



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL APPEAL NO 676 OF 2002

UNEEK ELECTRICAL COMPANY LIMITED APPELLANT

VERSUS

JOSEPH FANUEL ALELA RESPONDENT

(An Appeal from the Judgment and Order of Hon. C. O. Kanyangi, SPM
in Nairobi CMCC No. 5639 of 2000 delivered on 6th November, 2002).

JUDGMENT

On 31st July, 1999, the Respondent (Plaintiff in the lower court) then an electrician with the Appellant Company, suffered injury in the course of his duties when he fell off a ladder while attempting to install an electrical cable. He filed a suit against his employer company blaming it for negligence in not providing a safe ladder, and a helper to assist him.

The lower court agreed with him, and awarded him Kshs.515,352/= made up as follows:

General damages	Kshs.320.000
Future medical expenses	Kshs. 74,500
Diminished Earning Capacity	<u>Kshs.120,852</u>
Total	<u>Kshs.515,352</u>

The learned magistrate delivered himself as follows, in material part:

“It is clear that the Plaintiff was an employee of the defendant between 1988 – 2000. His only job was to install electricity in houses. On 31st July, 1999 he was sent to go and work in Karen and during the course of his work the ladder slipped and he fell down sustaining the injuries complained of. He blames it all on the negligence of the company which failed to provide for him a safer ladder. He says that with a 4-legged ladder the accident could not have happened. The defendant therefore cannot deny liability in this matter. The plaintiff sustained seriously injuries on duty and it is evident that the defendant company was negligent in not providing the plaintiff with a safe ladder to use in the course of duty.”

It is against that Judgment that the Appellant has preferred this appeal, citing the following five grounds of appeal.

1. THAT the learned trial Magistrate erred in law and in fact failing to find that the Respondent was contributorily negligent when he failed to use appropriate ladders provided for his use.

2. THAT the learned trial Magistrate's findings of liability against the Appellant was against the weight of the evidence before him.

3. THAT the learned trial Magistrate erred in law in making such a high award as to show that the Magistrate acted on a wrong principle of law.

4. THAT the learned trial Magistrate erred in law and in fact in making an award for diminished earning capacity when there wasn't any or any sufficient material before him thereby acting on the wrong principle or misapprehending the relevant facts.

5. THAT the learned trial Magistrate's award was so high as to be entirely erroneous.

Essentially, therefore, both liability and quantum are in dispute. Mr Bw'omote, Counsel for the Appellant, submitted that the Respondent fell off the ladder because he "turned" while on the ladder, not because the ladder was defective; that a four legged ladder was indeed available on the material day, but the Respondent, a 13- year experienced employee, failed to utilize the same, choosing instead to use a two-legged ladder; that the Appellant's failure to tender any evidence could not be assumed to find it guilty of negligence; and that the award was manifestly high for injuries sustained.

Mrs Ngala, for the Respondent, argued that the Respondent had given uncontroverted evidence that he fell because the two-legged ladder was defective; that when he asked for a four-legged ladder, he was threatened with dismissal; and that the Appellant had submitted no authorities both in the court below and here to show how the award was excessive. She asked that the lower court's award be upheld, including the award of Kshs.74,500/= for diminished earning capacity arising from 15% incapacity.

As the first Appellate Court, it is my duty to consider the evidence adduced in the lower court and to be satisfied that the findings of facts by the trial court are based properly on the evidence before it and that it has not acted on wrong principles in reaching its conclusion {See *Makube vs Nyamuro (1983) KLR 403*}. Having done this, I am fully in agreement with the lower court's decision both on liability and quantum.

Now, let us examine briefly the material evidence before the lower court.

Mr Bw'omote's main argument was that the Respondent fell because he "turned" while on the ladder. He relied on the evidence in cross-examination when the Respondent stated:

"The ladder was 2 legged and it had no rubbers. I climbed up the ladder, when I turned the accident had happened, I turned to hold the tube."

This statement, even if taken in isolation, does not lead me to the conclusion that the Respondent fell because he turned. That is certainly not evident to me. But, in any event, that statement cannot be taken in isolation, and without regard to the rest of the Respondent's testimony explaining the occurrence. Here is what he said (at page 20):

"... I was taken to Karen to install electricity. I was not given a labourer although I requested for one. ... The ladder had no rubber on the feet and so it could slip. I wanted a 4 legged wooden ladder. He started threatening me with dismissal. ... As I climbed the ladder slipped ... the ladder was not gripping (sic) the ground properly."

This evidence is uncontroverted. The defence did not provide any evidence to the contrary. There was nothing more easier for the Appellant to do than to come to court and say "no, we did not refuse the use of a four-legged ladder ..." or whatever it wanted to say, and then leave it to the court to decide who should be believed. Here the Court had no choice. The only evidence before it was that of the Respondent, and the Court had no reason to disbelieve his testimony. Accordingly, I see no reason to interfere with that finding, and I uphold the finding of fact that the Appellant was 100% to blame for this accident.

With regard to quantum, Mr Bw'omote did not quote any authority, even when prompted by this court to do so, to demonstrate how and why the award was manifestly excessive. In making its award, the lower court relied on authorities submitted by the Respondent. The Appellant had none, just as it had none here before this Court.

The Court of Appeal in the case of *Butler vs Butler C A No 49 of 1983* laid down the following principles that an appellate court should consider in reversing an award of damages by the lower court.

“(a) That the court acted on wrong principles;

(b) That the court has awarded so excessive or so little damages that no reasonable court would;

(c) That the court has taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered, and in the result, arrived at a wrong decision.”

Taking those principles into account, and based on the evidence in the lower court, including evidence relating to the permanent disability giving rise to the award for diminished earning capacity, I am satisfied that the overall award for general damages was fair.

Accordingly, and for reasons outlined, I dismiss this appeal with costs to the Respondent.

Dated and delivered at Nairobi this 10th day of May, 2005.

ALNASHIR
JUDGE

VISRAM