



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO. 24 OF 2016
DOMINION OUTDOOR ADVERTISING (2006) LIMITED....APPELLANT
VERSUS
PATRICK WACHIRA MURANGA.....RESPONDENT

JUDGMENT

1. The appeal was filed pursuant to dissatisfaction with the judgment of Senior Principal Magistrate E.K. Usui in a judgment delivered on 8th September, 2016.
2. The grounds of Appeal may be summarized as follows:-
 - a. The trial magistrate erred in finding the appellant 50% liable which finding was not supported by evidence since the respondent did not prove his case on liability.
 - b. The trial magistrate award of general damages for pain and suffering and loss of amenities is so manifestly excessive as to amount to erroneous estimate of the damages due to the Respondent.
 - c. The trial magistrate erred in adopting wrong principles in general damages for diminished earning capacity.
 - d. The trial magistrate erred in awarding medical Expenses which amounted to unjust enrichment.
3. The appellant raised the issue of jurisdiction in his submissions which matter was not raised in the memorandum of Appeal.
4. The Court of Appeal in **Kenya Ports Authority –vs- Modern Holding (E.A.) Limited 2017 ekLR** stated:-

“We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage even in an appeal though it is always prudent to raise it as soon as the occasion arises. It can be raised at any time, in any manner even for the first time on appeal, or even viva voce and indeed, even by the Court itself provided that where the Court raises it *suo moto* parties are to be accorded the opportunity to be heard.”
5. In the present case, the issue of jurisdiction was not raised at all in the memorandum of appeal and is raised for the first time in the written submissions of the Appellant.
6. The point raised is that pursuant to decision of Ojwang, J, in High Court Petition No. 185 of 2008, delivered on 4/3/3009 in which he declared certain provisions of the Work Injury Benefits Act (**WIBA**) unconstitutional including Section 16, an Appeal was preferred being Civil Appeal No. 13 of 2011 and the Court of Appeal delivered judgment on 17/11/2017 in which it set aside the learned judge’s orders declaring Sections 416 to be unconstitutional. The Court of Appeal decision was subsequently upheld by the Supreme Court in Petition No. 4 of 2019.
7. The suit the subject of this Appeal was filed on 21/5/2014 at the time the decision by the High Court was still in force. It follows that at that 0721xxx particular time, the magistrate Court had jurisdiction to hear and determine the suit in terms of the common law and Law Reform Act.

8. The judgment of the Court was delivered on 8th September, 2016, before the Court of Appeal set aside the High Court decision on 17/11/2017. The decision of the Court of Appeal and that by Supreme Court could not apply retroactively to nullify a decision of the magistrate Court that had already been delivered. The Preliminary Objection lacks merit and is dismissed by this Court sitting in the suit on appeal.

Merits

9. On the merits of the appeal, the Court of Appeal per Nambuye, Kiage and Murgor, JJA in **Samuel Kamere –vs- Lands Registrar Kajiado Civil Appeal No. 28 of 2008** stated:-

“This being a first appeal, we must consider the evidence adduced before the trial Court, evaluate it and draw our own conclusions.”

10. This is the approach that commends itself to this Court taking into account further principles to be followed in a first appeal enunciated in **Peters –vs- Sunday (1958) E.A. 424, and Selle –vs- Associated Motor Boats Company Limited (1968) E.A. 123**, that although the Court has jurisdiction to reconsider the evidence, re-valuate and draw its own conclusion, this jurisdiction must be exercised cautiously and the decision of the trial Court is not to be set aside or varied simply because the appellate Court would have arrived at a different decision.

11. During trial P.W.3, the plaintiff testified that he was a driver and was employed as such by the respondent. That on 8/6/2011 he was driving motor vehicle KAV 321D from Westlands to Industrial Area, when on Mombasa Road, he was involved in a road traffic Accident. That he took the inner road whilst passing via a supermarket where he had been directed by the employer to pick a cheque. That at that moment two trucks which were in the middle of the road pushed the vehicle driven by the plaintiff outside the road and the plaintiff lost control of the vehicle. That the plaintiff had tried to apply brakes but the brakes failed and the vehicle could not stop. That the vehicle overturned. That the plaintiff had his seat belt on. The plaintiff was pushed to the dashboard on impact. The plaintiff also testified that the vehicle had worn out tyres and the seat gear for adjusting the seat had failed before the impact. The plaintiff stated that he sustained injuries on his right middle fingers and the hands sustained injuries. That he was taken to Gertrude Embakasi by a good Samaritan and was later taken and admitted at Nairobi Women Hospital and was booked for an operation on the same day.

12. P.W.3 testified that he was admitted for 2 weeks and paid his own expenses at the hospital in the sum of Kshs 91,462. That the employer paid consultation fees of Kshs. 81,000.

