REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

APPEAL NO. 2 OF 2018

(Before Hon. Justice Mathews N. Nduma)

HAYER BISHAN SINGH AND SONS LIMITED.....APPELLANT

VERSUS

GEORGE ODHIAMBO AMIMO.....RESPONDENT

J U D G M E N T

1. The appellant challenged the judgment and decree of the Principal Magistrate at Winam court in suit number 214 of 2012 delivered on 24th February 2017 in which the court found the Appellant 100% liable for injuries suffered by the respondent in the course of duty and awarded the respondent general damage in the sum of Kshs. 400,000 and special damages in the sum of Kshs. 3,000.

2. The principles upon which the court acts on first appeal were set out in the case of ***Selle vs Associated Motor Boat Company 1968 EA 123*** as *follows:*

> *"The 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 that respect. In particular the court is not bound necessarily to follow the trial judge's finding of fact if it appears either that she has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impressed based on the demeanor of a witness is inconsistent with the evidence in the case generally"*

3. The brief facts of the case discerned from the record of proceedings are that the plaintiff was employed by the defendant in May 2011 at a quarry. That he was recruited by a lady manager of Asian descent named Cynthia. The plaintiff's work was to break stones using a hammer. That his supervisor was one Peter Omondi. That he worked for the defendant from 6th May 2011 up to 18th June 2011. On 18th June 2011, the plaintiff was breaking the stones using a hammer and accidentally a stone fell in his eye. The eye started bleeding and developed a swelling. The plaintiff sought treatment at Obambo dispensary and was referred to Kisumu District Hospital where he received further treatment. The claimant produced treatment book in court. The plaintiff was referred also to Nyanza Provincial hospital and produced treatment sheets from there. The claimant produced a medical report of one Dr. Dorothy Mutie for which she paid Kshs. 3,000 and produced a receipt for the fee paid. The claimant produced a demand letter by his advocate dated 8th February 2012. Plaintiff testified that the respondent paid him a weekly salary of Kshs. 2,800 though at times they were paid Kshs. 3,000 depending on the amount of work done. Payments were done by Cynthia. The quarry is at Chuth Ber area and the company is situated along Kisumu Bondo. The plaintiff testified that the defendant company was to blame for the accident in that the defendant failed to provide the claimant with protective gears to wit goggles and gloves. Plaintiff stated that if he had goggles on the material day, the accident of the eye would not have occurred. The plaintiff testified that he could no longer see with that eye and prayed for compensation and refund of the medical fees paid and costs of the suit.

4. The patient record book and medical report by Dr. Mutie were produced as exhibits by consent of the parties.

5. DW1 Peter Omondi Oyilo testified for the defendant that he was a granny foreman at Hayer Bishan Singh and Sons Company Limited for over 18 years. That he knew the plaintiff and that he was an employee of Ominde Sub-Contract and was not an employee of the defendant company. That the defendant had sub-contracted Ominde to collect stones that remained in the quarry to be taken for crushing. That the defendant company gave Ominde, a casual labourer form to fill. The forms were given to Ominde by Nagra Singh who hires the casual labourers. DW1 testified that on 1st August 2011, he did not receive any information that their workers had been injured. That there was no complaint from their workers. That DW1 had a daily attendance record to know who is in and who is not in. That in his record of 18th June 2011, the name of the plaintiff was not there. DW1 produced the record for the month of May and June 29th but the same was rejected by the court upon objection raised by counsel for the plaintiff that the document had not been served on the plaintiff and this was an ambush after closure of plaintiff's case. DW1 stated that on 18th June 2011, no employee reported that he was hurt. That only Nagra Singh hires the

employees. DW1 stated that the respondent did not provide employment cards to its workers. DW1 stated under cross examination that he saw the plaintiff working in the quarry but insisted that he was an employee of Ominde. DW1 testified that he did not know the exact work that was assigned to the plaintiff. DW1 testified that he did not have the sub contract issued to Ominde.

6. DW2 Wilson Okello testified that he was a supervisor at Hayer Bishan Singh. That he did not know the plaintiff and has never seen him. That the plaintiff has never worked at the crusher plant. That if one gets hurt at the crusher plant one gets first aid there and if the injury is serious, employee is taken to hospital.

7. Under cross examination, DW1 said he had a letter showing that he worked for Hayer Bishan Company though he did not have it in court. DW2 said that he did not know Ominde contractors. That he worked for respondent for 30 years and had not heard of Ominde contractors. DW2 could not remember the names of the people he supervised at the crusher and quarry on 18th June 2011. The defendant sought to produce alleged sub-contract agreement between Hayer Bishan Singh and Ominde contractors after DW2 had testified. The court ruled that the document was brought later in the hour and was inadmissible in a ruling delivered on 7th August 2013 by L.N. Waigara, SRM.

8. The learned trial magistrate in his judgment analysed the testimony by PW1, DW1 and DW2 and isolated three issues for determination as follows:

(i) Whether the plaintiff was an employee of the defendant.

