



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL NO. 274 OF 2013

KENYA NUT COMPANY LTD.....APPELLANT

VERSUS

SAMUEL MAINA MUYA.....RESPONDENT

[An appeal from the judgment of T. Gesora, Principal Magistrate,

in Kandara PMCC No. 163 of 2007 delivered on 12th November 2013]

JUDGMENT

1. The appellant contests the findings of the lower court on liability and quantum of damages for negligence for injuries allegedly sustained by the respondent while on duty at its farm. The appellant contends that the respondent's claim was fictitious.
2. In paragraph 5 of the plaint dated 2nd August 2007, the respondent (who was the plaintiff in the lower court) pleaded that that on 8th September 2004, he was guarding the gate at the appellant's factory gate when "*one of the employees came riding a motor cycle and hit the gate which then hit the plaintiff as a result of which [he] sustained serious injuries*". [underlining added].
3. The particulars of negligence of the appellant were pleaded as follows: exposing the plaintiff to a known risk; riding the motor cycle without due care or attention; improper working conditions; and, failing to offer "*adequate supervision*". He thus sought special and general damages.
4. By an amended statement of defence dated 13th December 2007, the appellant denied the occurrence of the incident and pleaded that if it ever arose, it amounted to a traffic accident which was never reported within 24 hours as required by the **Traffic Act**. In a synopsis, it denied that the incident amounted to an industrial accident. In the alternative, it assigned liability for the accident to the negligence of the respondent for, among other things, standing too close to the gate.
5. The learned trial magistrate found that the appellant was wholly liable and assessed general damages at Kshs 150,000; special damages at Kshs 2,000; and the doctor's attendance fees of Kshs 8,000. The respondent was also granted costs and interest.
6. The memorandum of appeal was lodged on 11th December 2019. There are eight grounds which can be condensed into three. Firstly, that liability was not proved; secondly, that the submissions by the appellant were not taken into account; and, thirdly, that the award of damages was manifestly excessive.
7. I granted directions on 18th September 2018 that the appeal be canvassed through written submissions. The appellant filed submissions on 15th February 2019 while those by the respondents were lodged on 16th November 2020.
8. In the written submissions at the High Court, learned counsel argued that evidence of the appellant's two witnesses rebutted the fabricated claim by the respondent. In a nut shell, she submitted that the respondent failed to discharge both the legal and evidential burden of proof.
9. The respondent's counsel countered that the trial court properly weighed the evidence and reached the correct conclusion on liability. In particular, that there was cogent evidence demonstrating that the respondent was injured while on duty at the estate and in support of the award of damages.
10. This is a first appeal to the High Court. It is thus on both *facts* and the *law*. I have re-evaluated the evidence and submissions and drawn independent conclusions. I am cognizant that I neither saw nor heard the witnesses. ***Peters v Sunday Post Limited*** [1958] E.A 424, ***Selle v Associated Motor Boat Company Ltd*** [1968] E.A 123.

11. From the admission in paragraph 3 of the amended defence as well as evidence, I readily find that the respondent was employed by the appellant.
12. The core of the appeal is whether respondent was injured in the course of his employment; and, whether the appellant was negligent.
13. In his examination in chief, the respondent said:

I was at Kiaura Farm doing security guard's job. I was assigned to the factory gate. My supervisor was Barnabas K. Towett, the security officer. A motor cycle came. I went to open but did not open completely. The motor cycle hit the gate and me. I was injured on the right leg and the forehead. It is the gate that hit me after being hit by the motorcycle, a Kawasaki belonging to the company ridden [sic] by Barnabas K. Towett". [underlining added].

14. In cross examination, he blamed the company because "the motorcycle was a tool for work...and because the rider [was] a company worker". He however admitted that he did not have the particulars of the two-wheeler.

15. The appellant's first witness, a nurse named Albert Ndwiga was on duty that afternoon. He denied receiving any report of an injury to an employee. He was relying on company records as he was not in employment at the date of the accident. The second witness DW4 was the Human Resources Officer. He produced records showing that the respondent and another employee (Awuor) were on duty and handed over at 6:15 without any report of an injury to the respondent.

16. I will now turn to the evidence surrounding the accident. I find that there was a dearth of evidence to support the respondent's allegations. If the respondent suffered severe injuries at 2:00 p.m., how come he continued to perform his duties until 6:15 and without seeking first aid at the company's dispensary? The respondent said he was given first aid by those who were near. He did not name them or call them. Secondly, he did not report the injuries to the company in the course of that afternoon or when he handed over.