13. That a second operation was done upon review and the plaintiff paid Kshs 90,000. The plaintiff paid Kshs 20,000 and the balance was not paid. The plaintiff underwent further operations and he paid Kshs 40,000 to Dr. Saidi. He produced the receipts for payments made. The plaintiff stated that he was issued with a police abstract. P.W.3 denied under cross-examination that he was driving carelessly. P.W.3 stated that he was told to record a statement by the employer while he was in pain with insurance brokers. P.W.3 stated that he was not charged with any traffic offence. P.W.3 stated that he could not use his hand well and had been denied work because of the injury. P.W.3 testified that he now sold clothes at Jamuhuri Estate. He produced receipts for all the expenses incurred in various hospitals.

14. The police abstract stated that the accident was self-involved and no other vehicles are mentioned in the police abstract. P.W.3 said he could not recall the details of the trucks which pushed him out of the road whilst he was passing one of the trucks. P.W.3 stated that he was issued with a notice of intention to prosecute but he was not charged.

15. P.W.1, Dr. Washington Wakobi testified that he was a Consultant Surgeon and that he examined P.W.3 on 4/7/2012. That he found that P.W.3 had sustained extensive friction burns on the back of his right hand. That he underwent treatment in various hospitals and several surgical procedures since he had a very stiff right hand on all fingers except the thumb. The fingers were also deformed. That P.W.3 could not do ordinary work with the right hand. The middle finger had a fracture. That the injury led to loss of blood and pain. The total incapacity was 40% with no possibility of future improvement. P.W.3 could still continue driving but with limitation. That the plaintiff spent a lot of money in private hospitals. P.W.1 produced a medical report. The Doctor was paid Kshs 2,000 for the report and Kshs 10,000 for Court attendance.

15. P.W.2, Dr. Shaban Saidi a Plastic and Reconstruction Surgeon based in Nyeri testified that he operated on the plaintiff at Mt. Kenya Hospital in Nyeri and at his private clinic and Mt. Sinai in Thika. P.W.2 said he was paid by the plaintiff for the services rendered. P.W.2 produced three medical reports. P.W.2 added that the plaintiff's right hand ability to function had diminished by half. P.W.2 was paid Kshs 20,000 for Court attendance. He produced the medical report. Under cross-examination P.W.2 said the plaintiff paid cash for the medical services rendered. That the plaintiff will incur costs for future medical expenses ranging from between Kshs 20,000 to 100,000.

16. P.W.2 said the plaintiff spent money for medicines, clinic, bandages etc in the sum of Kshs 33,183.

17. D.W.1 Michael Otaba Osuru testified that he was a transport manager. He stated that he ensured that company vehicles were in good working conditions and were fully serviced. That the plaintiff drove motor vehicle KAV 321D and it was properly serviced and maintained. That P.W.3 was the driver of the Boss. That on 2/6/2011, the vehicle the plaintiff drove was in good condition. That D.W.1 visited the scene but did not find P.W.3 there. The vehicle was upside down on right hand side. That the vehicle was inspected on 2/6/2011 and had no pre-accident defects. The inspection was done by Kenya Police. The report was produced in Court. D.W.1 stated he had no documents to show service of the vehicle before the accident. D.W.1 said he had no evidence to show when the tyres were bought. That P.W.3 was alone in the vehicle when the accident occurred. That the company paid some of the medical expenses for the plaintiff.

Analysis

18. In her judgment, the learned trial magistrate analysed the evidence by all the witnesses who testified, the pleadings and exhibits and written submissions by the parties and the learned magistrate concluded at page 16 of the judgment that the motor vehicle examination report

did not go into specifics but was a general report. The magistrate pointed out that she could not discern from the report at paragraph 9, what it stated on brake efficiency of the vehicle at a particular speed.

19. The trial magistrate then found:-

“From the evidence the plaintiff ought to have kept a proper look out and keep his vehicle at a proper and reasonable distance from other motor vehicles to avoid the situation he got into of being pushed off the road. The manner in which the vehicle behaved after it went off the road is an indication that something was the matter. I find on a balance of probability that the vehicle had faulty brakes. The Court will apportion liability as follows:-

Plaintiff – 50%

Defendant – 50%”

20. The finding by the magistrate is based on uncontroverted evidence by the plaintiff since no other eye witness testified to contradict the manner in which the accident occurred. The plaintiff also discredited the motor vehicle inspection report which was not clear and no witness elaborated its contents before the Court since the maker of the report did not testify before Court.

21. This Court finds no basis to fault the finding by the learned trial magistrate on the issue of liability. The trial magistrate rightly attributed some fault on the plaintiff and apportioned blame on the respondent there being no cogent evidence to rebut the testimony by the plaintiff that the motor vehicle belonging to the respondent had defective brakes and worn out tyres at the time of the accident.

