



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO 4 OF 2019**

**[FORMERLY MOMBASA HIGH COURT CIVIL APPEAL NO 201 OF 2017]**

**SIMON UNDA KATANA.....APPELLANT**

**VERSUS**

**DEEMAN CONSTRUCTION CO LTD.....1<sup>ST</sup>RESPONDENT**

**FREIGHT FORWARDERS NBI LTD & DTK.....2<sup>ND</sup>RESPONDENT**

**KITUI FLOUR MILLS LIMITED .....3<sup>RD</sup>RESPONDENT**

**COAST SILOS (K) LIMITED.....4<sup>TH</sup>RESPONDENT**

**KHALID OMAR SWALEH T/A JOMVU SCRAPE METAL.....5<sup>TH</sup>RESPONDENT**

*(Appeal from the judgment of Hon H. Nyakweba, PM in Mombasa CMCC No 1009 of 2013 dated 15<sup>th</sup> September 2017)*

**JUDGMENT**

1. This appeal was originally filed in the High Court at Mombasa as Civil Appeal No 201 of 2017. Pursuant to an order issued by **P.J Otieno J** on 3<sup>rd</sup> December 2018, the matter was transferred to this Court for hearing and disposal.
2. The appeal arises from the judgment of **Hon H. Nyakweba, PM** in **Mombasa CMCC No 1009 of 2013**.
3. In his Memorandum of Appeal dated 10<sup>th</sup> October 2017, the Appellant raises the following grounds of appeal:
  - a) That the learned Principal Magistrate erred in law and fact in failing to apportion liability among all the defendants;
  - b) That the learned Principal Magistrate erred in law and fact in failing to consider the submissions of the parties;
  - c) That the learned Principal Magistrate erred in law and fact in failing to provide the reasons behind his finding on liability;
  - d) That the learned Principal Magistrate erred in law and fact in making an inordinately low award on quantum in total disregard of the severity of the injuries sustained by the Appellant and the authorities cited by the Appellant;
  - e) That the learned trial Magistrate erred in law and fact in dismissing the case against the 1<sup>st</sup>, 3<sup>rd</sup> and 5<sup>th</sup> defendants without considering the evidence on record against them;
  - f) That the learned trial Magistrate erred in law and fact in failing to hold that the 5<sup>th</sup> defendant who was in control of the forklift was negligent in the manner that he operated the said forklift hence the injuries to the Appellant;
  - g) That the learned trial Magistrate erred in law and fact in making a finding on liability against the 2<sup>nd</sup> and 4<sup>th</sup> defendants principally on the basis of the interlocutory judgment entered against them;
  - h) That the learned Principal Magistrate erred in failing to properly consider the evidence before him in totality and further erred in

failing to make any proper findings on the evidence before him.

4. In his plaint filed before the trial court, the Appellant pleads that he was at the material time, employed by the 1<sup>st</sup> Respondent as a mason. On 29<sup>th</sup> September 2011, the Appellant entered the 4<sup>th</sup> Respondent's premises at Coast Silos (K) Limited to carry out the task of binding Y-25 steel bars as instructed by the 1<sup>st</sup> Respondent.
5. The Appellant further pleads that while he was in the course of his work at the 4<sup>th</sup> Respondent's premises, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' three wheeler Motor Vehicle Registration Number KAB 026C was carrying out mill construction works for the 3<sup>rd</sup> Respondent at the said premises.
6. A heavy metal object weighing approximately 200 Kgs is said to have slipped from the three wheeler Motor Vehicle Registration Number KAB 026C from a height of approximately 40 metres falling on the Appellant and causing him injuries.
7. The appeal was urged by way of written submissions.
8. This is a first appeal and the role of the first appellate court is well settled. In the written submissions filed on behalf of the 5<sup>th</sup> Respondent on 10<sup>th</sup> May 2018, reference was made to the High Court decision in *Ndungu Dennis v Ann Wangari Ndirangu & another [2018] eKLR* where **Joel Ngugi J** restated the applicable principles as follows:

