Kaimosi Tea Estates Ltd v Kitaban (Civil Appeal 11 of 2022)
[2022] KEHC 13367 (KLR) (28 September 2022) (Judgment)

Neutral citation: [2022] KEHC 13367 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAPSABET

CIVIL APPEAL 11 OF 2022

EKO OGOLA, J

SEPTEMBER 28, 2022

BETWEEN

KAIMOSI TEA ESTATES LTD ..... APPELLANT

AND

SELESTINE CHEMTAI KITABAN ..... RESPONDENT

(Being an Appeal from the judgment and decree of the Principal Magistrate in Kapsabet PMCC No. 239 of 2015 on 27th November 2017 by Hon. D.A Alego)

JUDGMENT

1. The Respondent herein instituted a suit against the Plaintiff being Kapsabet SPMCC 239 of 2018 seeking special damages of kshs. 6500 and general damages. The claim was based on injuries the respondent sustained on 4th August 2014 when she was working on the appellants' premises as a tea nursery attendant.

2. The Plaintiff called 3 witnesses. PW, Dr. Sokobe who examined her on 11th November 2015 testified that she had sustained a deep cut wound on the right wrist and bruises on the right elbow. He produced the medical report as PExh1a. PW2, a clinical officer at Kapsabet County Hospital testified that he examined the plaintiff and his diagnosis was that she had a deep cut wound. PW3, the Respondent herein, testified that on the material date she was at work at Kaimosi Tea Estate watering plants. She slipped and fell because of a trench she had not seen and she had no working garments which would have prevented any injury.

3. The Defendant called two witnesses in his defence. DW1 was a supervisor at the tea estate and he testified that the plaintiff was not at work on the material date. DW2, a nurse at the tea estate testified that she attended to the plaintiff for pains in her hands that she had previously. She did not see the plaintiff on the material date.

4. The trial Court considered the testimonies, submissions of counsel and the evidence before it and apportioned liability at 15% against the plaintiff. The learned trial magistrate awarded kshs. 200,000/- as general damages and the special damages as prayed.

5. Being dissatisfied with the judgment the appellant instituted the present appeal vide a Memorandum of appeal dated 8th January 2018 on the following grounds;

    1. The learned trial magistrate erred by arriving at a finding on liability of 85%:15% against the appellant which was not supported by evidence adduced at the hearing.

    2. The learned trial magistrate erred both in law and in fact in basing his finding on irrelevant matters.

    3. The learned trial magistrate erred both in law and in fact in failing to appreciate or take into account the appellants' submission or at all.

    4. The respondent's case was not proven on a balance of probability as is required by law.

    5. The learned trial magistrate's finding on liability was improper, unrealistic and inappropriate under all the circumstances of the case.

    6. The learned trial magistrate erred on all points of fact and law in as far as both liability and an award for damages is concerned.

Appellant's Case

6. The Appellant filed submissions on 30th April 2021. Learned counsel for the appellant submitted that the respondent did not prove any omission or commission on the part of the appellant as to blame them for being negligent. Further, that DW1s evidence of the appellants'' absence in the material date was corroborated by DW2's evidence. It is not clear where the respondent got the injuries from. The respondent did not mention the particulars of her injuries and she was released for work after treatment by DW2. He took issue with the fact that PW2 was not the treating doctor thus it was not clear under which circumstances the respondent got injured or the nature of the injuries.

7. It was submitted that the Respondent did not call any eye witness who saw her get injured at work. On this submission counsel relied on the case of Securicor Security Services vs Joyce Kwamboka Ongonga & Another, Kisii HCCC No. 230 of 2005. It was further submitted that the respondent ought to have known her workplace, and section 13 (a) of the Occupational Health and Safety Act was cited as follows:

    13(1) Every employee shall while at workplace Ensure his safety, health and that of other persons who may be affected by his acts or omission at the work place.

8. The Appellant also cited the case of *Amalgamated Saw Mills vs David K. Kariuki* (2016) eKLR in support of this submission.

9. According to the Appellant, the award for damages was excessive in the circumstances. Counsel cited the case of *Kemfro Africa Limited & Another vs Lubia & Another (No.2)* [1987] eKLR and submitted that the trial court left out relevant facts and thus ended up awarding an inordinately high amount.

10. It was submitted that the trial Magistrate did not take into account that the injury had healed which evidence of PW1 and 2 corroborated. The case of *Sokoro Saw Mills Limited vs Grace Nduta Ndungu* (2006) KLR was cited in support of this submission.