22. The appeal therefore fails on the issue of liability.

23. Regarding the matter of assessment of damages, the Court defers to the Court of Appeal decision in **Kemfro Africa Limited t/a Meru Express Services, Gathogo Kanini –vs- A.M.M. Lubia & Another (1982-88) I KAR 777** where the Court stated thus:-

“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 fact, 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 damages..”

24. In the present case, the trial magistrate found from the medical Report by Dr. Wokabi dated 18/7/2012 that the plaintiff sustained extensive friction burns on the back of the right hand, fractures of the proximal phalanx of the middle finger, extensive loss of skin exposing tendons and bone with many lacerated and torn tendons.

25. That the injuries healed resulting in stiff fingers of the right hand. That the plaintiff had difficulties to do his ordinary daily chores and could not write with the hand and could not use tools and implements. That the doctor awarded the disability at 40%. The trial magistrate further found that Dr. Shaban’s report corroborated the findings by Dr. Wokobi. That the plaintiff had undergone at least 4 operations to rectify the deformity to his hand and Dr. Shaban assessed the disability of the plaintiff’s right hand at 50%.

26. The trial magistrate further considered a report by Dr. Ashwin Madhiwala dated 4/8/2011 which she found also confirmed the other doctors’ findings on the nature of injuries sustained by the plaintiff. He assessed the degree of permanent incapacity at 30%.

27. The trial magistrate considered the submissions by the plaintiff who sought Kshs 1,500,000.00 for pain, suffering and loss of earnings and cited relevant decisions. The defendant’s counsel submitted that Kshs 180,000 would be adequate compensation for pain and suffering and loss of earning. They cited four decided cases.

28. The trial magistrate awarded Ksh 700,000 for pain and suffering taking into account the seriousness of the injuries suffered by the plaintiff. The magistrate further rewarded kshs.500,00 for diminished earnings. The Court further awarded 120,000 for future medical expenses and Kshs 235, 139 being proved special damages.

29. Firstly, the special damages are based on receipts produced before Court by the plaintiff. The Appellant did not tender any evidence before Court that it had paid those experts for the plaintiff nor that it had reimbursed all the medical expenses incurred by the plaintiff. The finding by the trial magistrate on the award of the special damages is cogent and this Court has no basis of reversing the same.

30. The appellant on the issue of Quantum relied on the case of **Kenya Tea Development Agency –vs- Augustine Gori Makori (2014) eKLR Nairobi HCCA No. 136 of 2005** in which the respondent suffered a fracture of right index finger and burns thereon and had mild pains and was awarded Kshs 100,000 as general damages for pain, suffering and loss of amenities.

31. The trial magistrate had considered this case and had found the plaintiff in the present case had suffered more serious injuries.

32. Furthermore, the Appellant relied on the case of **Samba Posho Mills Limited – vs- Onguti 92005) eKLR (2005) eKLR – Nairobi No. HCCA 65 of 2002** where the respondent had suffered an amputated distal phalanx of the right hand and cut wound on the right hand. The trial Court awarded Kshs 360,000 and the High Court reassessed the same at Kshs 180,000.

33. The trial magistrate had also taken into account this case before making the final award.

34. In the comparable case of **Caroline Wanjiku Karimi –vs- Simon K. Tum and Shami Trading Company Limited – Civil Case No. 368 of 2010 eKLR**. The plaintiff suffered gross deformities to the right hand with severe stiffness and friction burns on the entire right wrist. The plaintiff had a permanent disfigurement of about 30% and the Court awarded general damages of Kshs 1,800,000 in 2012.

35. This Court notes that the injuries suffered by the plaintiff, the extent of permanent disability and prolonged pain and suffering due to the stiffness of the hand, loss of skin and at least four operations make the case of the plaintiff more serious than those presented in the two cases above. Furthermore, both cases were decided more than 10 years ago from the date the judgment of this Court was decided. Taking into account the nature of the injuries suffered by the plaintiff, pain and suffering and loss of amenities depicted in the evidence adduced before the trial Court this Court does not find any sound reason to vary and/or set aside the award by the trial magistrate and uphold the same in its entirety.

36. In the final analysis, the Appeal is dismissed in its entirety and the decision by the trial Court upheld.

37. Accordingly, judgment is entered in favour of the respondent as against the appellant as follows:-

(a) Pain and suffering – Kshs.700,000

(b) Diminished earning – Kshs 500,000

(c) Future medical expenses – Kshs720,000

(d) Special damages – Kshs.235,138.000

Less contribution -50%

Kshs.777,569.000

(e) Interest at Court rates from date of trial Court judgment to payment in full.

(g) Costs before the trial Court and this Court.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 23TH DAY OF SEPTEMBER, 2021

MATHEWS N. NDUMA

JUDGE

Appearances

Muchui & Co. Advocates for the Appellant

Wangai Nyuthe & Co. Advocates for the respondent

Ekale – Court clerk