



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MACHAKOS**

**APPEAL NO. 5 OF 2021**

*(Formally Machakos HCCA No. 91 of 2017)*

**Before Hon. Lady Justice Maureen Onyango**

**SUPERIOR HOMES (KENYA) LIMITED.....APPELLANT**

*VERSUS*

**MUSANGO KITHOME.....RESPONDENT**

*(Being an appeal against the judgement and decree of Hon. I. M. Kahuya (Mrs), Senior Resident Magistrate delivered on 16<sup>th</sup> February 2018 at Machakos in CMCC No. 514 of 2016 – Musango Kithome v Superior Homes (Kenya) Limited)*

**JUDGMENT**

1. Vide his Complaint dated 16<sup>th</sup> June, 2016 and filed in Court on 4<sup>th</sup> August, 2016, the Respondent sought the following reliefs from the Appellant –
  - a. Special damages of Kshs.5,000.00.
  - b. General damages for pain, suffering and loss of amenities.
  - c. Costs of the suit and interest.
2. In his Complaint the Respondent averred that on or about 11<sup>th</sup> May, 2016 while working as a casual labourer in the Appellant's painting section, he was injured when the ladder he was using slid causing him to fall. He attributed his injuries to negligence on the part of the Appellant, particulars of which were listed in the Complaint at Paragraph 5 (a) to (f).
3. In response to the Complaint, the Appellant filed its Statement of Defence on 5<sup>th</sup> September, 2016 which majorly consisted of denials. In particular, it denied the existence of any employment relationship between it and the Respondent or that the Respondent was injured while in its employment.
4. The Appellant also denied any negligence on its part and contended that the injury was solely attributable to the Respondent's negligence and prayed for the suit to be dismissed with costs.
5. The case was heard on 10<sup>th</sup> May, 2017 with the Respondent testifying on his own behalf and calling Dr. Mutunga John who had

examined him and prepared a medical report. The Appellant closed its case without calling any witnesses.

6. Subsequently, judgment was delivered on 22<sup>nd</sup> June, 2017 wherein judgment was entered for the Respondent as follows–

- a. Liability apportioned at 70%: 30% in favour of the Respondent as against the Appellant
- b. General damages of Kshs.300,000.00; and
- c. Special damages of Kshs.5,000.00.

7. Aggrieved by the lower court's judgment, the Appellant filed an appeal being Machakos Civil Appeal No. 91 of 2017. The Appeal was later transferred to this Court pursuant to the Ruling on Directions issued by Kemei J. on 1<sup>st</sup> December, 2020.

8. The grounds of appeal are as follows –

*(i) The Learned Trial Magistrate erred in law and in fact in failing to consider or have sufficient regard to the Appellant's pleadings on liability and the judicial authorities quoted in the submissions made on behalf of the Appellant on liability thus arriving at an apportionment of liability at 70%: 30% in favour of the Respondent as against the Appellant which is erroneous in law and/or does not give sufficient and/or fair contribution on liability on the part of the Respondent.*

*(ii) The Learned Trial Magistrate erred in law and in fact in failing to consider that the Respondent's pleadings and witness statement were at variance with the testimony he subsequently gave in court to the effect that the ladder on which he was working broke whereas his pleadings and testimony indicated that the ladder he had been working on slipped.*

*(iii) The Learned Trial Magistrate erred in law and in fact in failing to consider or have sufficient regard to the evidence adduced as to the nature and extent of the Respondent's injuries, and the judicial authorities quoted and cited in the submissions made on behalf of the Appellant thus making an award for Kshs.213,000/- in general damages which is manifestly excessive.*

9. The Appellant sought to have its Appeal allowed and the lower court's finding on liability set aside and substituted with an order dismissing the Respondent's suit.

10. In the alternative the Appellant sought to have the apportionment of liability at a higher degree of contributory negligence. Further, that the award in general damages be set aside and substituted with an amount that is fair and commensurate with the injuries sustained by the Respondent as well as an order directing the Respondent to bear the costs of this Appeal.

11. The parties agreed to dispose of the Appeal by way of written submissions.

### **Appellant's Submissions**

12. The Appellant submitted that the Learned Magistrate erred in law and fact in her finding on apportionment of liability as it was clear from the Respondent's testimony that he was the one who placed the ladder where it was and can therefore not blame the Appellant for the accident as it had no control over where and how the Respondent used the ladder. For emphasis the Appellant cited and relied on the case of **Wilson Nyanyu Musigisi v Sasini Tea & Coffee Limited HCCA No. 15 of 2003** where the trial judge quoted the case of **Mumias Sugar Co. Ltd v Samson Muyinda Kakamega HCCA No. 58 of 2000 (unreported)** where the Court stated that where an employee is engaged in manual labour that does not require any exceptional skills and injures himself, he cannot hold his employer liable under statute or common law.

13. The Appellant further submitted that the Respondent gave two different accounts of how the accident occurred in his pleadings and in his testimony in Court. The Appellant urged this Court to find that the Respondent was bound by what was indicated in his pleadings being that the ladder he was using slid and he fell off the ladder. To buttress this argument the Appellant cited and relied on the case of **Associated Electrical Industries Limited v William Otieno HCCA No. 421 of 1998**.

14. The Appellant further submitted that the quantum awarded to the Respondent was inordinately high given that the Respondent

had suffered minor soft tissue injuries as was supported by PW1's testimony who examined the Respondent following the accident. For emphasis the Appellant cited and relied on the Court's findings in the case of **Timsales Limited v Stephen Gachie** where the Court set aside judgment from a Trial Magistrate who had awarded Kshs.90,000/- as general damages where a claimant suffered soft tissue injuries and substituted it with an award of Kshs.75,000/-.

