REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 108 OF 2020

PETER KIBE WAWERU.....APPELLANT

VERSUS

MOSES MAINA.....RESPONDENT

(Being an appeal from the Judgment of Hon. J.B Kalo Chief Magistrate delivered on 28th May, 2020 in Nakuru CMCC No.786 of 2016 between Peter Kibe Waweru Vs Moses Maina)

J U D G M E N T

1. Vide a plaint dated 29th of June 2016, the Appellant filed a suit at Nakuru Law Courts seeking the following reliefs–

(a) General Damages

(b) Special damages of Ksh. 16,140/=

(c) Costs of the suit.

2. The Appellant's basis for instituting ***Nakuru CMCC No. 786 of 2016 Between Peter Kibe Waweru vs Moses Maina*** was that on or about 12th February, 2016 while in the course of employment at the Respondent's premises, he was injured by a machine used for grinding animal feed and that due to the Respondent's non provision of a proper and safe system of work his hand was severely injured and the Respondent's was wholly to blame. The particulars of the negligence on the part of the Respondent were enumerated at **paragraph 4 (a)-(e).**

"PARTICULARS OF NEGLIGENCE OF THE DEFENDANT

a) Assigning the plaintiff duties for which he was not trained.

b) lack of proper supervision

c) failing to provide the plaintiff with protective apparel namely gloves.

d) exposing the plaintiff to a risk which it knew or ought to have known.

e) failing to provide the plaintiff with a safe system of work."

3. The Respondent filed his defence on 25th January, 2021 in which he denied the claim. In particular, the respondent denied the existence of an employment relationship between him and the Appellant; any negligence on his part and contended that that the injury was attributable to the Appellant's negligence as he operated the machine without his permission and resultantly injured himself. The respondent relied on the maxim of *"Volenti non fit injuria"* and prayed that the suit be dismissed with costs. The particulars of negligence against the Appellant were enumerated at **paragraph 4 (a)- (c) of the defence.**

"PARTICULARS OF NEGLIGENCE OF THE PLAINTIFF

a) Operating the machine without the permission or authority of the machine operator of the Defendant.

b) Operating the machine without having knowledge on how to operate.

c) Exposing himself to danger he knew or ought to have known."

4. The case was heard on 17th April, 2018. The Appellant and his witnesses Daniel Mungai Waweru and Dr. Kiamba testified.

5. It was the Appellant's testimony that he was employed as a general worker by the respondent and his duties entailed preparing cereals to feed cows. That on the 12th February 2016 while using a chuff cutter machine feeding materials into the machine Moses Maina distracted him and in the process his right hand was grabbed by the machine as a result of which his index and fore fingers were severely injured. He was admitted at Provisional General Hospital in Nakuru for four days and he incurred medical expenses. He later healed from the injuries. He was examined by Dr. Kiamba who prepared a medico legal report. It was his evidence that he had worked for the respondent for 2½ years, but this was the second time he was working in the machine. He had not been trained to use the machine and had not been supplied with safety apparels including gloves and overall even though he asked for safety devices.

6. On cross examination he said that he had been employed as a shamba boy. That he did not have any document to prove he had been so employed.

7. PW2, **Daniel Mungai Waweru**, testified that he knew both parties and that the plaintiff was his friend employed by the defendant. He confirmed that he was not present when the accident happened. PW3, **Dr. Kiambaa**, confirmed that he examined the appellant and that he sustained amputation of right index finger and right middle finger with 20% permanent disability. There was pain in the stumps and the appellant right hand's function was reduced and would not be in a position to perform heavy duties.

8. **DW1 Moses Wanu Maina** testified that he had one employee at the material time by the name Willy Kinyanjui whose duty was to look after the cattle. That on the 22nd February 2016 he learnt from his employee that a person who had tried to operate the chaff cutter without permission had sustained injuries. He denied that Peter Kibe Waweru was his employee.

9. On cross examination he testified that the chaff cutter was mounted in his store and only he and his employee had access to the store. That he had not raised any complaint against Peter Kibe for trespass. He denied any knowledge of Daniel Waweru. He did not have any document to show that Willy was his employee.

