REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CIVIL APPEAL NO 37 OF 2019

[FORMERLY NAIROBI HIGH COURT CIVIL APPEAL NO 539 OF 2015]

RUSHBAH INDUSTRIES LIMITED.....APPELLANT

VERSUS

ELIJAH SEKA OWINO.....RESPONDENT

(Appeal from the judgment delivered on 26th October 2015 by Hon. E. Usui, SPM

in Milimani CMCCC No 6059 of 2012)

JUDGMENT

1. This appeal was originally filed in the High Court at Nairobi as *Civil Appeal No 539 of 2012*.

2. By an order issued by **B. Thuranira Jaden J** on 4th September 2019, the matter was transferred to this Court.

3. At the trial court, the Respondent had sued the Appellant for damages on account of an occupational disease allegedly contracted in the course of employment.

4. The trial Magistrate found for the Respondent and entered judgment in his favour in the following terms:

a. General damages……..Kshs. 750,000

b. Special damages……7,455

Total……757,455

5. Being dissatisfied with the judgment, the Appellant filed the present appeal.

The Appeal

6. In its Memorandum of Appeal dated 12th November 2015, the Appellant raises the following grounds of appeal:

a. The learned trial Magistrate misdirected herself and erred both in law and in fact by holding that the Respondent had proved his case against the Appellant on a balance of probability;

b. The learned trial Magistrate misdirected herself and erred both in law and in fact by holding the Appellant 100% liable for the alleged accident the subject of the suit;

c. The learned trial Magistrate misdirected herself and erred both in law and in fact by holding the Appellant 100% liable whereas evidence on record called for dismissal of the entire suit against the Appellant;

d. The learned trial Magistrate misdirected herself and erred in law and in fact by failing to find that the Respondent failed to discharge his duty of establishing a cause of action against the Appellant and thus arrived at an erroneous finding on liability;

e. The learned trial Magistrate erred both in law and in fact by not properly considering the medical report on record and hence arrived at a wrong assessment of damages that are so manifestly excessive as to be erroneous;

f. The learned trial Magistrate misdirected herself and erred in law and in fact by failing to properly consider the Appellant's submissions on record thus arrived at an erroneous finding on liability and quantum;

g. The learned trial Magistrate erred in law and in fact by failing to uphold precedent and the doctrine of *stare decisis*.

7. The Appellant raises seven (7) grounds of appeal, which may be categorised under the twin limbs of liability and quantum of damages.

Liability

8. This being a first appeal, my duty is to re-consider and re-evaluate the evidence on record and draw my own conclusions, taking into account that I did not have the opportunity to encounter the witnesses first hand.

9. The duty of a first appellate court was laid down by the Court of Appeal in ***Selle v Associated Motor Boat Company Ltd [1968] E.A 123*** as follows:

> **"An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. 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 if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities……..or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

10. In stating their respective cases, the parties proceeded on the path of an ordinary accident. My reading of the record however reveals that the issue at hand was occupational disease allegedly caused by exposure to dangerous fumes at the work place.

11. In her judgment delivered on 26th October 2015, the learned trial Magistrate states:

> **"At the time of hearing, the Plaintiff told court that he worked for the defendant as a machine operator. He told court that in the course of duty he was exposed to a lot of black smoke as the machine he was using made nylon paper. He said as a result his respiratory system was affected.**
>
> **He told court that he blamed the defendant for failing to provide him with a nose and mouth mask.**
>
> **I find the evidence uncontroverted and accept it as the truth. By failing to provide the Plaintiff with protective gear, they exposed him to a risk of injury which was foreseeable.**
>
> **I find the Plaintiff has proved his claim on a balance of probability and find the defendant 100% liable for the injury suffered by the Plaintiff in the course of his employment.**
>
> **The medical report by Dr, Okoth Okere indicates that the Plaintiff sustained severe chest infection and allergic bronchitis due to exposure to smoke. A report by Dr. Smita Shah confirmed the Plaintiff has suffered occasional coughing and difficulty in breathing but has now healed."**

12. In the submissions filed on behalf of the Appellant, reference was made to the decision in ***Lamorna Limited v Hannah Waruguru Macharia [2015] eKLR*** where it was held that in a claim based on exposure to harmful substance, the specific substance ought to be identified and expert evidence adduced linking the harmful substance to the alleged ailment.

13. I understand this to be the law. In an occupational disease claim, it is not enough to prove employment and the occurrence of disease. The Claimant must go further to create a nexus between the disease and a specific substance at the work place. In order to discharge this burden, expert evidence beyond the medico-legal report is necessary. I need to add that the burden to prove causation is not diminished by the failure of the defence to call witnesses.

14. In her judgment, the learned trial Magistrate did not address this crucial issue, despite the Appellant having raised it in its written submissions.

15. That said, I find and hold that the trial court proceeded on the wrong principles on the question of liability and thus arrived at an erroneous decision. The appeal therefore succeeds on this head.

Quantum of Damages

16. The learned trial Magistrate made an award of Kshs. 750,000 in general damages, taking into account past decisions and the cost of inflation.

17. An award in damages is discretionary. In its decision in ***Kemfro Africa Limited T/A Meru Express Services (1976) & another v Aziri***

Kamu mudika Lubia & another [1985] eKLR the Court of Appeal held that:

> **"The principles to be observed by an appellate court in deciding whether it is justified in disturbing 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 that either that the judge, in assessing the damages, took into account an irrelevant factor 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 wholly erroneous estimate of the damage.**

18. The Court did not find any such error on the part of the trial court. It follows therefore that had I confirmed the finding on liability, I would not have interfered with the award of damages. As it is, the issue is now moot.

19. The upshot is that the appeal succeeds, the judgment and award by the learned trial Magistrate is set aside and is replaced with an order dismissing the claim.

20. In light of the past relationship between the parties, I direct that each party will bear their own costs.

DELIVERED VIRTUALLY AT NAIROBI THIS 2ND DAY OF DECEMBER, 2021

LINNET NDOLO

JUDGE

Appearance:

Mr. Mahugu for the Appellant

Miss Biage h/b for Mr. Mbiti for the Respondent