REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR

RELATIONS COURT AT MOMBASA

CIVIL APPEAL NUMBER 19 OF 2018

BETWEEN

CHINA JIANGXI INTERNATIONAL [K] LIMITED.....APPELLANT

AND

ANTHONY WAMBUA DAVID alias

ANTHONY DAVID MULU.....RESPONDENT

[An Appeal from the Judgment delivered on 4th July 2018 by Hon. R.K. Ondieki, SPM in Kilifi SPMCC No. 29 of 2017]

BETWEEN

ANTHONY WAMBUA DAVID alias

ANTHONY DAVID MULU.....PLAINTIFF

VERSUS

CHINA JIANGXI INTERNATIONAL [K] LIMITED.....DEFENDANT

Rika J

Court Assistant: Benjamin Kombe

Gikera & Vadgama Advocates, for the Appellant

Kioko, Munyithia, Ngugi & Company Advocates for the Respondent

JUDGMENT

1. The Respondent herein, was a successful Plaintiff in Kilifi SPMCC No. 29 of 2017. He brought the Suit against his Employer, the Appellant herein, for work injury. He prayed for General Damages for pain, suffering and loss of amenities, General Damages for diminished earning capacity, Special Damages at Kshs. 3,000, Costs, and Interest.

2. The Trial Court granted a global award of General Damages to the Claimant at Kshs. 2 million, Special Damages at Kshs. 3,000, Costs and Interest.

3. The Appellant filed Memorandum of Appeal on 5th November 2018. Various grounds are raised on Appeal, including: -

i. The Trial Court failed to consider that the Respondent was blatantly negligent, the Respondent having urinated on top of the timber he was standing on, making it wet and slippery, leading to his fall and injuries.

ii. The Respondent failed to take adequate precautions for his safety, as he did not at all times wear suitable protective apparel

provided by the Appellant.

iii. The Respondent failed to follow training instructions.

iv. The Trial Court failed to consider that the Appellant had provided the Respondent sufficient personal safety equipment.

v. The Trial Court did not take into account Appellant's Witness's account of the events leading to the accident, and disregarded the account presented in the DOSH Form, on the cause of the accident.

vi. The Trial Court erred in finding the Appellant 90% liable, while apportioning liability at only 10 % against the Respondent.

vii. The Trial Court erred in granting Damages, by not taking into account that County DOSH Office had recommended the Respondent is paid Kshs. 28,717 which he declined to collect.

viii. The Trial Court did not take into account, in awarding Kshs. 2 million as General Damages, that the Appellant paid Kshs. 600,000 on account of Respondent's hospital bill

ix. The award of Kshs. 2 million was exaggerated and exceptionally high.

4. The Appellant prays the Court to allow the Appeal.

5. Parties agreed to dispense with oral argumentation, and to rely on Written Submissions.

6. Upon careful consideration of the Record of Appeal, in particular proceedings of the Trial Court and Judicial Authorities supplied by the Parties, the **Court Finds**:

§ The Respondent gave medical evidence at the Trial Court. He suffered severe head injuries comprising concussion; fracture of the mastoid bone; hematoma in the mastoid cells, both sphenoid sinuses and auditory meatus; right temporal parietal multifocal contusional hemorrhage; lifted extra dural hematoma ; and mass effect and effacement due to brain edema.

§ Severe chest injuries, including fracture of the 5^{th} and 6^{th} posterior ribs.

§ The Respondent was admitted in hospital for 9 days. He was in the ICU after brain operation.

§ Dr. Ndegwa, whose evidence was availed to the Trial Court, confirmed that the Respondent suffered very severe multiple and brain injuries, with 9% permanent disability. The Respondent was exposed to the risk of epileptic attacks, could only perform light duty and was not likely to find comparable job, in event the Appellant terminated his contract on medical ground.

§ The Appellant did not seek second opinion, and did not lead medical evidence to contradict that availed by the Respondent.

§ The Appellant paid Kshs. 600,000 toward Respondent's medical bill.

7. In light of the above, it cannot be doubted that the Respondent suffered a serious workplace accident, resulting in grave injuries.

