



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
APPEAL NO. 13 OF 2015

(Originally Naivasha High Court Civil Appeal No. 71 of 2015)

H. YOUNG & CO. (E.A.) LTD

APPELLANT

v

SAMSON OKOTH ORENKO

RESPONDENT

**(Appeal from the Judgment of Hon P Gesora (Mr.), Chief Magistrate delivered on 21st May, 2015
in Naivasha CMCC No. 206 of 2014)**

JUDGMENT

1. This judgment relates to an appeal against the judgment of the lower Court delivered on 21 May 2015 in which the Respondent was awarded; *General damages of Kshs 1,000,000/- for pain and suffering, special damages of Kshs 13546/-, diminished earning capacity of Kshs 1,353,744/- together with costs and interest.*
2. The Appellant raised 11 grounds of appeal to wit
 1. THAT the learned Magistrate erred in law and in fact by finding the Defendant liable 100% which was against the weight of evidence from both the Plaintiff and defendant.
 2. THAT the learned Magistrate erred in law and in fact in failing to find that the Plaintiff was at fault or substantially liable for the accident as he was in control of the object.
 3. THAT the learned Magistrate erred in law and in fact by failing to find that the Defendant had not breached any duty of care.
 4. THAT the learned Magistrate erred in law and in fact by failing to find that the Defendant had supplied all protective gears necessary for this matter.
 5. THAT the learned Magistrate erred in law and in fact by failing to find that the plaintiff did not take adequate steps to ensure his own safety.
 6. THAT the learned Magistrate erred in law and in fact in failing to find that the plaintiff had a pre-existing condition and that the Defendant was not liable.
 7. THAT the learned Magistrate erred in law and in fact in failing to find that the plaintiff had filed another suit arising from the same cause of action being Naivasha CMCC 515 of 2014.

8. THAT the learned Magistrate erred in law and in fact by making awards on General damages that was excessive regards (sic) being decided cases.

9. THAT the learned Magistrate erred in law and in fact in making an award for diminished earning capacity without any proper basis and evidence.

10. THAT the learned Magistrate erred in law and in fact by making awards on diminished earning capacity that was excessive regards (sic) being decided cases.

11. THAT the learned Magistrate erred in law and in failing to follow and be bound by the principle of stare decisis.

3. The Appeal was transferred to this Court and was mentioned initially before me on 25 November 2015, and in a ruling delivered on 9 December 2016, the Court gave directions as to the filing of process and determination of the appeal.

4. The Appellant therefore filed its submissions on 9 February 2017, while the Respondent filed his submissions on 17 February 2017 and which submissions they indicated they would rely on without oral highlighting.

5. The Appellant collapsed the 11 grounds of appeal into 4 broad categories and the Court will examine the appeal on those broad categories.

Role of this Court

6. This being a first appeal, the Court is expected to re-evaluate and analyse the evidence and either agree with the conclusions of the lower Court or make its own conclusions, but bearing in mind that it did not have the advantage of seeing and hearing the witnesses (see *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Ar* (2004) eKLR).

Liability (grounds 1 to 5)

7. The Respondent's testimony before the lower Court is that on 27 June 2013 he was assigned to carry marine board(s) from the stores and that in the course of ferrying the fourth board, he felt some sharp pain which caused him to fall down. He gave the cause of the pain and fall as the weight of the marine board which in his view should have been carried by cranes.

8. The Respondent gave the dimensions of the board(s) but not the weight.

9. The Appellant called one witness a Safety Officer who in a very brief testimony only talked about safety courses/lessons given to employees and also stated that he was not aware that the Respondent got injured in the work place though admitting records kept suggested that he got injured in the work place.

10. The record before the lower Court in this respect does not show that the Appellant challenged or controverted the Respondent's testimony that the immediate cause of the fall and injury was the weight of the marine boards.

11. In so far as the Respondent attributed the fall and injury to the weight of the marine boards and that the boards should have been carried by cranes, in my view he had satisfied the test of proving his case on a balance of probability. He had discharged the legal burden in cases of this nature and therefore evidential burden shifted to the Appellant.

12. The Appellant, in its submissions attempted and went to great lengths to urge that there were inconsistencies in the Respondent's pleaded case and testimony and examples given included pleading *sliding* while in testimony the evidence was on *falling*.

13. Pleadings as a rule should set out the facts setting out the cause of action in as clear manner as possible but the evidence to support the pleaded facts come out in evidence/testimony.

14. In my view, the facts as set out by the Respondent clearly brought forth the case he was presenting and though there appear to be minor inconsistencies and appreciation of the same by the lower Court, the same were not so material as to affect the findings on liability.