***“i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;***

***ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her;***

***iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.***

***These three principles are well settled and are derived from various binding and persuasive authorities including Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No. 172 of 2000; Tunoi, Bosire and Owuor JJA);***

***Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another (Civil Appeal No. 345 of 2000; Okubasu, Githinji and Waki JJA);***

***Virani T/A Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd (Kisumu High Court CC No. 88 of 2002).”***

9. The Appellant raises eight (8) grounds of appeal, which in my view fall under two (2) broad heads being; liability and quantum of damages.
10. In his judgment dated and delivered on 15<sup>th</sup> September 2017, the learned trial Magistrate dismissed the case against the 1<sup>st</sup>, 3<sup>rd</sup> and 5<sup>th</sup> defendants and entered judgment against the 2<sup>nd</sup> and 4<sup>th</sup> defendants jointly and severally.
11. The Appellant faults the learned Magistrate on this score and states that liability ought to have been apportioned among all the five (5) defendants.
12. From the record, it is evident that liability against the 2<sup>nd</sup> Respondent was determined at the interlocutory stage.
13. In his judgment the learned trial Magistrate states as follows:

***“From the foregoing, it is not disputed that the plaintiff was injured by the falling of an object from the forklift owned by the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant despite being duly served with summons to enter appearance failed to do so. Consequently, interlocutory judgment was entered. This settles the issue of liability in my view.”***
14. In its written submissions filed on 16<sup>th</sup> May 2018, the 3<sup>rd</sup> Respondent relied on the decision in *Abdullahi Ibrahim Ahmed (Suing as the Personal Representative of the Estate of Anissa Sheikh Hassan (Deceased) v Lem Musolo [2013] eKLR* where the Court of Appeal held that once interlocutory judgment has been entered, the question of liability becomes a foregone and an unassailable conclusion.
15. That may well be so. However, in a case with multiple defendants such as the present one, entry of interlocutory judgment against one defendant does not extinguish the claim against the other defendants. Having found the 2<sup>nd</sup> defendant liable even at the interlocutory stage, the trial court was still under a duty to determine the contribution, if any, of the remaining (4) four defendants.
16. The learned trial Magistrate appears to have failed to perform this crucial duty with respect to the 1<sup>st</sup> and 3<sup>rd</sup> Respondents. In his judgment, he states:

***“From the evidence on record, it is not in dispute that the plaintiff was an employee of Deman Construction Ltd as shown in***

**DOSH 1 form [P. Exh.5] and he was injured while on duty on 29.09.2011. That by the Articles of Agreement [D.Exh.1] entered into on 03.06.2010 between Kitui Flour Mills Ltd and Deman Construction Ltd, the latter was contracted by the former to erect and complete a mill building, a warehouse among other works at plot No. 1056 Section V. MN Mikindani. Further, the plaintiff told the court that he was injured when a heavy metal fell on him from a forklift KAB 026C the property of Freight Forwarders NBI Ltd & DTK.”**

17. Having made these critical findings of fact, how then did the learned trial Magistrate let the 1<sup>st</sup> and 3<sup>rd</sup> Respondents off the hook? I have had occasion to peruse the testimony of the 3<sup>rd</sup> Respondent’s witness, Salim Wambua as contained in the Record of Appeal.

18. Wambua told the trial Court that the 3<sup>rd</sup> Respondent had contracted the 1<sup>st</sup> Respondent to do some work at the accident scene. He was however not present when the accident occurred. Yet in his judgment, the learned trial Magistrate states:

**“The 3<sup>rd</sup> defendant called one witness who exonerated it from blame.”**

19. This Court did not see any material in Wambua’s testimony to justify the conclusion by the trial court that the 3<sup>rd</sup> Respondent had been exonerated from blame.

