constitute contributory negligence varies with the circumstances of each case. Thus, the greater the risk of suffering damage the more likely it will be; all other things being equal. That the reasonable person in the claimant's position would have taken precautions in respect of that risk. The reasonable person will be careless and so the claimant who does not anticipate that the defendant might be negligence may be guilty of contributory negligence. However, the law does not require the claimant to proceed with a timorous fugitive constantly working over his shoulder for the acts from others"*

The apportionment of liability between the appellant and the respondent in the respective ratios should therefore take the form of both causation and capability.

As shown from the record in the trial court only the evidence of the appellant was tendered before it. Whether the injury was occasioned entirely by the negligence or improper conduct of the appellant or whether the respondent company so far contributed to the misfortune is a matter of evidence before the trial court. It is interesting to note that the learned trial magistrate decided to mitigate the award of damages by way of apportioning liability without evidence to support such a finding. In my view, the decision that the appellant was partly responsible for his own harm was reached by the trial magistrate without a legal or factual basis.

That exercise of discretion of contributory negligence can only be applicable where evidence has been led to justify a

legal direction by the trial court."

34. I find the decision on all fours with the instant appeal and have nothing further to add but to return the finding that the Magistrate did not err in finding the Appellant 100% liable.

35. As regards quantum, the Respondent has urged the Court in its submissions to uphold the finding of the Trial Court. He relied on the case of **West (H) & Sons. Limited v Shepherd [1964] AC 326** where the Court held that the Court must award compensation reasonably with a uniformity in this endeavour.

36. To establish the veracity of the award by the Trial Court, he relied on the case of **Millicent Atieno Ochuonyo v Katola Richard [2015] eKLR** where the Court awarded the Plaintiff therein who in his view, suffered similar injuries to his, KES 2,000,000 as general damages for pain and suffering.

37. He also relied on the case of **Shabani v City Council Nairobi [1995] eKLR** where the Court held that an Appellate Court will not disturb an award of damages unless it is inordinately high or low so as to represent an entirely erroneous estimate, based on some wrong legal principle or on a misapprehension of evidence.

38. The Appellant on the other hand relied on a similar holding as was made by the Court of Appeal in the case of **Mohamed Mahmoud Jabane v Highstone Butty Tongoi Olenja [1982-88] 1 KAR 982** where the Court held that:-

> "*an award is not to be interfered with unless the same is based on the application of a wrong principle or misunderstanding of relevant evidence or so inordinately high or low as to be an entirely erroneous estimate for an appropriate award*".

39. It was the Appellant's submission that the Trial Magistrate did not base the award on any judicial authority, and that the same was inordinately high. The Appellant relied on the Court of Appeal decision in **Cecilia W. Mwangi & Another v Ruth W. Mwangi [1997] eKLR** with regards to the Court's consideration on the assessment of damages.

40. The Appellant submitted that the authority relied upon by the Respondent, **Millicent Atieno Ochuonyo v Katola Richard** supra was inapplicable as the injuries suffered by the Plaintiff in that case were incomparable to those suffered by the Respondent herein.

41. The Appellant urged the Court to rely on the finding of the Court in the case of **Gabriel Kariuki Kigathi & Another v Monica Wangui Wangechi [2016] eKLR**. The said matter was an appeal where the incapacity of the Claimant as assessed at 20% was awarded KES 400,000 which was substituted for the Trial Court's award of KES 800,000.

42. In conclusion, the Appellant urged the Court to set aside the award of KES 1,500,000 as general damages and replace it with a sum of KES 350,000.

43. I have considered all the decisions cited to the Trial court and those cited before me. I agree that an award of general damages is an exercise of judicial discretion for which the appellate Court ought not to freely and lightly interfere with. I also agree that an award of damages ought to be guided by comparative awards to comparative injuries. The Medical Report by Dr. Wambugu produced by the Appellant cites a 12% permanent incapacitation. It also gives a recommendation for a restorative surgery at an all-inclusive cost of KES 80,000 which I note was cited by the Doctor but not verified for the benefit of the Trial Court.

44. I am not persuaded that there is any reason to disturb the award of the Trial Court. The Appellant's own evidence establishes that the injury was severe and there was a permanent incapacitation that required surgical intervention. The case of **Gabriel Kariuki Kigathi (supra)** is distinguishable as the Court relied on the second medical report procured by the Defendant in the trial Court which found that there was no incapacitation of the Claimant. Further, there was no mention of future medical procedures as in this case.

45. I therefore find no reason to interfere with the decision of the Trial Court and retain and uphold the award of KES 1,500,000 in damages.

46. With regard to the award of the KES 11,000 in special damages, I have confirmed from the Record of Appeal that the sum KES 3,000 for the expenses of the medical report was pleaded in the Plaint. The Respondent also pleaded for medical expenses that would be adduced at the hearing. There are receipts for both the Medical Report and the Court attendance fees for the Doctor which were produced in evidence as Plaintiff's Exhibit 6b and 6c respectively.

47. I find that the said damages were pleaded and proved and uphold the award of the Trial Court.

48. **The upshot is that the Appeal fails in its entirety. The costs of this Appeal and in the lower court are awarded to the Respondent.**

49. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF AUGUST 2021

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