15. In conclusion the Appellant urged this Court to find merit in its appeal and allow it as prayed.

### **Respondent's Submissions**

16. The Respondent on the other hand submitted that he had proved his case and that his injury occurred as a result of breach of statutory duty on the part of the Appellant. To fortify this argument the Respondent cited and relied on the case of **Purity Wambui Muriithi v Highlands and Mineral Water Co. Limited (2015) eKLR** where the Court held that an employer has a duty to ensure safety, health and welfare of all its members of staff.

17. The Respondent further submitted that the Appellant did not adduce any evidence or avail any witnesses to controvert his account of how the accident occurred only choosing to rely on its filed defence.

18. The Respondent maintains that the Appellant has failed to prove any of the principals set out in the case of **Jabane v Olenja, Civil Appeal No. 2 of 1986** to warrant this Court to interfere with the award of damages.

19. He further argued that the award of damages was in fact commensurate with the injuries that he suffered and was not erroneous as contended by the Appellant.

20. In conclusion the Respondent urged this Court to find the Appeal without merit and dismiss it with costs to the Respondent.

### **Analysis and Determination**

21. I have considered the appeal, evidence annexed in the record of appeal and the parties' submissions and find that the issues for determination are-

(i) Whether the trial court erred in law and fact when it apportioned liability at 70%: 30% in favour of the Respondent as against the Appellant;

(ii) Whether the award in damages by the Trial Magistrate was inordinately high considering the nature of injury, comparable awards, evidence before the court and relevant principles of law;

(iii) Whether the orders sought by the Appellant should be granted.

22. Being a first appeal, this Court has a singular duty to re-evaluate the entire case and come up with its own findings in the matter as enumerated in the case of **Selle v Assorted Motor Boat Company 1968 EA Company 1968 EA 123-126**. In the said case it was held that:

*"Briefly put they are that this 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 this respect. In particular this court is not bound necessarily to follow the trial. Judge's findings of fact appear earlier than he has clearly failed on some part to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."*

### **Liability**

23. The Appellant maintained that the Trial Magistrate erred in law and in fact by apportioning liability in the ratio of 70%: 30% in favour of the Respondent as against it and contended that the Trial Magistrate failed to take into consideration its

pleadings and submissions on the issue.

24. The Appellant further argued that it had no control over the actions of the Respondent and can therefore not be held liable for his actions given that the Respondent was engaged in manual work and no special skill was necessary. It further attributed the accident to negligence on the part of the Respondent and urged this Court to find the Trial Magistrate's apportionment of liability without basis.

25. The Respondent on the other hand attributed the accident to negligence on the part of the Appellant. He majored on the fact that the Appellant failed to provide him with proper training, protective gear and work tools that were in proper working condition for him to perform his tasks.

26. From the Respondent's testimony it emerged that the ladder he was provided with was a makeshift wooden ladder. He was not provided with any protective gears to protect him from injury in the event an accident occurred.

27. The Appellant's contention that it had no control over the Respondent's action is in my view not a valid defence as it was its responsibility to provide the Respondent with proper working tools. A ladder was a necessary tool for the work the Respondent was tasked to perform and the Appellant was under a duty to provide the same.

28. No evidence was availed by the Appellant to prove that it had provided the Respondent with a safe working environment as envisaged under the provisions of Section 101 of the Occupational Safety and Health Act, 2007.

29. Further, as per the Respondent's testimony the accident happened when the ladder he was using slid causing him to fall off and in the process he sustained the injuries as set out in his Plaintiff.

30. The Appellant failed to avail any witnesses to controvert the Respondent's testimony of how the accident occurred.

31. Based on the evidence before it, the Trial Magistrate apportioned liability at 70%:30% in favour of the Respondent as against the Appellant.

32. In my view the apportionment by the court was well reasoned as the Appellant bears a greater responsibility to ensure the Respondent has a safe working environment. I therefore find no reason to interfere with the decision of the lower court on this issue.

33. On the issue of quantum, the Appellant submitted that the amount of Kshs.213,000 was highly excessive considering the injuries sustained by the Respondent being mere soft tissue injuries. The Appellant did not demonstrate that the award of Kshs.213,000 was inordinately high to warrant interference by this Court as held in **Bashir Ahmed Butt v Uwais Ahmed Khan, By M. Akmal Khan (1982-88) 1 KAR 1**.

34. I further note that the assertion that the Respondent suffered mere soft tissue injuries as made by the Appellant is not supported by any evidence. From his plaint, the Respondent lists the following particulars of injuries:

- 1) *Blunt injury to the right knee*
- 2) *Blunt injury to the left hand*
- 3) *Dislocation right knee joint*
- 4) *Dislocation left wrist joint*
- 5) *Wound on the palm*

35. The above injuries are confirmed in the Medical Report by Dr. John Mutunga and treatment notes of Athi River Shalom Community Hospital produced as PEx. 1 and PEx 2 respectively.

36. This Court has further considered the case of **Timsales Limited v Stephen Gachie (supra)**, relied upon by the Appellant and note that the same cannot be used in this case as the Claimant therein suffered purely soft tissue injuries to his left thumb. This Court further takes judicial notice that the decision is fairly old and therefore may not give an accurate assessment of quantum currently.

37. I therefore find no reason to interfere with the Trial Magistrate's award.

38. **For the foregoing reasons I find the appeal unmerited and dismiss it with costs.**

**DATED, SIGNED AND DELIVERED AT MACHAKOS ON THIS 26<sup>TH</sup> DAY OF NOVEMBER 2021**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**



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