REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

APPEAL NO. 4 OF 2016

(Before D. K. N. Marete)

JAMES FINLAY (K) LTD.....APPELLANT

VERSUS

JOSEPH AJODE OKEDI.....RESPONDENT

JUDGMENT

This Appeal was originated by way of a Memorandum of Appeal dated 13th January, 2011. It seeks the following relief of court;

1. The learned trial Magistrate erred by arriving at a finding on liability, which was not supported by evidence.

2. The learned trial Magistrate erred in law and fact in basing his finding on irrelevant matters.

3. The respondent's case was not proved on balance of probability as is required by law.

4. The trial magistrate should have found that there was no basis on which the appellant could be blamed for the accident.

5. The learned trial magistrate's award of damages was inordinately too high and manifestly excessive for the very minor soft tissue injuries allegedly suffered by the plaintiff.

6. The learned trial magistrate erred on all points of fact and law in as far as both liability and award of damages is concerned.

She prays as follows;

1. That the decision of the Chief Magistrate on both liability and quantum in Kericho PMCC No.993 of 2004 be set aside and a proper finding be made by this Honourable Court.

2. That this Honourable Court do make such further orders as may be just and expedient.

3. This appeal be allowed with costs.

The appellant in her written submissions presents a case of no blame on the part of the appellant. It is her

case that the slip and fracture in the course of the employment of the respondent cannot likely be visited on the appellant and this renders her blameless in the circumstances.

On an examination of the respondent's case the appellant submits as follows;

> *"The respondent testified that he was passing through the terraces. He slipped and fell thereby sustaining injuries (contained at page 22-23 of the record of appeal). When the respondent was cross-examined by the defence counsel he stated that it rained and the ground was slippery and as a result of which he slipped over the terrace causing him to sustain injuries. The respondent also stated that he had worked for the appellant four about 5 to 6 months. The respondent therefore cannot blame the appellant for the injuries that he sustained. The appellant as an employer could not do anything to ensure that the respondent never slipped into a terrace while walking. There was an implied term of the contract that the respondent took the risks incidental to his contract. He ought to have been aware of the dangers of walking next to unmarked terraces. It was then the appellant's primary duty to keep a safe look out."*

She further sought to rely on the authority of **Abdala Baya Mwanyule -vs- Swaladin Sahid t/a Jomvu Total Petrol Station (2004) eKLR** the Court of Appeal Stated as follows;

> "*It is an implied term of the contract of employment at common law that an employee takes upon himself risks necessarily incidental to his employment. Apart from the employer's duty to take reasonable care; and employee cannot call his employer, merely upon the ground of their relation of employer and employee to compensate him for an injury which he may sustain in the course of his employment in consequence of the dangerous character of the work upon, which he is engaged. The employer is not liable to the employee for damages liable to the employee for damages suffered outside the course of his employment. The employer does not warrant the safety of the employees' working condition nor is the insured of his employee's safety; the exercise of due care and skill suffice – the employer does not owe any general duty to the employee to take reasonable care of the employee's goods; the duty extends only to his person"*

The appellant further submits that the finding of the Honourable Magistrate is faulty in that the respondent's case was not proved on a balance of probability. It is her case that the respondent did not produce X-ray forms or medical treatment notes from the hospital he visited and the medical examination report –Pexh1 is not credible in that it was prepared six months after the respondent had completely healed.

Again, the appellant faults the award of Kshs.300,000.00 in compensation for a simple fracture of the long bones on the left leg which had healed well with no complications. She suggested a reduction of this to Kshs. 150,000.00.

The respondent on the other hand, submits that for the appellate court to interfere with a judgment of the trial court, it must be satisfied that;

> *1. Either the trial magistrate, in assessing damages, took into account an irrelevant factor or left out on account a relevant factor. Or*
>
> *2. The amount is inordinately so high or so low that it must be a wholly erroneous estimate of damages.*

She also sought to rely on the authority of **SOKORO SAWMILLS LTD VS GRACE NDUTA** (also cited by the appellant.)

> *".... authority of Sosphinats Co. Ltd -vs- Daniel Ng'an'ga – Nakuru Civil Appeal No. 315 of 2001 (Appeal from the judgement of the High Court of Kenya at Nakuru (Rimita J) dated 23rd day of March, 2001.)*

At pages 2-3 it states:-

"The assessment of damages for personal injuries is a difficult task. The court is required to give a reasonable award which is neither extravagant nor oppressive. And while the judge is guided by such factors as the previous award for similar injuries and the principles developed by the courts, ultimately, what is a reasonable award is an exercise of discretion by trial judge and will invariably depend on the peculiar facts of each case.

In this case, the trial Judge considered the evidence of the respondent, the three medical reports which he quoted extensively, the submissions of respective counsel and the authorities cited to him in arriving at what he referred to as adequate compensation". It is evident from the medical reports that the respondent sustained a severe head injury resulting in the deformity of the brain injury.

It has not been shown that in assessing the damages the learned Judge failed to apply the relevant principles nor can it be justifiably said that the award is in the circumstances of the case so high that it amounts to an erroneous estimate. There are no valid grounds, in our view, for interfering with the award."

It is apparent from the record and judgment of the Principal Magistrate's Court the parties to this appeal agreed on a liability ratio of 80% to 20% for the respondent and plaintiff respectively. This was reduced to a sum of Kshs. 244, 500.00 being payable to the claimant. The learned Magistrate in her judgment dated 7th December, 2010 awarded Kshs. 300,000.00 as general damages. This is the subject of this appeal.

This appeal is a contradiction of the goings on during trial. The parties on their own motion agreed and entered into a consent judgment at 80/20 % in favour of the plaintiff. The appellant, then respondent, who was party to this consent now comes in to fault the trial court judgment on grounds of irrelevancy of evidence, liability for the accident and inordinate assessment and finding on general damages. She also now faults the trial Magistrate for finding in favour of the plaintiff when the case was not proved on a balance of probabilities. To me, this can only be an afterthought and is inconsistent with the mood of the consent judgment entered *inter partes*. These grounds of appeal therefore collapse on the wayside.

A comparative of the trial court award on general damages and the consent judgment renders any further debate or dissent on the subject superfluous. The award is in sync with the consent judgment of the parties and does not make a significant departure from similar awards by courts on the subject.

I am therefore inclined to dismiss the appeal with costs to the respondent.

Delivered, dated and signed this 31st day of January, 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Sitienei instructed by Kibichiy & Company Advocates for the Appellant.

2. Mr. Meroka instructed by Meroka & Company Advocates for the Respondent.