8. The award of global sum of Kshs. 2 million in General Damages, was supported by Judicial Authorities availed to the Trial Court by the Respondent. In ***H.C.C.C No. 95 of 2002 at Nyeri, Silvano Nyaga & another v. Joseph Kogi Ngotho*** the Plainfiff therein was awarded Kshs. 2.5 million for similar injuries as sustained by the Respondent in this Appeal. ***In Court of Appeal decision at Nakuru, Sospine Co. Limited & Another v. Daniel Ng'ang'a*** [citation not indicated] an award of Kshs. 2 million was made for similar injuries. These decisions were made more than 13 years ago.

9. An assessment and award of a global amount of Kshs, 2 million, given to the Respondent years after the above Superior Courts' decisions were made, to Plaintiffs who were similarly injured as the Respondent herein, and taking into consideration that the Respondent had also sought Damages for diminished earning capacity, cannot be said to have been exceptionally high. Furthermore the Appellant failed to submit on quantum of General Damages at the Trial Court. There is no basis to challenge quantum on Appeal, while there was no submission made on quantum at the Trial Court, by the Appellant. This was the holding by the High Court at ***Meru in Civil Appeal No. 111 of 2017, Daniel Muchemi & another v. Rosemary Kawira Kiambi.***

10. Kshs. 600,000 paid by the Appellant in meeting Respondent's medical costs was not shown through the trial, to have been part of Appellant's obligation for pain, suffering, and loss of amenities, and diminished earning capacity sustained by the Respondent. The sum was not claimed by the Appellant in its Pleadings before the Trial Court. The Trial Court did not have ground to grant a remedy which was not sought by the Appellant, by ordering deduction of Kshs. 600,000 from the award of General Damages. Section 34 of the Employment Act 2007, makes it an obligation on the part of an Employer, to ensure the provision of sufficient and proper medicine for his Employee during illness, and if possible medical attendance during serious illness. The Appellant acted within its obligation under the law. The Trial Court did not have any reason, to consider that Kshs. 600,000 in medical bill was paid for the Respondent by the Appellant, or to deduct such amount from the award of General Damages.

11. The Court is satisfied that the grant of General Damages at Kshs. 2 million was within the law, and supported by medical evidence and

judicial authorities.

12. On liability, the Trial Court apportioned 90% against the Appellant. The Respondent in his evidence told the Trial Court that he slipped and got injured. The board where he stood as he worked was slippery. It was unguarded, with no safety belt to hold the Respondent in event of an accidental slip.

13. The Appellant told the Trial Court that the Respondent slipped on his own urine. He urinated at a corner on top of the already completed side of the building. It was while there that the Respondent skidded and fell.

14. There was no clear evidence from the Appellant on trial, that the Respondent urinated on a board, making it slippery, and that as a result, he slid and fell occasioning himself serious injuries. The Witness [DW1] who testified for the Appellant did not establish this allegation. He stated that he saw ‘’*something like water from above*.’’ DW1 was not a credible Witness, telling the Court that even though there was a barrier at the site where the Respondent worked, the Respondent still fell through the gaps. There was a safety net according to DW1, but the Respondent still fell to the ground. The Trial Court was not persuaded that the Respondent urinated, or that the urine was the cause of the slipperiness, slide and fall. Having heard the Witnesses in person, the Trial Court was best placed to judge their demeanor and truthfulness on the subject of urinating. The E&LRC has not seen any material to affect the finding of the Trial Court on this.

15. There is certainty on liability of the Appellant, for non-provision of protective tools of trade, such as safety belt. With proper guard rails, safety boots, helmet and safety belt, it is possible the Respondent would not have slid and fallen, even had he urinated on the board. The Appellant did not show that it provided the Respondent with a safe and secure work environment. It was not shown that the Respondent had appropriate tools, necessary for safe discharge of work, in a construction industry.

16. There are no sustainable Grounds of Appeal, both on liability and quantum of damages.

17. Lastly, there is no Decree in the Record or Supplementary Record of Appeal. The Court adopts the view of the High Court in ***H.C.C.A No. 51 of 2013, Ndegwa Kamau t/a Sideview Garage v Fredrick Isika Kalumbo,*** that failure to include the Order or Decree, from which the Appeal arises, is fatal to the Appeal.

IN SUM, IT IS ORDERED:-

a) The Appeal is declined.

b) Costs to the Respondent.

Dated and delivered at Mombasa this 27th day of September 2019.

James Rika

Judge