11. The Appellant proposed an award of kshs. 80,000/- as appropriated and relied on the cases of; Machakos HCCA No. 68 of 2013 – *Alex Ogutu vs PMN*, Nakuru HCCA No. 162 of 2011 – *Simon Kimani Kuria vs Transpares (K) Ltd*. Kisumu HCCA No. 52 of 2012 – *Dickson Ndungu Krembe & Anor vs Anna Anyango Chaka.*

He prayed that the appeal be dismissed with costs.

Respondent's Case

12. The Respondent filed submissions on 2nd September 2021. She buttressed her testimony that she was at work on the material date by producing a referral note dated 4th August 2014 which was corroborated by DW2 who stated that she attended to the respondent on the said date.

13. It was submitted that under the *Occupational Safety and Health Act*, it is the statutory duty of the employer to ensure the health, safety and welfare of employees and to provide protective gear. *Garton Limited vs Nancy Njeri Nyoike* (2016) eKLR, and Efil Enterprises Limited vs Dickson Mathambayo Kilonzo (2018) eKLR on the responsibility of the employer to provide proper appliances to safeguard the workers were cited.

14. It was submitted that the Respondent produced treatment notes to buttress her claim and none of the documents were controverted. The appellant opted not to subject the Respondent to a second medical examination to challenge the injuries. Counsel cited the case of *Efil Enterprises Limited vs Dickson Mathambayo Kilonzo* (2018) eKLR and *Veronica Mkanjala Myapara vs Charles Kinanga Babs* (2020) eKLR where the court awarded kshs. 300,000/- for soft tissue injuries. It was submitted that the award of kshs. 176,500 being an award for general damages was not inordinately high.

15. Upon perusing the record of appeal and considering the submissions of counsel I have identified the following issues for determination;

    1. Whether the court erred in its determination on liability

    2. Whether quantum was excessive

Whether the Court erred in it determination on liability

16. As an appellate court, I have borne in mind the principles applied by the Court of Appeal in the case of *Selle & Another vs Associated Motor Boat Company Ltd. & Others* (1968) EA.

> " An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. 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 if it appears either that he has clearly failed on some point 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."

17. The Appellant was at work on the material date. This is evidenced by her testimony which was corroborated by DW2 who attended to her that morning. However, the appellant failed to provide protective gear for the employees pursuant to the provisions of the Occupational Health and Safety Act.

18. The sick note from Kaimosi Tea Estate is evidence that the respondent sustained a deep cut injury and the same was while she was on duty. It is therefore clear that she was at work on the material date and sustained the injury on the material date.

19. It is not in disputed that the respondent sustained injuries while on duty. The appellant also failed to prove that it had provided the employees with any protective gear while conducting their duties.

    Section 13 (1) (a) of the Occupational Health and Safety Act provides;

    13(1) Every employee shall while at workplace

    Ensure his safety, health and that of other persons who may be affected by his acts or omission at the work place.

    In *Purity Wambui Muriithi vs. Highlands Mineral Water Co. Limited* [2015] eKLR it was held that:

    "...as a general rule the employer is liable for any injury or loss that occurs to his employees while at the workplace as a result of the employer's failure to ensure their safety..."

20. The Respondent adduced uncontroverted evidence to show that she was never provided with protective gear, and that had this been done, his injuries would have been minimized. She also mentioned that this particular ditch was unmarked; and therefore that no warning at all was given of its existence to the plantation workers. Clearly therefore, the appellant not only failed to provide the respondent with a safe working environment, but also failed to provide her with protective gear that would have cushioned him from bodily harm.

    I find that there is no need to interfere with the trial court's finding on liability.

Whether the Award for damages was excessive

21. It is trite that assessment of damages is a matter of discretion in respect of which an appellate court ought not to interfere unless such interference is warranted. In *Peters vs. Sunday Post Limited* [1958] EA 424 it was held that:

> " It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion..."
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> In *Stanley Maore vs Geoffrey Mwenda* [2004] eKLR, the Court of Appeal suggested thus:
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> "...we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general 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."

22. I have looked at some comparable decisions on similar injuries including; *Kipkebe Tea Limited v Duke Nyang'au* [2015] eKLR where the respondent sustained a deep cut on the writ and a cut on the elbow and the trial Court reduced the award to kshs. 100,000/-

    In *Godwin Ireri vs. Franklin Gitonga* [2018] eKLR, the Respondent had been awarded Kshs. 300,000/= as general damages for two cut wounds on the forehead, cuts on the scalp and bruises on the left ankle and right knee. The award was reduced to Kshs. 90,000/=.

23. I therefore find that the award by the trial court was not manifestly excessive as a consideration of the inflation since the above decisions were rendered would result in a similar award.

In the premises the appeal is dismissed with costs.

DATED, DELIVERED AND SIGNED AT ELDORET THIS 28TH OF SEPTEMBER 2022.

E. K. OGOLA

JUDGE