Parvat Builders v Makau (Appeal 81 of 2022)
[2023] KEELRC 575 (KLR) (8 March 2023) (Judgment)

Neutral citation: [2023] KEELRC 575 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL 81 OF 2022

JK GAKERI, J

MARCH 8, 2023

BETWEEN

PARVAT BUILDERS ..... APPELLANT

AND

CHRISTOPHER MAKAU ..... RESPONDENT

(Being an appeal from the judgement of the Honourable Magistrate (Mr. Mbeja) delivered on the 13th September, 2018 in Nairobi CMCC No. 1058 of 2017)

JUDGMENT

1. This is an appeal against the judgement of Hon Mbeja Senior Resident Magistrate delivered on September 13, 2018.
2. The plaintiff sued the respondent on February 27, 2017 alleging that he had been injured in the course of employment by the defendant on April 1, 2016 when a ladder he was standing on collapsed and as a consequence fell and was seriously injured.
3. In its defence, the defendant denied that the plaintiff was its employee. It also denied that an accident had taken place on the material day.
4. It further averred that it had taken reasonable and practical steps to ensure the plaintiff's safety and the plaintiff contributed to the occurrence.
5. Strangely, the defendant adduced no evidence in court and judgement was entered in favour of the plaintiff.
6. This is the judgement appealed against.

7. The appellant faults the learned magistrate in that;

   (1) The court had no jurisdiction to entertain the dispute.

   (2) The apportionment of liability was not proved in evidence.

   (3) Employment relationship was not proved.

   (4) Particulars of negligence were not proved.

   (5) The evidence before the court did not establish negligence against the defendant.

   (6) The award of Kshs 1,400,000.00 was exhorbitant and excessive as there was no permanent disability and

   (7) Failed to consider medical evidence.

8. The foregoing grounds of appeal may be summarised as jurisdiction, employment relationship, evidence before the court and the award of Kshs 1,400,000/=.

9. In its submissions, the appellant company submitted that there was no evidence on record to establish the particulars of negligence catalogued by the respondent or that the appellant's blameworthiness stood at 90%.

10. That the trial magistrate made no finding on liability and the apportionment.

11. Counsel submitted that the respondent did not inform the appellant that the ladder was faulty and he did not ask for protective equipment and was to blame for the accident.

12. That the trial court failed to analyse the evidence on record.

13. Counsel further submitted that the trial court misdirected itself on the apportionment of liability as the appellant was not liable.

14. On the quantum of damages, counsel submitted that since the plaintiff's injuries left no permanent incapacity, the amount awarded was inordinately high. That although the appellant/respondent relied on persuasive authorities, the trial court did not take them into consideration in arriving at its decision as it did not explain how the quantum was arrived at.

15. Counsel urged that there was a case for the court's interference with the award as the trial court failed to take into account the respondent's injuries.

16. Reliance was made on the decision in *TAM (minor suing through her father and next friend J.O.M) v Richard Kirimi Kinoti & another* [2015] eKLR where the court awarded the sum of Kshs 250,000/= as general damages for pain and suffering, as was the decision in *Bhachu Industries Ltd v Peter Kariuki Mutura* where the respondent had a fracture femur and an award of Kshs 300,000/= was made.

17. The respondent's counsel addressed two issues namely; whether the trial magistrate erred in law and fact on the question of liability and quantum.

18. On liability, counsel relied on the sentiments of the court in *Selle v Assorted Motor Boat Co* [1968] EA 123 on the duty of the first appellate court.

19. Counsel submitted that the respondent proved his case on a balance of probabilities in that an accident occurred on April 1, 2016 in the course of his employment by the appellant on account of breach of duty by the appellant, evidence the appellant did not controvert.

20. That the appellant was required to provide and maintain a safe working environment as provided by section 6(1) of the *Occupational Safety and Health Act*, 2007.

21. Reliance was further made on the sentiments of Aburili J in *Garton Ltd v Nancy Njeri Nyoike* [2016] eKLR to reinforce the submission.