10. **DW2 Willy Kinyanjui Wanjiru** testified that he was an employee of the defendant. He operated the chaff cuter and on the material date the appellant appeared in the compound and asked to operate the machine. That he told him not to. That he left the machine on and went to the toilet only to find the plaintiff operating it. It was then that he was injured. He called the defendant (DW1) who came and they took the plaintiff to hospital. He too confirmed that he did not have any letter of appointment to show that he was employed by the DW1.

11. In the judgment on 28th May, 2020 the learned trial magistrate dismissed the plaintiff's suit with costs. The court found that; the appellant failed to prove that he was an employee of the respondent; and that he acted contrary to **section 55 of the Occupational Safety and Health Act** as he operated on the machine while untrained and unauthorized; that the respondent did not breach any employment contract with him so as to be held liable for his injuries. On quantum the court stated it would have awarded Kshs.600, 000/= as general damages for pain and suffering and Kshs.16, 140 as special damages had the appellant proved his case.

12. Aggrieved by the judgment, the appellant filed an appeal in this court. The Appeal is based on the following grounds–

(i) The Learned Magistrate erred in law and in fact in finding that the suit was without merit.

(ii) THAT the learned magistrate erred in law and in fact in failing to consider evidence and submissions by the Appellant.

(iii) THAT the learned Magistrate erred in Law and in fact in failing to find that the Appellant was an employee of the Respondent.

(iv) THAT the learned Magistrate erred in Law and in fact in relying on the Respondent's evidence which was contradictory to determine the suit

(v) That the learned Magistrate erred in Law and in fact in failing to summarize the evidence on record accurately.

13. The Appellant therefore sought an award of the following orders–

(a) That the Appeal herein be allowed and the judgment of the subordinate court be set aside.

(b) That the costs of this Appeal and the lower court be awarded to him.

14. The parties agreed to canvass the appeal by way of written submissions. Only the Appellant's submissions are on record.

THE APPELLANT'S SUBMISSIONS

15. It is submitted that the learned magistrate failed to consider the following evidence on record while determining this suit:-

· ***That the appellant had worked for the respondent for 2 ½ years taking care of his cows prior to the accident and that he was grinding animal fed using a machine together with one Willy who would hand him the feed so he could put the same to the***

grinding machine. The said Willy was called by the respondent as DW2.

· ***That PW2 introduced the Appellant to the respondent.***

· ***DW2's testimony that he was not issued with an appointment letter by the respondent when he was employed which was an indication that the respondent does not issue any appointment letter or any documents when employing his employees.***

· ***That the respondent did not take training of his employees seriously***

· ***That it was impossible for a stranger to get into someone's compound and start operating a running machine***

· ***Absence of a report to the police of an intruder in the respondent's compound.***

· ***Contradictory evidence of defence witnesses. Specifically that the respondent had never met the Appellant yet his witness stated that together with the respondent they took the Appellant to the hospital.***

· ***That the respondent never gave the appellant any protective gear despite asking for the same and that the machine was not affixed to the ground therefore it was shaky and posed danger to the appellant.***

· ***Their reliance on the case of Pietro Canobbio vs Joseph Amani Hinzano [2016] eKLR which the court considered that the machine that injured the respondent therein was available for use and there was no evidence that the respondent was under instructions not to use the machine and further the same was not locked in a store.***

· ***Failure to note that the respondent did not comply with the provisions of the law under section 6(1) of the Occupational Safety and Health Act.***

16. On quantum they faulted the trial court's award of Kshs.600, 000/= on grounds that it was unsubstantiated. They submitted that an award of Kshs.1 million as general damages for pain and suffering will suffice. To fortify this position they relied on the case of **Pietro Canobbio vs Joseph Amani Hinzano (supra)** where the respondent who had sustained amputation of the left index finger, left right finger and small finger with a permanent disability of 18% was awarded general damages of Kshs.750, 000/= .

