



**REPUBLIC OF KENYA**

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

**APPEAL NO. 2 OF 2020**

**(Formerly Machakos HCCA 73 of 2017)**

**Before Hon. Lady Justice Maureen Onyango**

**APEX STEEL LIMITED.....APPELLANT**

**VERSUS**

**PAUL OTIENO HAGOI.....RESPONDENT**

***(Being an appeal arising from the judgment and decree of Hon. J. A. Agonde, Senior Resident Magistrate which was delivered on the 28<sup>th</sup> day of April 2017 at the Principal Magistrate's Court at Mavoko Law Courts in Civil Suit No. 272 of 2015)***

**JUDGMENT**

The Appellant herein filed an appeal against the Judgment and Decree of the Senior Resident Magistrate at Mavoko PMCC No. 272 of 2015 delivered on 28<sup>th</sup> April, 2017. In the Judgment the Learned Trial Magistrate found the Appellant 100% liable and awarded the Respondent general damages in the sum Kshs.87,000 and Special damages in the sum of Kshs.3,000 together with costs and interest thereon at Court rates as against the Appellant.

The Appellant being dissatisfied by the Judgment of the Trial Magistrate seeks to set it aside on the following grounds as raised in her Memorandum of Appeal:

- 1. The Learned Trial Magistrate misdirected herself and erred in law and in fact by holding that the Plaintiff had proved his case against the Defendant on a balance of probabilities.*
- 2. The Learned Trial Magistrate misdirected herself and erred in law and fact by holding, that the Respondent was injured on the day he alleges he was injured while the evidence or record did not support the finding.*
- 3. The Learned Trial Magistrate misdirected herself and erred in law and fact by holding that the alleged accident indeed occurred at the appellant's premises while the evidence or record did not support the finding.*
- 4. The Learned Trial Magistrate erred in law and misdirected herself in holding that the Appellant was to blame at all for the alleged accident when the evidence shows the alleged accident did not occur at all.*
- 5. The Learned Trial Magistrate misdirected herself and erred in law and in fact by disregarding the Defendant's Witnesses testimony and holding the Appellant liable for the alleged accident while the evidence or record called for dismissal of the suit against the Respondent.*
- 6. The Learned Trial magistrate misdirected herself and erred in law and in fact by failing to consider the Defendant's Witness exhibits on record and hence arrived at an erroneous finding on liability.*
- 7. The Learned Trial Magistrate misdirected herself and erred both in law and in fact in failing to consider the Defendant's overwhelming evidence on record and hence arrived at an erroneous finding on liability.*
- 8. That the Learned Trial Magistrate erred in law and in fact by failing to find that the plaintiff did not prove his case against the Respondent on a balance of probability or at all and hence arrived at an erroneous finding on liability.*
- 9. The Learned Trial Magistrate erred in law and in fact by awarding general damages for pain and suffering that are so manifestly*

*excessive as to be erroneous vis a vis the injuries sustained by the plaintiff.*

*10. That the Learned Trial Magistrate misdirected himself and erred in law and in fact by totally failing to consider the Defendant's Submissions on record thus arrived at an erroneous finding on liability and quantum.*

*11. The Learned Trial Magistrate erred in law and in fact by failing to uphold precedent and the doctrine of stare decisis.*

The Appellant seeks the following orders:-

*a) That the Appellant's appeal be allowed.*

*b) That the whole of the judgment delivered on 28<sup>th</sup> day of April 2017 against the Appellant on liability be set aside.*

*c) That the Respondent's suit in the lower Court be dismissed with costs to the Appellant.*

*d) That without prejudice to the foregoing the whole of the judgment, delivered on 28<sup>th</sup> day of April 2017 against the Appellant on quantum be set aside.*

*e) That without prejudice to the foregoing, General Damages be substantially reduced.*

*f) That without prejudice to the foregoing the respondent be blame for the accident.*

*g) That the costs of this Appeal be awarded to the Appellant in any event.*

*h) Such other and/or further relief as this Court may deem just to grant.*

This Court notes that at the trial Court the matter proceeded for hearing by way of viva voce evidence with both the Claimant and Respondent calling one witnesses each.

#### **Brief facts of the case**

The facts of this case are not contested. The Respondent in his Complaint filed on 23<sup>rd</sup> March, 2015 contended having been employed by the Appellant and that on or about 25<sup>th</sup> May, 2013, while in the course of his lawful duties at the Appellant Company he had an accident and as a result sustained a cut wound on his 2<sup>nd</sup> digit figure of his right hand.

The Respondent attributed the occurrence of the said accident to negligence, breach of statutory duty and breach of contract on the part of the Appellant.

In its defence Appellant denied the allegations made in the Complaint and in particular that the Respondent was its employee and that an accident occurred on 25<sup>th</sup> May, 2013 involving the Respondent herein and that the injuries sustained by the Respondent were not sustained in the course of the Respondent's duties in the Appellant premises.

The Trial Magistrate and upon consideration of the facts of the matter, the evidence on record and submissions by the Parties presented in this matter the Trial Magistrate found the Appellant 100% liable for the injuries sustained by the Respondent and awarded him Kshs.87,000 as general damages and Kshs.3,000 as special damages plus costs and interest of the suit from the date of the judgment.