22. Counsel submitted that the appellant was bound to inform the respondent of any unforeseen dangers as it was his first day at work and the appellant did not do so as it did not adduce evidence.

23. It was submitted that the trial magistrate made a correct finding on liability.

24. As regards quantum, counsel relied on the sentiments of the Court of Appeal on *Catholic Dioses of Kisumu v Tete* (2004) 2 KLR to underscore the discretion of the trial court to assess general damages and the powers of the appellate court to interfere in certain instances.

25. It was urged that the nature of the respondent's injuries was not in dispute and were of grievous nature and the award was justified.

26. Reliance was made on the decisions in *Patrick Kinyanjui Njama v Evans Juma Mukweyi* [2017] eKLR and *Lucy Waruguru Gatonde v Francis Kinyanjui Njuku* [2017] eKLR among others, to reinforce the submission.

27. It was urged that there was no evidence to show that the trial court acted on wrong principles.

28. Finally, the court was urged to uphold the judgement by the trial magistrate and dismiss the appeal.

29. This being a first appeal, the court is bound to re-evaluate and re-assess and analyse all the evidence on record and draw its own conclusions but give allowance on account that it neither saw nor heard the witness as stated in *Selle v Associated Motor Boat Co* (supra), *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, *Peters v Sunday Post Ltd* [1958] EA Ltd, *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR among others.

30. The respondent testified that he was a former employee of the appellant.

31. In his written statement adopted in court, the respondent stated that on April 1, 2016, he was provided with unsafe working system and when he was on top of a ladder, the same caved in sending him to the ground occasioning serious injuries. That the injuries were occasioned by the appellant's negligence and catalogued the particulars of negligence and breach.

32. In his oral testimony, the respondent stated that a ladder broke and he fell breaking his leg and blamed the employer as there were no safety measures.

33. On cross-examination, the respondent confirmed that he started work on April 1, 2016 and the accident happened on the same day and had not been trained. That he reported the accident to the foreman who had given him the ladder.

34. It was his testimony that he had not checked the ladder.

35. That they were about 10 workers. That after the accident, he went to the hospital and had not healed as he continued to experience sharp pains in cold weather.

36. The appellant did not tender any evidence in court.

37. Documentary evidence on record reveal that the respondent was admitted at the Kenyatta National Hospital on April 2, 2016 and discharged on May 19, 2016, about one (1) month and 17 days.

38. The diagnosis was femur intertrochanteric, a type of hip fracture or broken hip exclusively and the bill was Kshs 81,024/=.

39. Strangely, a copy of the DOSHS Form I on record is incomplete.

40. It is unclear whether a compensation claim was made pursuant to the provisions of the *Work Injury Benefits Act*, 2007. The DOSHS Form I identified the respondent as a general labourer and the appellant as the employer and Fidelity Shield Insurance Co Ltd as the insurer.

41. The penultimate document is a medical report by Dr C.K Mwaura of Kinoo medical clinic dated January 15, 2017. The report stated that the respondent had swollen tender and deformed left thigh and a fractured left femur – upper $^{1}/3$.

42. According to the doctor, he found the respondent healthy, normal and healed, save for pain of left thigh on exertion.

43. The last document is a copy of the receipt issued by Kinoo medical clinic for the medical report. Puzzlingly, the doctor was not called to produce the medical report or testify on his findings.

44. In his judgement, the learned trial magistrate relied on the decision in *Michael Njagi Karimi v Gideon Ndungu & another* [2013] eKLR to award the plaintiff Kshs 1,400,000/= in general damages for pain and suffering and apportioned liability at the ratio 90:10.

45. First, although the appellant faulted the learned trial magistrate on jurisdiction to hear and determine the issue, grounds 1 and 2 of the memorandum of appeal, it did not submit on the issue and the respondent ignored it altogether. The same appears to have been abandoned by the appellant and the court makes no finding on it.

46. Ground 4 faulted the trial court on the premise that an employment relationship between the appellant and the respondent had not be established.

47. Granted that the appellant opted not to adduce evidence in support of its defence, the respondent's evidence remained uncontroverted.

