



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 15 OF 2019

JOHNSON MWANIKI EPHANTUS NYAGA T/A KIMANGA FARM...APPELLANT

VERSUS

PETER NYAGA NGUGI.....RESPONDENT

JUDGMENT

1. The appeal herein arose from the judgment of Hon. S.K. Mutai (PM) delivered on the 26th day of February, 2019, in Embu CMCC No. 232 of 2014, in which suit, the respondent sued the appellant claiming general damages for pain, suffering and loss of amenities, special damages in the sum of Kshs. 5,200/= and interest at the prevailing court rate.
2. The respondent's cause of action was premised on an accident that is said to have occurred on or about 25th May, 2012 when he was lawfully in the course of his duty at the appellant's premises, when he was called upon to undertake a dangerous duty being to repair a water pump machine and in the process, one of the shafts let loose and violently hit him on the face thereby injuring his eye.
3. The respondent averred that the accident was caused by negligence on the part of the appellant, the particulars of which have been set out in paragraph 6 of the plaint. He further contended that following the said accident, he suffered loss and damage and has set them out in paragraph 7 of the plaint. The particulars of injuries have been stated in paragraph 6 of the plaint.
4. The appellant denied the respondent's claim vide a defence filed on the 21st October, 2014. He averred that at the time of the alleged accident, the respondent was not in his employment and/or in the course of his duty as alleged and contended that he was injured by a pair of scissors held by one Joseph Njaro Tenges. The particulars of negligence of the appellant were denied *in toto*.
5. The matter proceeded to hearing and in its judgment delivered on the 26th day of February 2019, the court found the appellant liable and entered judgment against him in the sum of Kshs. 1,004,500/= plus costs and interest.
6. Being dissatisfied with the said judgment, the appellant filed the appeal herein in which he has listed six (6) grounds of appeal in the memorandum of appeal filed on the 2nd March, 2019. A perusal of the grounds of appeal revealed that the appeal is on both liability and quantum of damages.
7. The appeal proceeded by way of written submissions. In his submissions, the appellant submitted that the learned magistrate erred in law and in fact and seriously misdirected himself when he came to the conclusion that the appellant was negligent and therefore liable for the injuries sustained by the respondent without pointing out his acts of either commission or omission that led to those injuries.
8. The appellant further submitted that the learned magistrate misdirected himself when he failed to realize that there were material contradictions in the evidence and the pleadings of the respondent. The appellant averred that the contradictions are material and went to prove that the respondent was not a credible witness and that his evidence did not satisfy the threshold required to prove the case on a balance of probability.
9. The appellant contended that the respondent was not on duty at the material time when the accident occurred. Further that he used to work as a casual labourer when and if the casual work was available and that he had not been given any casual work on the material day.
10. On the part of the respondent, it was submitted that as a general rule, the appellant was supposed to provide his employees with protective gear and/or guarantee their safety while at work.
11. On the issue of whether the respondent was at work on the material day, the respondent relied on the letter dated 1st October, 2013

(exhibit 2) in which the Labour Office upon hearing the witnesses from both sides concluded that the respondent was on duty. Further that in his evidence, he confirmed that he was the appellant's employee having worked in the farm for 1½ years but used to be paid on weekly basis. He also relied on the evidence of DW3 who was working at the farm on the material day.

12. On the issue of contradictions it was submitted that, from the evidence on record, the respondent was injured while at the appellant's farm and that the issue of injury is not disputed and that the same occurred while the water pump was being repaired. Reliance was made on the case of **Kenya Bus Service Limited Vs Joseph K. Ayoro [1994] eKLR**.

13. Further that even if there may have been minor contradictions, they did not go to the root of the case as the fact remains that the respondent was injured at the appellant's farm.

14. On quantum, it was the respondent's submission that the learned magistrate applied the right principles in awarding the amount he did and averred that, as a general rule the appellate court will rarely interfere with an award of damages unless the same is manifestly excessive which is not the case herein.

15. The court has considered the grounds of appeal and the submissions by both the appellant and the respondent. On whether the respondent was on duty on the material day when he was injured, the evidence on record by the respondent who testified as PW2 is that he was an employee of the appellant. This evidence is corroborated by that of PW3 and that of DW3.

