**REPUBLIC OF KENYA**

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

**APPEAL NO. 15 OF 2018**

**BETWEEN**

**KITCHEN KING LIMITED.....APPELLANT**

**AND**

**ALI MWINYIKAI SELEWA.....RESPONDENT**

**[An Appeal from the Judgment of the Senior Resident Magistrate's Court at Mombasa [Hon. SPM F. Kyambia] given in SRMCC No. 1784 of 2015 on 17th February 2017]**

**BETWEEN**

**ALI MWINYIKAI SELEWA.....PLAINTIFF**

**VERSUS**

**KITCHEN KING [K] LIMITED.....RESPONDENT**

***Rika J***

***Court Assistant: Benjamin Kombe***

***C.B. Gor & Gor Advocates for the Appellant***

***Mercy Ngugi & Associates, Advocates for the Respondent***

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**JUDGMENT**

1. The Respondent herein, Ali Mwinyikai Selewa was a successful Plaintiff in the Civil Case at the Senior Resident Magistrate's Court, whose details are indicated at the title to this Judgment above.

2. He sued his Employer for work injury, sustained on 31st March 2014.

3. In its Judgment of 17th February 2017, the Trial Court found liability in favour of the Respondent at 100%, and awarded general damages at Kshs. 800,000; special damages at Kshs. 2,000; and costs of removal of metal implant at Kshs. 200,000; bringing the total to Kshs. 1,000,200. (The correct figure should have been Kshs. 1,002,000). The Respondent was allowed the prayer for costs and interest.

4. Dissatisfied, the Appellant filed Civil Appeal No. 39 of 2017 at the High Court Mombasa. The Appeal was transferred by the High Court to the E&LRC on 25th July 2018 on jurisdictional grounds. It is not clear why Parties in matters of the nature herein, tend to file Appeals at the High Court first, rather than come directly to the right Court. This is confounding because after 9 years of the compartmentalized Court System, consisting the E&LRC, the High Court and the ELC, Litigants and their Advocates would be expected to approach the right Court directly. Filing the Appeal at the wrong Court, and having to go through the process of transfer, directions *et al*, results in unnecessary delay in disposal of the Appeals. The Appeal was received at the E&LRC and assigned the current registration.

5. The Appellant relies on 12 Grounds of Appeal, listed in the Memorandum of Appeal on record. These may be summarized as follows:-

- The Trial Court erred by apportioning liability at 100% against the Appellant.
- The Trial Court erred in awarding the Respondent excessive general damages at Kshs. 800,000.
- The Trial Court erred in failing to consider the evidence of Appellant's Witness Dr. Udayan Sheth a Consultant Orthopedic Surgeon, while upholding that of the Respondent's Witness Dr. Ndegwa, who is not an Orthopedic Surgeon.
- The Trial Court erred in holding that Dr. Udayan favoured the Appellant, because he was paid by the Appellant.
- The Trial Court erred in granting the Respondent Kshs. 200,000 as cost of removing the metal implant, whereas evidence presented by Dr. Udayan indicated the cost would be Kshs. 60,000.
- The Trial Court failed to consider, or to adequately consider evidence and submissions filed by the Appellant.

6. Parties agreed to have the Appeal considered and determined on the strength of the Record of Appeal. They filed their Submissions on 27th April 2018 and 7th May 2018 respectively.

***The Court Finds***:-

7. At page 106 of the Record of Appeal, the Trial Court made these findings:-

- The Defendant [Appellant herein] closed its case without calling any Witnesses.
- The evidence by the Plaintiff [Respondent herein] is not rebutted.
- The Defendant's allegations of negligence on the part of the Plaintiff are not supported by evidence.
- In the circumstances liability is apportioned against the Defendant at 100%.

8. At page 99 of the Record of Appeal, the Respondent gave the following evidence on cross-examination: -

- It is my Colleagues who lifted the block.
- They wanted us to put it on the trolley.
- I told them the same will damage the trolley.
- I told them to use the chain block.
- That is what caused the accident.
- Had we used the trolley, I would not have been injured.

9. Notwithstanding that the Appellant did not call Witnesses, it is clear from the evidence of the Respondent on cross-examination, that he bore a measure of liability for the accident. He advised his Colleagues against using the trolley. He insisted on using the chain block. They used the chain block. The Respondent conceded that had they used the trolley, as suggested by his Colleagues, there would have been no accident.