48. Although the respondent identified it as one of the issues in its statement of issues dated May 19, 2017 and submitted on it, the appellant appears to have admitted the respondent's assertion and did not contest it in its submissions.

49. The learned trial magistrate did not consider it an issue as evidenced by the first paragraph of the impugned judgement dated September 12, 2018. Relatedly, on page 2, the court states that;

> " Having all the above into consideration, it is not in dispute that the plaintiff herein was the defendant's employee and that he was injured while on duty. The evidence so far on record suggest that the plaintiff was injured while on duty."

50. The fact that there was no witness notwithstanding.

51. The information contained in the DOSHS form I, which the appellant did not controvert or challenge reinforces the respondent's contention that he was an employee of the appellant and was injured while in the course of his employment.

52. If the appellant honestly believed that the respondent was not its employee, it was incumbent upon it to adduce evidence to controvert the respondent's claim.

53. The trial court was also faulted on the ground that it failed to find that the particulars of negligence pleaded were not proved and there were no eye witnesses.

54. Surprisingly, the respondent's evidence on record made no reference to the time of the day when the accident happened, type of material the respondent was carrying, who took him to hospital and paid the bill and when he was admitted at the Kenyatta National Hospital.

55. Be that as it may, the appellant made a choice not to contest the respondent's claims.

56. The claimant testified that this was first date at the appellant's place of work and had been given a ladder by an unnamed foreman which turned out to be faulty and he fell down breaking his hip. Contrary to the appellant's submission that the respondent had failed to prove that he was not negligent, it was the obligation of the appellant to demonstrate that it had a safe and secure work environment for its employees. Employees are invitees of the employer who is required by law to take all reasonable steps to ensure that the place of work is reasonably safe as they discharge their obligations as employees.

57. Since the ladder in question was supplied by the appellant and it turned out to have been faulty, the burden of proof lay on the appellant to establish that it had inspected and satisfied itself that the ladder was safe for use by its employees and had provided other necessary paraphernalia to each employee including helmets, boots, gloves e.t.c, as necessary.

58. The respondent adduced no evidence to show that it had taken any steps to ensure that its work place was reasonably safe or provided employees with the necessary paraphernalia.

59. At the very least, the appellant ought to have provided a safety policy and demonstrated that it had trained the respondent on matters of safety at the work place. Contrary to the appellant's counsel's submission that the respondent had been trained, that was not the case.

60. The trial magistrate found that;

> " He started work on April 1, 2016 when he got injured. He had not been trained. He was moving objects upwards using a ladder provided by the foreman. He could not remember the name of the foreman. He also did not check the ladder . . ."

61. The learned trial magistrate found that the appellant knowingly exposed the respondent to risk of injury guided by the decisions in *Waladi v Kenya Cargo Handling Services Ltd* CA 86 of 1986 and *Mumias Sugar Co Ltd v Charles Namatiti* civil appeal No 151 of 1987.

62. In light of the foregoing, the trial magistrates cannot be faulted for having found that the particulars of negligence had been proved.

63. Relatedly, the trial court is assailed for having disregarded the appellant's submissions.

64. In its submissions filed on July 5, 2018, counsel submitted that, the respondent should have checked the ladder as he used it on daily basis, did not ask for protective equipment, could not recall the name of the supervisor, had no identity card, documentary evidence of employment and acted recklessly.

65. Similarly, it was submitted that the appellant had a safe system of work.

66. Although the respondent's conduct on that day implicates negligence, it is common ground that the appellant adduced no shred of evidence to prove how safe its system of work was and that the

respondent was careless. Needless to emphasize, the appellant's defence was not substantiated. The allegations made therein remained mere allegations. The trial court found in favour of the respondent.

67. As regards the quantum and apportionment of liability at 90:10, the trial magistrate was faulted on the ground that the award was erroneous, contrasted with awards in similar cases and the respondent's contribution exceeded 10%.

68. It is trite law that the court's power to award damages is discretionary and the amount awarded ought not be interfered with on appeal unless it is determined that the trial court acted on wrong principles.