Existence of parallel Suit (Naivasha CMCC No. 515 of 2014)

15. Though making much on a Court sticking to facts as pleaded in reaching a conclusion on the issues in dispute, the Appellant attacks the lower Court for having failed to find that there existed a suit in which the Respondent was agitating the same cause of action, but nowhere in its Statement of Defence did it plead such a defence.

16. The only time the Appellant raised the issue of parallel proceedings was when it filed a Motion on 5 February 2015 seeking the consolidation of Naivasha CMCC No. 206 of 2014 and Naivasha CMCC No. 515 of 2014 and/or striking out of one of the suits.

17. This motion was filed on the morning when the suit had been scheduled for hearing and from the record, it appears that the lower Court did not give any directions as to the hearing of the application for the Court merely directed *Matter to proceed*.

18. If indeed the Respondent filed 2 suits alleging same cause of action, that would amount to abuse of the court process but because it is not apparent from the record as to what became of Naivasha CMCC No. 515 of 2014, and failing to show what prejudice or injustice it has suffered or may suffer, the Court is of the view that nothing turns on this ground of appeal.

19. If the said suit is still on the lower Court's docket, the Appellant has effective options which include moving for its dismissal with an appropriate order for costs.

20. In any case, by dint of section 6 of the Civil Procedure Act, CMCC No. 206 of 2014 being the earlier suit should have been the one to proceed for trial unless ordered otherwise.

General damages (ground 8)

Pain and suffering

21. The Appellant attacks the award of general damages on the reasons that the Respondent did not lead any testimony on the injuries he sustained.

22. It is not in dispute that the Respondent produced 2 medical reports (exhibits 6 and 8) and treatment notes (exhibits 2(a),(b),(c) and a discharge summary (exhibit 3) while the Appellant produced as a bundle exhibits including a medical reports dated 6 November 2013, 27 November 2013 and 21 November 2014 (Dr. E. Kimani) indicating the Respondent had a chronic back disease going back about 6 months and had sustained blunt injuries to the lumbar and sacral region which required further management.

23. The medical reports on record clearly indicated the nature of injuries sustained by the Respondent and the failure to produce x-rays in my view was not material. The medical reports were prepared on the basis of physical examination of the Respondent and by reference to x-rays among other primary medical notes.

24. The reports by the Appellant, put in perspective, only go to show that the persistent medical complaints by the Respondent could be attributed to the injuries of 27 June 2013 and not any previous chronic injuries unrelated to the work place accident.

25. If by any chance the Appellant wanted the authors of the medical reports to be called to tender

evidence to disprove the contents of the reports that was an option available to it at the trial and not in this Court.

26. On the general damages, the Appellant challenges the award as not being supported by case law/precedent and the submissions show that it relied on the cases of *Shem Shituyi v Rexon Shiyonga* (2014) eKLR, *Patrick Mwiti Imanene & Ar. V Kevin Mugambi Nkunja* (2013) eKLR and *Power Lighting Comp. Ltd & Ar. v Zakayo Saitoti Naingola & Ar* (2008) eKLR.

27. Unfortunately, the Appellant did not file these authorities with the Record of Appeal but has now sought to rely on authorities which were not presented to the lower Court.

28. The Court has looked at the authorities cited before the lower Court and cannot conclude that the lower Court went way out of the findings and holdings thereon.

Diminished earnings

29. The Respondent was awarded Kshs 1,353,744/- on account of diminished earnings, but the Appellant challenges the same as not available because it was not supported by both medical and factual evidence.

30. The Appellant asked the Court to rely on the medical report by Dr. Kimani.

31. Dr. Kimani's opinion was

The above named person suffered a lot of pain and psychological trauma. He requires future medical attention as regards the accident for further management and due to pre-disposition to osteoarthritis and limb paralysis. The degree of injury is grievous harm.

32. In my view, the lower Court's conclusion on damages for diminished earnings can be supported by the opinion of the medical reports which were produced before the lower Court.

Medical report not produced before the lower Court

33. It appears that the Appellant sneaked into the Record of Appeal a medical report which was not produced before the lower Court (see Respondent's submissions on Ground 8).

34. If that is correct, in my view, the whole Appeal would be rendered incompetent and it would be a sign of utter dishonesty on the part of the Appellant.

35. I would therefore have dismissed the Appeal on that ground alone.

36. Before concluding the Court must observe that from the record, it is apparent that the parties prosecuted their respective cases casually in the lower Court.

Conclusion and Orders

37. The Court finds no merit in the appeal and upholds the judgment of the lower Court.

38. The appeal is thus dismissed with costs to the Respondent.

Delivered, dated and signed in Nakuru on this 10th day of April 2017.

Radido Stephen

Judge

Appearances

For Appellant Kinyanjui Njuguna & Co. Advocates

For Respondent Wanga Amboko & Co. Advocates

Court Assistant Nixon