17. Furthermore, and from a legal standpoint, the causation of the accident as pleaded by the respondent cannot be attributed to the negligence of his employer. He said that the motorcycle approached at high speed from outside the gate. He did not have its registration particulars but he said the rider was an employee. It hit the gate which in turn hit the respondent who had managed to open it partially. He also opined that the rider "did not know how to ride a motorcycle. He could not have caused the accident if he was experienced"

18. The respondent was employed as a guard manning the gate. The causation of the accident was by an unidentified motorcycle which hit the gate and caused it to hit the respondent. So much so that it would be a bit farfetched to blame his employer for the negligence of the rider. In short, the liability for the accident points strongly in the direction of Barnabas Kipkemboi in the genre of a tort founded on a road traffic accident.

19. But in the event that I am wrong in that analysis, I find that the respondent did *not* discharge his evidential burden of proof on a balance of probabilities to demonstrate that he was injured at work on the material afternoon. I have three reasons. First, I have stated that he never reported the injuries that day or attended the company's clinic. Secondly, the treatment card from Gatundu Hospital produced by PW2 (exhibit 7) shows he only sought services *three days* later on 11th September 2004. Thirdly, the doctor (PW2) did not examine the respondent until *two years* after the accident.

20. Lastly, it remained the *primary duty* of the respondent to keep a safe look out. Even assuming that he was hit by the gate after it was hit by a motorcycle, it would be unreasonable in the circumstances to blame his employer.

21. The duty of the employer to ensure the safety of an employee is not *absolute*; it is one of *reasonable care* against a foreseeable risk or one that can be avoided by taking reasonable measures or precautions. It would be absurd to expect an employer to be his employee's insurer round the clock. See *Halsbury's Laws of England* 4th edition volume 16 paragraph 562, *Mwanyule v Said* [2004] KLR 1, *Arkay Industries Ltd v Amani* [1990] KLR 309.

22. The legal burden of proving *negligence*; or, *breach* of any statutory duty of care fell squarely on the respondent's shoulders. See section 107 of the **Evidence Act**. From my re-appraisal of the evidence and the reasons I have outlined above, I find that the respondent was unable to prove a *balance of probabilities* that they were sustained on 8th September 2004 at the appellant's farm.

23. For all of those reasons, and with tremendous respect to the learned trial magistrate, I am *not* satisfied that the appellant was negligent or failed to provide a safe working system.

24. I will now turn to quantum of damages. An appellate court will not interfere with quantum of damages unless the award is so high; or, inordinately low; or, founded on wrong principles. *Butt v Khan* [1982-88] KAR 1.

25. From the medical report by *Dr. Kiama Wangai* dated 22nd August 2007 (exhibit 5) the respondent suffered blunt injuries, pains and soft tissue injuries on the right leg, foot and forehead which had healed. The treatment given comprised of analgesics. I thus find, with respect, that the general damages awarded by the lower court of Kshs 150,000 were too high as to disclose an error of principle.

26. In *Peter Kahugu & another v Ongaro*, High Court, Nairobi, Civil Appeal 676 of 2000 [2004] eKLR, Kshs 80,000 was awarded for multiple soft tissue injuries. In *Timsales Ltd v Penina Omondi*, High Court, Nakuru, Civil Appeal 192 of 2008 [2011] eKLR, the respondent suffered a deep cut wound on the left index finger and severe soft tissue injuries. The High Court reduced the general damages to Kshs 60,000.

27. Granted the injuries in this case an award of Kshs 80,000 would have been sufficient. The special damages of Kshs 2,000 were specifically pleaded and strictly proved by the respondent. I would also not begrudge the doctor's attendance fees of Kshs 8,000.

28. But that is now water under the bridge: The respondent having failed to establish liability, this appeal must succeed. I hereby *set aside* the judgment and decree of the lower court dated 12th November 2013. I substitute it with an order *dismissing* the respondent's case in the lower court.

29. Costs follow the event and are at the discretion of the court. Considering the predicament that has now befallen the respondent, I order that each party shall bear its own costs in the lower court and in this appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 25th day of March 2021.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:

No appearance by counsel for the appellant.

No appearance by counsel for the respondent.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.