69. The foregoing principle has been restated by the Court of Appeal in countless decisions.

70. In *Catholic Diocese of Kisumu v Tete* (supra) for instance, the court stated as follows;

> " It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at the first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied wrong principles. As by taking into account some irrelevant factors or leaving out of account some relevant (one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate. (See *Kemro v A.M Lubia & Olive Lubia* [1982 – 88) 1 KAR 727 and *Kitavi v Coast Bottlers Ltd* [1985] KLR 47)."

71. See also *Butt v Khan* [1982-1985] KAR 1, *Lucy Wanjiku Kagunda v Julius Gachau Mwangi* CA/142/2003.

72. Counsel for the appellant urged that since the Respondent's injuries had healed with no permanent incapacitation and the injuries were not traceable to the negligence or breach of duty by the appellant, no damages were awardable.

73. That the award was not supported by any legal reasoning and the authorities were merely persuasive.

74. In arriving at the quantum of damages, the trial court considered the injuries suffered, submissions by counsel and authorities cited and in particular *Michael Njagi Karimi v Gideon Ndungu Nguribu & another* (supra) where the court awarded the plaintiff Kshs 2,000,000/= for pain, suffering and loss of amenities. The plaintiff suffered extensive injuries and was hospitalized for almost 6 months, underwent at least 5 surgeries and was in a comma for 4 days.

75. H.P.G Waweru stated;

> " I have noted the very serious injuries suffered by the plaintiff and his long hospitalization and treatment. Mercifully, the injuries did not involve the head or spinal cord. That he suffered much pain and discomfort cannot be in doubt. He still needs to undergo further remedial surgeries and the prospects of the same must be daunting to him. He has disability of the total person to the extent of 35%.
>
> I have looked at the cases cited in the submissions and have noted the awards made for various fractures, combination of fractures and related injuries. The awards range from Kshs650,000/= for fractures to the right leg . . . "

76. Unlike in the present case, the plaintiff had fractures in both lower limbs and upper right limb.

77. The other decision relied upon by the plaintiff was *Charles Wanyoike Githuka v Joseph Mwangi Thuo & 2 others* [2008] where Maraga J (as he then was) awarded the plaintiff Kshs 2,000,000/= for pain, suffering and loss of amenities. The plaintiff suffered extensive injuries including head injuries, chest, fracture, mid-shaft of the right femur, segmental fractures of the left femur, compound fracture of the right lower leg (tibia and fibula bones), fracture of the right tibia plateau, (knee joint), fracture of right ankle, deep cut wound, compound fracture, dislocation of the right foot, fracture of the right upper incisor tooth with loss of the fracture fragment and deep abrasion on the left lower leg.

78. In addition, the plaintiff underwent blood transfusion.

79. The last decision relied upon was in *Raphael Muthoka Mailu v Ernest Jacob Kisaka* [2009] eKLR where Khamoni J awarded Kshs 1,600,000/= as general damages.

80. The plaintiff (a minor) suffered serious injuries and was in hospital for 90 days loosing one (1) year of school. He suffered substantial head injuries (semi-comatose) which still manifested itself as left limb tremors, compound fracture of the left femur leading to shortening of the left leg, fracture of right femur, dislocation of left shoulder region, deep lacerations of the perineum and anus necessitating the opening of a temporary anal opening, bleeding of pelvis and behind the intestines, injury to the left eye leading to a squint and rolling over of the eye and had to use glasses, abnormal injuries and several operations of the intestines with tear of the peritoneum and multiple embarrassing scars.

81. The respondent on the other hand relied on the decision in *Arkipo Odhiambo Otieno v Kenya Bus Service Ltd* [2005] eKLR where Ang'awa J awarded Kshs 100,000/= as general damages where the plaintiff had sustained a fracture of right femur.

82. The trial court relied on the foregoing authorities to assess the general damages awardable to the respondent, but appeared to have grounded its decision on the authorities cited by the plaintiff exclusively.