10. There is merit in the Ground that the Respondent should have been apportioned a measure of liability. He disregarded the views of his Colleagues, resulting in the accident and injury upon himself. It was mainly the responsibility of the Appellant to have in place, a proper and safe system of work, and not leave its Employees debating about which system to adopt. Taking into account the overall duty of the Employer to ensure there was a safe system of work, and the failure by the Appellant to give evidence showing the measures put in place to have such a safe system, the Court is of the view that liability should have been apportioned against the Appellant at 70%, while the Respondent, having conceded on cross-examination that he played a part in causation, ought to have been apportioned 30% of liability.

11. On General Damages, the Trial Court took into consideration decisions of the High Court and the Court of Appeal, cited at page 106 and 107 of the Record of Appeal. Taking into account the years when these decisions were made, and the injuries sustained by the Respondent, the assessment of General Damages at Kshs. 800,000 was not excessive.

12. The Appellant's assertion that the Trial Court disregarded the evidence of its Dr. Udayan, while unreasonably relying on Dr. Ndegwa's, is meritless. Firstly, Dr. Ndegwa testified in person and was subjected to cross-examination. Dr. Udayan did not testify in person, was not

subjected to cross-examination, and only had his medical report exhibited with the consent of the Parties. Secondly, the Trial Court observed correctly that Dr. Udayan's report was made in reaction to Dr. Ndegwa's. It was meant to contradict Dr. Ndegwa's. The proceedings do not show that Dr. Ndegwa was questioned about his qualifications on cross-examination. He stated in his evidence-in-chief, that he holds a Bachelor of Medicine and Surgery Degree from the University of Nairobi. Nothing about his competence and knowledge in the subject matter was said by the Appellant on cross-examination. Dr. Udayan as stated above did not offer himself to the Court in person, to establish his expertise and/or discredit the evidence given by Dr. Ndegwa. The statement by the Trial Court, that Dr. Udayan was paid by the Appellant, and therefore made a medical report favourable to the Appellant, was blown out of proportion by the Appellant. This was a general observation, which was made by the Trial Court with respect to all Doctors, including Dr. Ndegwa, who appear for Parties in injury claims. The Trial Court stated, *''It is clear that experts are ordinarily paid by their Clients and that it is not unusual to tend to give opinion that is more favourable to his Client.''* This is a general statement, applicable in the view of the Trial Court, to medical Witnesses. Ultimately the difference in the evidence of the 2 experts would have been clarified by Dr. Udayan's attendance in Court, and subjection, like his Counterpart, to cross-examination.

13. The amount of Kshs. 200,000 awarded as cost of removal of the metal implant was based on the evidence of Dr. Ndegwa. The Doctor was cross-examined on this at page 97 and 98 of the Record of Appeal. The suggestion by the Appellant was that the amount of Kshs. 200,000 would apply in a high end hospital. Dr. Ndegwa explained this was the cost on average, at different hospitals. Dr. Udayan gave the figure of Kshs. 60,000 in his report, but as stated above, did not testify. The Trial Court did not err in relying on Dr. Ndegwa's evidence. Furthermore the Trial Court followed 2 decisions of Superior Courts, ***Regina Mwikali Wilson v. Stephen M. Gichuhi & Anor. [2015] e-KLR*** and ***Zipporah Nangila v. Eldoret Express Limited & 2 Others, [2016] e-KLR***, where costs for removal of similar metal implants was awarded at Kshs. 200,000 and Kshs. 250,000 respectively. The Trial Court was properly directed in granting future medical costs at Kshs. 200,000.

14. On the whole the Court is satisfied that the decision of the Trial Court should stand, save on the apportionment of liability, which the Court reworks at 70% against the Appellant.

IT IS ORDERED:-

***a) The Appeal is allowed in part on liability.***

***b) The Appellant shall bear 70% liability, while the Respondent bears contributory liability at 30%.***

***c) Consequently general damages shall be paid by the Appellant to the Respondent at Kshs. 560,000; special damages at Kshs. 2,000; and costs of removal of metal implant at Kshs. 200,000- total Kshs. 762,000.***

***d) No order on the costs of the Appeal.***

***e) Interest allowed at 14% per annum from the date of this Judgment, till payment is made in full.***

**Dated and delivered at Mombasa this 19th day of July 2019.**

**James Rika**

**Judge**