



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CIVIL APPEAL NO. 12 OF 2018

KENYA POWER & LIGHTING COMPANY LIMITED.....APPELLANT

VERSUS

KASSIM WEKHOBIA TOLOI.....1ST RESPONDENT

SINO HYDRO CORPORATION LIMITED.....2ND RESPONDENT

JUDGMENT

1. The appellant in Civil Appeal No. 40 of 2017 was the 1st Respondent in the suit filed by Mr. Kassim Wekhoba Toloi, now the 2nd Respondent whereas the Appellant in Civil Appeal No. 41B of 2017 was the 2nd Respondent in the same suit. This Appeal is against the Plaintiff and the 2nd Respondent in the initial suit.

2. For the purpose of this judgment I shall refer the parties by their designations in the initial trial. That is Kassim Wekhoba Toloi as the Plaintiff, Sino Hydro Corporation Limited as the 1st Respondent and Kenya Power and Lighting Company Limited as the 2nd Respondent. The two appeals shall be considered together since they are against the Judgment of Hon. Ng'ang'ar (CM) in Kisumu CMCC No. 331 of 2016 delivered on 12th April 2017 in favour of the Plaintiff against both Respondents in the suit. The Honourable Court found the Respondents jointly and severally liable for injuries sustained by the Plaintiff in the course of his duties. Liability was apportioned at 20% for the Plaintiff and 80% by the Respondents.

3. The facts of the case were that on or about 5th February 2013, the Plaintiff whilst in the employment of the 1st Respondent Sino Hydro Corporation Limited as a crane driver at Nyamasaria area along Ahero-Kisumu road and while under the supervision of the 1st Respondent Mr. Young to use the crane to remove gabage from a trench, where a new bridge was under construction the Plaintiff caused the crane to touch overhead electrical wire cables owned by the 2nd Respondent Kenya Power and Lighting Company Limited and was electrocuted and suffered severe injuries well documented in the medical reports produced during the trial.

4. The appeal by the 1st Respondent is to the effect that the global award of Kshs 12,151,328/= was grossly excessive and that the trial magistrate erred in awarding liability at a ratio of 80:20 against the Respondents jointly and severally.

5. The 2nd appeal by the 2nd Respondent faulted the decision by the learned magistrate in finding that the Power Company was liable in negligence to the Plaintiff without any evidence to that effect. Furthermore, the magistrate erred by lumping together liability at 80% as between the two Respondents without apportioning degree of liability or between the two of them.

6. The 2nd Respondent also challenges the magistrate's decision in making an award for costs of domestic help when no proof of such helper was offered, nor any evidence given of the cost thereof.

7. The learned magistrate is also said to have used a multiplier that was too high without any reasonable or sound basis leading to overall excessive Quantum of damages.

8. The 2nd Respondent also challenges as erroneous the apportionment of liability to the Plaintiff at 20% against the grain of evidence that showed that the Plaintiff was solely or substantially to blame in negligence for the accident.

9. Both Appellants pray that the Judgment of the trial magistrate be set aside with costs to the Plaintiff.

DETERMINATION

10. In *Selle –VS- Associated Motor Boat Company [1968] E.A 123* it was held -

“An appeal to this court from a trial by the High Court is by way of retrial and the principals upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that 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 on 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 (Abdul Hameed Seif –VS- Ali Mohamed Sholan [1955], 22 E.A.C.A 270)”

11. However, in **Jabane –VS- Olenja [1986] KLR 601**, the Court of Appeal has held that it will not lightly differ from the findings of a trial Judge who had the benefit of seeing and hearing all the witnesses and will only do so based on no evidence or the judge is shown demonstrably to have acted on wrong principle in reaching the findings he did.

12. These principles apply to all first appeals including the present one from a magistrate court to Employment and Labour Relations Court which is a court of equal status with the High Court.

13. In this regard, the court has carefully considered the proceedings of the court aquo and especially the evidence of the Plaintiff who clearly testified that he was an employee of Sino Hydro Corporation Limited, the 1st Respondent and how on the material day he was assigned duties, to clear ‘logs of woods’ that had blocked a bridge under construction. That he was aware of the overhead power cables at the site and had specifically been told by his supervisor Mr. Young that an old line marked (X) at the site was not functioning. He however inadvertently touched this line with the crane and was electrocuted hence the injuries. The Plaintiff said that he blamed his manager and his employer for giving him duties in a dangerous place since there was a live wire that he did not know of. That the supervisor should have told him.

Under cross-examination the Plaintiff said that he was not an employee of Kenya Power Company Limited and had no relationship with the Company at all. He said the Power cables were 10 to 20 metres high and were not down and that the electric poles were intact. The crane could go up to 25 metres high past the cables. That he knew it was his duty to ensure that the crane did not touch the power lines. That he was controlling the crane when it touched the wire, though this was not his intention. The crane was not faulty. That there were no Kenya Power personnel at the site.

14. The 2nd witness DW1 a co-worker of the Plaintiff contended that the Plaintiff was instructed by a Chinese to go to the site. He also confirmed that the electric wires were on normal poles and had not fallen down. That the Plaintiff was experienced crane driver and he was electrocuted when the crane touched the wires.

15. In his judgment at Page 6, the learned magistrate found

“As to liability of the 2nd defendant, he was responsible for the live wires being at the scene of accident. They were under duty to provide information to the public and by extension to the Plaintiff on the danger of electricity. The Plaintiff clearly stated that there was no such information and/or warning.”