83. In determining whether there is justification for interference with the exercise of discretion by the trial court, the court is guided by inter alia the sentiments of the Court of Appeal.

84. On appeal by the appellant herein, the respondent relied on three decisions, namely;

Patrick Kinyanjui Njama v Evans Juma Mukweyi (supra) where the court awarded Kshs 1,500,000/= for pain and suffering. The plaintiff suffered various injuries, namely; fracture on the left leg, two other fractures on the right leg, a metal plate was fixed on the right leg and used clutches for mobility, was operated and was on catheter for 3 months. The doctor assessed disability at 30%. The High Court agreed with the trial court that the injuries were severe and upheld the award.

85. Another decision relied upon was *Lucy Waruguru Gatundu v Francis Kinyanjui Njuku* (supra) where the High Court upheld the award made by the trial court of Kshs 1,600,000/= for right femur fracture (distal end) with bone loss, right tibia segmental fracture and right fibula segmental fracture.

86. The court is further guided by the sentiments of the Court of Appeal in *Arrow Car Ltd v Elija Shamalla Bimomo & 2 others* [2004] as follows;

> " What about the injuries sustained by the respondents in this appeal? We have indicated that taking into account the fact that comparable injuries should be compensated by comparable awards and as the 1st and 3rd respondents herein suffered what the doctors describes as soft tissue injuries, the awards of Kshs 350,000/= for such injuries made by the superior court are, in our view inordinately high as to warrant our interference . . ."

87. Although no two injuries can be exactly the same, the principle of comparability is intended to ensure that damages awarded for comparable injuries are also comparable which promotes certainty and predictability.

88. In this case, the decision relied upon by the respondent before the trial court and on appeal relate to instances where victims suffered grave injuries and were incapacitated and not comparable to the injuries sustained by the respondent in this case where the injuries were fractured left femur and swollen, tender deformed left thigh coupled with full recovery with no disability.

89. The injuries in these cases are not comparable to the injuries the respondent sustained.

90. On the other hand, the decisions relied upon by the appellant on appeal appear more comparable.

91. In *TAM v Richard Kirimi Kinoti & another* (supra), the plaintiff suffered a fractured leg, was admitted at the Kenyatta Hospital for 4 weeks, 2 days, at the Nairobi Hospital, used clutches for 2 months and had pain in the injury site. The court awarded Kshs 250,000/= as general damages.

92. Similarly, in *Bhachu Industries Ltd v Peter Kariuki Mutura* (supra), Mabeya J upheld the award of Kshs 300,000/= as general damages for a fractured right femur and injury to the chest. The plaintiff was admitted at the Kenyatta National Hospital.

93. In both cases, the doctors reports did not determine any incapacity.

94. In the instance case, the court did not critically analyse the authorities relied upon by the appellant in the context of the medical report by Dr C.K Mwaura and in the circumstances made an inordinately high award for pain and suffering which justifies the court's interference with the award.

95. As a consequence, and in light of the foregoing finding, the rival authorities cited by the parties inflation and other circumstances, the court is persuaded that an award of Kshs 600,000/= as general damages for the injuries sustained suffices.

96. As regards apportionment of liability by the trial magistrate, the learned magistrate was satisfied that the respondent contributed to the accident at 10% based on the evidence before the court. He did not examine the ladder, something he ought to have done or ask for protective gear or gloves. However, the court is alive to the fact that this was his first day at work and may not have been aware of his entitlements as a general labourer.

97. On the other hand, the appellant tendered no evidence to show that the respondent was negligent on the material day.

98. In light of the foregoing, the court has no justification to interfere with the apportionment of liability by the trial court.

99. In the end, the appeal is partially successful and the award of Kshs 1,400,000/= by the trial court is set aside and is substituted with an award of Kshs 600,000/=.

100. Other awards made by the trial court are upheld.

101. Given the circumstances of this case, it is only fair that parties bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 8TH DAY OF MARCH 2023

DR. JACOB GAKERI

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 15th March 2020 and subsequent directions of 21st 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.

DR. JACOB GAKERI

JUDGE