The parties agreed to dispense the Appeal by way of Written Submissions and each party filed its respective submissions to the Appeal.

#### **Appellant's Submissions**

The Appellant in its submissions invited this Court to relook at the entire evidence and draw its own independent conclusion this being an Appeal in the first instance. The Appellant relied on the case of **Sielle v Associated Motor Boat Company & Another (1968) 128**.

The Appellant further submitted that the Respondent failed to discharge the burden of proof during the trial of this matter and that as a result the Trial Magistrate erred in law and fact in finding the Appellant 100% liable.

The Appellant further submitted that based on the exhibit "DEx No. 1", the accident register produced in the trial court did not have the Respondent's name and therefore on that basis he failed to prove that he had sustained injuries as pleaded while working for the Appellant.

The Appellant urged this Court to find in its favour and allow the Appeal.

On the issue of quantum, the Appellant submitted that the amount awarded was inordinately high and urged this Court to set aside the award and substitute the same with an award of Kshs.50,000. For emphasis the Appellant relied on the case of **Eldoret Mills Limited v Emily Wangui (2011) eKLR** where the Court reduced an award of Kshs.100,000 to Kshs.40,000 where the Respondent had sustained a cut on her

leg.

The Appellant also relied on the case of **Kreative Roses Limited v Olpher Kerubo Osumu (2014) eKLR** where the Court made an award of Kshs.50,000 for a cut wound on the right leg.

In conclusion the Appellant further urged this Court to reverse the trial Court's finding on liability and quantum.

### **Respondent's Submissions**

The Respondent on the other hand submitted that from the evidence on record as well as his oral evidence that he was injured while in the lawful course of his assigned duties while at the Appellant's premises as a result of unsafe system of work while working for the Appellant.

The Respondent further submitted that he was later treated for the injuries he sustained and produced a treatment card from Athi River Medical Services marked as PEx. 1 and a medical summary from the same institution marked as PEx 1(b).

He further submitted that the accident register as produced by the Appellant contained inconsistencies a fact that was admitted by DW1.

The Respondent submitted that the Appellant's contention that the accident did not occur on the basis that it was not recorded in the Appellant's accident register is not true as his injuries are supported by medical records. the Respondent relied on the case of **Ngome Marumu Ngome v Mombasa Maize Millers Limited (2014) eKLR**.

The Respondent further submitted that the award awarded as damages was not inordinately and unjustifiably high to warrant this Court to interfere with the same.

In conclusion the Respondent submitted that the instant Appeal has no merit and therefore urged this Court to dismiss the same with costs to the Respondent.

### **Analysis and Determination**

I have considered the evidence, submissions from both counsels. In a first appeal like this one, the duty of the court is to evaluate the evidence in the lower court both on points of law and fact and come up with its findings and conclusions.

This principle is set out in the case of **Selle v Assorted Motor Boat Company 1968 EA Company 1968 EA 123-126** have since been long settled to guide Appellate Court such as this one in the determination of such appeals. In the said case it was held that:

*“Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial. Judge's findings of fact appear earlier that he has clearly failed on some part to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”*

I have considered the record of appeal and the submissions of parties in this matter and find that the following issues arise for determination;

1. Whether the Respondent was injured in the cause of his employment with the Appellant.
2. Whether the Appeal is merited

### **Whether the Respondent was injured in the cause of his employment with the Appellant.**

The Appellant denied that the Respondent was injured while on duty as his name is not reflected in the accident register produced in Court.

However, DW1 in evidence confirmed that the Respondent was employed by the Appellant and further admitted that the accident register as produced in court was inconsistent in the manner in which the injuries were recorded. I have considered the record and I agree with the observation of the respondent. The record shows as follows –

From 22<sup>nd</sup> March 2013 – first injury

12<sup>th</sup> April 2013 – second injury

12<sup>th</sup> April 2013 – third injury

6<sup>th</sup> April 2013 – fourth injury

The Respondent on the other hand insisted that he sustained injuries in the course of his employment with the Appellant and further submitted that the inconsistencies in the accident register may have been occasioned by the Appellant in an effort to conceal the occurrence of the accident.

On the basis of the foregoing I find that the Trial Magistrate did not misdirect herself in finding that the Respondent was injured in the course of his employment.

**Whether the Appeal is merited**

I find that the Court's decision is properly supported and anchored on evidence adduced at the hearing as well as submissions filed by the parties.

On the issue of quantum, the Appellant submitted that the amount awarded ought to be set aside and substituted as the award was inordinately high for the injuries sustained by the Respondent.

The Respondent on the other hand submitted that the Appellant

has not advanced any concrete grounds to support the assertion that the amount awarded was excessive.

I have considered the authorities cited by the Appellant and the Respondent's submissions on the issue of quantum and opine that the quantum awarded is neither inordinately high nor low to warrant this Court's interference. I rely on the case of **Butt Khan**

(1977) 1 KAR where the procedure was set as follows:

*“An Appellant Court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”*

For the foregoing reasons I find the instant appeal is devoid of merit and dismiss it in its entirety with costs to the Respondent both in the appeal and in the subordinate court.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12<sup>TH</sup> DAY OF AUGUST 2020**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**