20. Regarding the 5<sup>th</sup> Respondent, the trial court rendered itself in the following terms:

**“Though the 5<sup>th</sup> defendant did not call any evidence, the plaintiff did not in his testimony adduce any evidence of negligence on his part. Despite this, the 5<sup>th</sup> defendant was sued as the driver of the forklift from which the heavy object fell. The 5<sup>th</sup> defendant was therefore an agent of a known principal who is the 2<sup>nd</sup> defendant. Liability cannot attach as against the 5<sup>th</sup> defendant. The issue of a falling object could only be explained by the 5<sup>th</sup> defendant who was not called. This being so, the master who was the 2<sup>nd</sup> defendant is the one to be held wholly liable.”**

21. I do not agree with the learned trial Magistrate that negligence on the part of the 5<sup>th</sup> Respondent was not established. In his plaint, as amended on 11<sup>th</sup> July 2013, the Appellant cites several particulars of negligence against the 2<sup>nd</sup> and 5<sup>th</sup> Respondents. Further, in his testimony before the trial court, the Appellant specifically blamed the 5<sup>th</sup> Respondent for the accident.

22. Having said so, I agree with the learned trial Magistrate that because the 5<sup>th</sup> Respondent was an agent of the 2<sup>nd</sup> Respondent, then the 2<sup>nd</sup> Respondent was vicariously liable for his actions. On this ground alone, I confirm the decision of the trial court, dismissing the claim against the 5<sup>th</sup> Respondent.

23. Regarding the claim as against the 1<sup>st</sup> and 3<sup>rd</sup> Respondents, I find and hold that the learned trial Magistrate misdirected himself on the law and facts and thus arrived at an erroneous decision on the question of liability.

24. On quantum of damages, the Appellant complains that the award given by the trial court was inordinately low in view of the severity of the injuries sustained and the authorities cited by the Appellant.

25. According to the medical report by Dr. S.K Ndegwa dated 24<sup>th</sup> April 2012, the Appellant suffered the following injuries:

- a) Fracture of the right humerus;
- b) Severe abdominal trauma leading to rupture of the liver;
- c) Severe chest injuries including fracture of the 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> ribs and large deep laceration on the posterior right rib cage.

26. The Doctor’s conclusion was that the Appellant had suffered severe multiple bone, vital organ and soft tissue injuries. He rendered the following opinion:

**“Simon was injured while on duty at his place of work, sustained the above severe injuries, was treated and healing is expected with 12% permanent disability due to the liver damage. Future medical costs including removal of the implants will be 100,000ksh.”**

27. In his judgment, the learned trial Magistrate cited a 1991 High Court decision being **Pius Kegancho v Zephaniah Anyieni & another (HCCC No.4915/1991)** in which the plaintiff was awarded Kshs. 600,000. Having considered the lapse of time and inflation, the learned Magistrate awarded the Appellant Kshs. 1,600,000 in general damages in addition to Kshs. 100,000 for future medical expenses and Kshs. 2,000 as special damages.

28. I find nothing in the assessment by the learned trial Magistrate to justify interference with the award. In doing so, I have ignored the Appellant’s attempt to introduce an element of loss of earning capacity that was not canvassed before the trial court. I have also ignored the statements made by the Respondents in their written submissions that the award by the trial court was too high, which in effect amount to cross appeals through the back door.

29. In the end the judgment by the learned Principal Magistrate dated 15<sup>th</sup> September 2017 is varied in the following terms:

a) Judgment is entered in favour of the Appellant against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents jointly and severally, in the sum of Kshs. 1,600,000 in general damages, Kshs. 100,000 for future medical expenses and Kshs. 2,000 as special damages.

b) The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents will pay the costs incurred in this Court and in the Court below.

30. These are the orders of the Court.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 24<sup>TH</sup> DAY OF OCTOBER 2019**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Shariff for the Appellant

Miss Munyari for the 1<sup>st</sup> Respondent

Miss Kieti for the 2<sup>nd</sup> Respondent

Cootow & Associates for the 3<sup>rd</sup> Respondent

Mr. Mwangunya for the 5<sup>th</sup> Respondent