16. With respect to the learned magistrate, this finding was based on no evidence at all. Overhead Power cables cut the length and breadth of Kenya lawfully to provide electricity to the people of Kenya. Indeed the electricity is an essential amenity to provide domestic and industrial power to the country. There was absolutely no evidence that the Kenya Power and Lighting Company were aware that the Plaintiff was at the fateful site removing garbage. No evidence at all was led to establish that the 1st Respondent had contacted Kenya Power Company to switch off power in that area where works were being conducted. It is true that the Plaintiff had no way of knowing that the overhead power cable was live. However the responsibility squarely lay with his employer to ensure the site was safe before sending the Plaintiff to carry out the works as per instructions.

17. Furthermore, the learned magistrate made an assumption based on no evidence at all that members of the public did not know the dangers of live power cables and that Kenya Power and Lighting Company had not provided such information to the public.

18. Accordingly, the court finds that the learned magistrate erred in finding the 2nd Respondent, Kenya Power and Lighting Company liable for the injuries sustained by the Plaintiff in the course of duty at the 1st Respondent’s site and under the direct supervision and instructions of Mr. Young, a supervisor of the 1st Respondent.

19. The Appeal by the Kenya Power and Lighting Company, the 2nd Respondent succeeds on the point and the court finds that the trial magistrate ought not to have apportioned any percentage of liability to the 2nd Respondent.

20. With regard to the apportionment of liability as between the Plaintiff and the 1st Respondent, his employer the learned magistrate correctly found at Page 5 of the judgment that –

“The Plaintiff was in employment when the accident occurred. He was acting on instructions from a supervisor of the 1st defendant. He ought to have been trained on the job. The Plaintiff stated that he was not instructed on how to perform his duties in an environment that had live wires. He also had no protective gear. It then follows that the 1st defendant by way of vicarious liability indeed provided poor working conditions. The 1st defendant failed to provide proper information and safe environment to the Plaintiff hence liable for the accident and resultant injuries to the Plaintiff”.

21. This was a proper analysis of the testimony by the plaintiff which was not rebutted at all by DW1. The trial magistrate correctly found that the 1st Respondent was 80% liable for the accident and the injuries caused to the Plaintiff. There was no basis whatsoever to find that

this liability was shared with the 2nd Respondent

22. Accordingly the Appeal by the 2nd Respondent on the apportionment of liability at 80:20 fails. The 80% liability is to be fully carried by the 1st Respondent. Equally, the magistrate correctly apportioned 20% of liability to the Plaintiff based on his own admission that he had negligently caused the crane to touch the power lines even though he had been wrongly advised by his supervisor that the wires were not live.

23. On the issue of the multiplier of 20 used by the learned magistrate in assessing loss of future earnings, the trial court found that the Plaintiff was 37 years old and earned Kshs.25,000/= a month. The court considered the proposal by the Plaintiff of an award of Ksh. 6.9 Million based on a multiplier of 23 years which was the remaining number of years to the retirement age of 60. The court also considered the proposal by the 2nd defendant of a multiplier of 15 owing to the disability of 90%. The court considered the cases cited by the 2nd defendant including **HCC Malindi 46 of 2009 Abubakar Bode VS T.S.S. Transporters 2011** eKLR 1 in which a 35 years old Plaintiff got an award based on 15 years multiplier and **Mombasa HCC NO. 468 of 2001 Dennis O. Nyangilo –VS- African Marine & another 2005 eKLR** in which a 35 years Plaintiff got an award based on a 20 year multiplier hence the award of Kshs.5,425,328/= on this head

24. This court does not fault at all the findings of the trial court on this issue. The court is aware of the principle announced by the Court of Appeal in **Kemfro Africa Limited Meru express Service & Gathogo Kanini –VS- A.M.M. Lubia & Another (1982-88) 1 KAR 777**, where it was stated;

“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 and were held by the ... Court of Appeal of Eastern Africa to be that it must be satisfied either judge in assessing of 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 a wholly erroneous estimate of the damage. (see Kango –V- Mayoka (1961) EA 705, 709-713)”.

25. This court therefore in the circumstances of this case has no basis to interfere with the Quantum of award by the trial court.

Equally, the award of General damages for pain and suffering by the learned magistrate was sound and based on the extent of injuries sustained by the Plaintiff and the extent of permanent disability assessed by the doctor who testified as PW2 to be 90%. The court also correctly ruled on **HCC NO. 287 OF 2007 Simon Avio Mue VS Kioye Munene & 12 Others** for comparative purposes together with **Paul –VS- KPLC 2016 eKLR**.

The award of Kshs. 5 Million on this head cannot be faulted by this court therefore.

However, this court agrees with this Appellant’s challenge on the award of Kshs.8,000 per month for 20 years in respect of domestic help on the basis that no evidence was adduced by the Plaintiff at all to support this limb of his claim.

A careful consideration of the proceedings shows that no evidence at all was led regarding this matter.

The award of Kshs.1,728,000 on this head is accordingly set aside for want of proof.

26. In the final analysis the appeal by the Kenya Power and Lighting Company Limited, being Appeal No. 41B of 2017 succeeds fully and the award of damages and costs against the company set aside.

The appeal by the Sino Hydro Corporation Limited being Appeal No. 40 of 2017 is dismissed except with regard to the award of Kshs.1,728,000/= in respect of costs of domestic help which is wholly set aside.

The Appellant in Appeal No. 40 of 2017 to pay the costs of the Appeal and the proceedings in the court below to the Plaintiff and the 2nd Respondent/Appellant.

Judgment Dated, Signed and delivered this 24th day of January, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Ojuro for Appellant

Anne Babu & Co. Advocates for the Respondents

Chrispo – Court Clerk