ANALYSIS & DETERMINATION

17. Having considered the appeal, the evidence in the Record of Appeal and the Submissions on record and I opine that the issues for determination are –

i. Whether there was an employment relationship between the Appellant and the Respondent.

ii. If the answer to the above is in the affirmative, whether the appellant has established how he sustained the injuries and whether the respondent was wholly liable for the Appellant's injuries

iii. *What damages should be awarded to the Appellant.*

i. Whether there was an employment relationship between the Appellant and the Respondent.

18. This being a first appeal the appellant is entitled to a review by this court of all the evidence on record and for this court to arrive at its own conclusions.

19. It is contended that the Appellant did not prove that he was an employee of the Respondent. **Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya** provides that:

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

20. In **Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another [2005] 1 EA 334,** in which the Court of Appeal held that:

"As a general proposition under section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act."

21. The appellant testified that he was an employee of the defendant Moses Maina. That he was working with the machine cutter when the defendant distracted him. Two things here. The first one, employment. The appellant did not have any document to confirm his employment. He did not have any witness to confirm that he worked for the defendant except for DW2 who also contradicted him on the number of years he had worked there. So was he an employee?

22. The appellant did not produce any evidence to support the claim of employment. But the reality in this country is that no one really gives men employed as herdsmen or farm hands (I find the term shamba boy derogatory full of kasumba ya ukoloni) an appointment letter. It would be expecting too much to demand the same from the appellant. The defendant did not even have the same for his own declared employee.

23. The respondent would like the court to believe that the appellant a complete stranger walked into his homestead, found the machine cutter running and began to operate it. His testimony that the machine was locked up in a store only accessible to him and his employer was contradicted by his employee who told the court that the machine was set up in an open space in the compound.

24. The denial that the appellant was known to the respondent is not believable. He raised no complaint against the appellant as an alleged trespasser. It appears to me that DW2 knew the appellant and it is more likely than not that the appellant was working for the respondent.

25. The respondent did not report the incident to the police or even the local administrator. He took the appellant to hospital without any hesitation because there was no doubt that it was his machine that had chopped off the appellants fingers. He was not shocked because the appellant was known to him. Had he been a total stranger as alleged, then the second thing after taking him to hospital would have been to take action against the appellant. That omission on his part is an indication that the appellant was not a complete stranger to him.

25. The burden of proof in Civil Cases is on a balance of probability. *Lord Denning J.* in **Miller vs Minister of Pensions (1947) 2 ALL ER 372,** discussing that burden of proof had this to say-

> ***"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not.***
>
> ***Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."***

26. What is this "balance of probabilities"? *Kimaru, J* in **William Kabogo Gitau vs George Thuo & 2 Others [2010] 1 KLR 526** stated that:

> *"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."*

27. From the body of evidence before me I find that the testimony by the appellant that he was an employee of the respondent as a farmhand is believable.

> **ii. If the answer to the above is in the affirmative, whether the appellant has established how he sustained the injuries and whether the respondent was wholly liable for the Appellant's injuries**

28. The appellants' testimony was that he was working when the respondent distracted him. There is no evidence that the respondent was present when the appellant was working. He does not say how the respondent distracted him. What did the respondent do? The appellant did not give any evidence on what the respondent is supposed to have done to distract the appellant. It was not enough for him to simply state that the respondent distracted him. He had the obligation to state how that happened to enable the court determine whether or not the respondent was responsible for the appellant's injury.

29. **Section 6(1) of the Occupational Safety and Health Act** provides:-

> **"Every occupier (employer) shall ensure the safety, health and welfare at work of all persons working in the workplace."**

30. **In the case of Oluoch Eric Gogo vs Universal Corporation Limited [2015] eKLR**, *which cited the decision in* **Mumias Sugar Co. Ltd vs Charles Namatiti** *The Court of Appeal held thus:*

> ***"An employer is required by law to provide safe working conditions of work in the factory and if an accident occurs while the employee is handling machinery the employer is responsible and will be required to compensate the injured employee."***

31. In ***Halsbury's Laws of England, 4th Edition vol. 16 Para 560,*** it is stated that:

> ***"At common law an employer is under a duty to take reasonable care for the safety of his employees in all the circumstances...So as not to expose them to an unnecessary risk."***

32. **In Wilson & Clyde Coal Co. vs English (1938) AC 579** court held that employers are under a duty to provide adequate material and a safe system of work.