(ii) Whether he plaintiff was injured within the defendant's premise and if so who is to blame.

(iii) Whether the plaintiff is entitled to any damages.

9. This court has also carefully re-considered and evaluated the testimony of PW1, DW1 and DW2 and has come to the same conclusion as did the learned trial magistrate that the plaintiff was employed by the defendant at their quarry at Chuth Ber area which was about 20 metres from the company premises.

10. This court has similarly noted contradictory evidence between DW1 and DW2 regarding whether the plaintiff ever worked at the quarry where both DW1 and DW2 were supervisors and whether the defendant sub-contracted work to one Ominde. Whereas DW1 testified that he knew the plaintiff and saw him work at the quarry, DW2 who had worked for the respondent as a supervisor for 30 years testified to the contrary that he had never seen the plaintiff at work and had never heard of a sub-contractor by the name Ominde. It is the finding of this court that the trial magistrate did not err in concluding that DW1 and DW2 were not honest witnesses and their testimony was therefore unreliable and was disregarded. The trial court also took into account correctly, in my view the fact that the defendant sought to introduce an agreement between the defendant and Ominde after DW1 and DW2 had testified and the court rightly disallowed production of the same.

11. This court finds that the testimony by the plaintiff was consistent and credible and that the plaintiff was indeed employed by the defendant company in their quarry. That the plaintiff was employed to crush stones which is dangerous work that required the defendant to provide at least eye protection by way of goggles to the employees crushing stone, including the plaintiff. Indeed, due to the dust particles that emanate from crushed stone for prolonged hours, it is in the court's view essential for employers to provide facial protection to employees including mouth and eye cover to avoid injuries and contraction of lung diseases. This aspect was not canvased in this case but is a necessary by the way in my analysis.

12. Accordingly, the trial court, as this court correctly found that the defendant was 100% liable for the injury that visited the plaintiff in the course of work on 18th June 2011 at the quarry. I return the same verdict therefore.

13. With regard to the quantum of damages, the testimony by the plaintiff and the medical report by Dr. Dorothy M. Mutie dated 6th June 2012 was not contradicted at all by the defendant. The Doctor determined in her report that the plaintiff had suffered permanent visual disability as a result of the injury assessed at 30%. The learned magistrate took this permanent disability into account.

14. The principles followed by an appellate court in determining whether or not to interfere with a final court's award of damages were laid down in the case of ***Hinga vs Manyeko (1961) EA 705 and Kemfro Africa Limited vs A.M. Lubia and another 1982-1988 KAR 727*** as follows:

> "*The appellate court will interfere if the final court in assessing damages took into account irrelevant factors or left out a relevant one, or that the award is so inordinately low or high that it must be a wholly erroneous estimate of damages."*

15. The trial court considered in addition to the facts before it the case of ***Jaget Singh and sons Limited vs Njenga Moche Nairobi HCCCA No. 423of 1998*** in which an award of general damages for an eye injury was assessed at Kshs. 250,000 and was confirmed on Appeal on 8th October 2002 about 15 years ago. The court considered the injury in that case to be similar to the ones suffered by the plaintiff in this suit. This court notes that the plaintiff in Jaget case had suffered more severe eye injury but the passage of 15 years is such a long time in evaluation as to find that an award of Kshs. 400,000 is not so inordinately high in the circumstances of this case though the plaintiff had suffered a lesser disability.

16. The court has also referred to ***Kisii HCC Civil Appeal NO. 319 of 2006 Njuca Construction Company Limited vs Akumu Kenyariya Alfred*** in which the High Court reduced award of damages by the trial court with regard to an injury suffered in the left eye from Kshs. 90,000 to Kshs. 40,000. In that case, the learned judge expressed doubt as to how Dr. Ajuoga, a General practioner and not eye specialist reached the conclusion that the respondent's left eye had reduced vision.

17. In the present case, the medical report that assessed permanent disability at 30% was produced by consent and that assessment was not challenged at all.

18. In the circumstance of this case, 30% permanent disability of an eye is a serious injury to warrant the award of general damages assessed at Kshs. 400,000 in the considered view and finding of this court. The authorities relied upon were decided more than ten years ago. The learned magistrate correctly took into account passage of time in arriving at the quantum of damages.

19. Accordingly this court finds no valid grounds to interfere with the trial court's finding on liability and assessment of quantum. The court upholds the verdict of the trial court and confirms the award of general damages to the respondent as against the Appellant in the sum of Kshs. 400,000 at 100% liability and special damages in the sum of Kshs. 3,000.

20. The Appeal is consequently dismissed with costs.

Judgment Dated, Signed and delivered this 7th day of October, 2019

Mathews N. Nduma

Judge

Appearances

L.G. Menezes and Company for Appellant.

Geoffrey O. Okoth and Company Advocates for the Respondent.

Chrispo – Court Clerk