33. That due to non-provision of a proper and safe system of work his hand was severely injured. During hearing the appellant also testified that the machine was not safely placed on a flat surface and he was not trained on how to use it. He also testified that he was not issued with protective apparel such as gloves and overalls. This was the exact testimony of DW1, that he had not been trained to use the machine, neither had he been supplied with safety apparel.

34. The respondent accused the appellant of negligence for operating the machine without his permission. He relied on the maxim of *volenti non fit injuria*. That by acting without permission he was wholly to blame for the injury. As the Waswahili say *mwiba wa kujindunga hauna kilio au hauambiwi pole.*

35. In ***Halsbury's Laws of England*** **3rd Edition Vol 28 Paragraph 28.**

> ***"where the relationship of master and servant exists, the defence of*** *volenti non fit injuria* ***is theoretically available but is unlikely to succeed. If the servant was acting under the compulsion of his duty to his employer, acceptance of the risk will rarely be inferred. Owing to his contract of service, a servant is not generally in a position to choose freely between acceptance and rejection of the risk and so the defence does not apply in an action against the employer."***

36. Other than the respondent accusing the appellant of causing operating the machine without his permission there is nothing to support that position.

37. In ***Winfield and Jolowicz on Tort*** **by WVH Rogers, 14th Edition, London Sweet & Maxwell at page 213**, it is stated as follows *inter alia*:

> **"If a worker is injured just because no one has taken the trouble to provide him an obviously necessary safety devise, it is sufficient and in general, satisfactory to say that the employer has not fulfilled its duty."**

38. The respondent was duty bound to train his employees on the use of the chaff cutter and to provide the requisite safety devices.

39. The fact that the appellant did not demonstrate how the respondent distracted him, the respondent cannot be wholly to blame. On the evidence before me I would assign 50% liability on the respondent for failing to provide a safe working environment.

iii. What damages should be awarded to the Appellant

40. The respondent did not dispute the injuries suffered by the appellant. According to the Medical Report produced by Dr. Kiambaa, the appellant sustained Amputation of the two distal phalanges of the right index finger and Amputation of the two distal phalanges of the right middle finger.

41. It was the opinion of this witness that the appellant as a result of the injuries suffered 20% permanent disability which resulted into reduction of function of the right hand. The lower court awarded him Kshs.600,000/= as general damages for pain and suffering.

42. It is the appellant's contention that this award is low and that the trial court failed to consider his submissions on case with similar injuries.

43. The Court of Appeal in **Catholic Diocese of Kisumu vs Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

> **"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 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 the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."**

44. **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini vs A.M. Lubia and Olive Lubia (1985) 1KAR 727.** At **page 730** *Kneller J.A.* said: -

> ***"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."***

45. The Court of appeal in **Cecilia W. Mwangi & Another vs Ruth W. Mwangi [1997] eKLR** and **Arrow Car Limited vs Bimomo & 2 others [2004] 2 KLR 101** held that in assessment of damages the general method of approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.

46. Appellant cited **Pietro Canobbio vs Joseph Amani Hinzano [2016] eKLR** where the respondent who suffered amputation of three fingers leading to 18% permanent disability was awarded Kshs. 750,000/=.

47. The plaintiff in the above case sustained more injuries compared to the appellant herein; he lost three of his fingers while the appellant herein sustained amputation of two fingers. Award of general damages is discretionary. Kshs.600, 000/= as general damages for pain and suffering is not inordinately low as to represent an entirely erroneous estimate.

48. To that end the appeal succeeds in part.

49. The judgment of the trails court with respect to liability and general damages is set aside and substituted as follows.

i. **Liability 50%:50%**

ii. **General damages 50% of Kshs. 600,000/= i.e Kshs. 300,000/= plus half the costs and interest at court rates.**

50. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 7TH DAY OF APRIL, 2022.

MUMBUA T. MATHEKA

JUDGE

IN THE PRESENCE OF;

CA EDNA

RUBUA NGURE FOR APPELLANT

OMBATI & OMBATI & CO. ADVOCATES FOR RESPONDENT N/A