16. Further, the appellant paid the medical expenses that was incurred by the respondent. It cannot therefore be true that the respondent was not on duty when he was injured. He stated that he reported on duty on the 25th day of May 2012 and he was assigned work by his foreman, Mr. Harisson Githinji which was to put a radiator into the chaff cutter.

17. PW3 in his evidence confirmed having seen the respondent being injured by a machine near the borehole. In view of the above evidence, this court is not persuaded by the evidence of the appellant's witnesses that the respondent was not given any work on that day.

18. On whether the appellant was negligent, it was his evidence that he was asked to check on a water pump which had broken down and as he was checking on the wires, Joseph gave him a scissor and put it on his eyes and he felt pain. In cross examination, he stated that his eye was injured by a scissor and that no shaft hit his eye. On further cross-examination he stated that he was injured by Tenges but on being asked why he did not sue the said Tenges, he stated that it was because he had no intention to injure him.

19. On his part, DW2 (Mr. Joseph Tenges) told the court that he was the one who was repairing the water pump at the appellant's premises when the respondent went to the farm and found the farm manager was not there. That the respondent went to where he was repairing the pump and as he raised the scissor to cut a wire he hit the respondent's eye.

20. Further that it was accidental that he was injured. It was not intentional. It was his further testimony that the respondent was not repairing the machine but it was him (Joseph Tenges) who was repairing the same when he accidentally hit the respondent's eye.

21. In his plaint, the respondent pleaded that he was given the duty to repair a water pump machine and that, one of the shafts let loose and violently hit him on the face thereby injuring his eye. It is trite that the respondent's cause of action is based on the tort of negligence against the appellant and therefore the burden was on him to prove negligence on the part of the appellant.

22. Under Section 107 of the Evidence Act, 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. Under Section 109, the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

23. In the case of **Statpack Industries Vs James Mbithi Munyao [2005] eKLR** the court held thus: -

It is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone's negligence and the injury. The plaintiff must adduce evidence for which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily a result of someone's negligence. An injury per se is not sufficient to hold someone liable for the same. Here, in this case, the respondent did not lead any evidence to connect his injuries or accident to an act or omission on the part of the appellant...."

24. In his own testimony, the respondent stated that Tenges had no intention to injure him and that is why he did not sue him in the first place. On his part, Tenges testified that he hit the respondent accidentally and that, it was not intentional.

25. With this kind of evidence and with all due respect to the learned magistrate, it was erroneous for him to have found that the respondent had proved negligence against the appellant. There was no iota of evidence to prove negligence on the part of the appellant and/or his employee (Tenges), to warrant judgment in favour of the respondent on liability.

26. On the material contradictions in the evidence and the pleadings, the court has carefully gone through the evidence and has perused the plaint filed in the lower court. The appellant has submitted on the contradictions in that in the P3 form, the respondent has stated that he was assaulted by a person known to him; In his witness statement he stated that he was injured by wires connecting the machine; In the demand letter, it is stated that he was injured by Tenges; in the plaint filed in court, he has pleaded that he was injured by a water pump shaft that was let loose whereas in his evidence he has stated that Tenges gave him scissors and put it in his eye.

27. On his part, the respondent has argued that the contradictions are not material and has relied on the case of **Kenya Bus Service Limited**

(supra). The court has considered the contradictions in the case relied on by the respondent and the ones in the case before it, and I cannot hesitate to find that the contradictions in this case are material to the case and further that the evidence adduced by the respondent and his witnesses does not support the pleadings.

28. On the quantum of damages, the respondent sustained grievous harm to his left eye and lost his eyesight. He suffered total permanent incapacitation of the left eye following the accident. The estimated total incapacitation is 50%. I have perused the authority of **Fred Ben Okoth Vs Equator Bottles Limited [2015] eKLR** where Kshs. 855,400/= was awarded and it is my considered view that the same was on the higher side while the proposed Kshs. 100,000/= is too low.

29. An award of Kshs. 700,000/= would have been reasonable but since the respondent did not succeed on liability, the appeal herein is allowed.

30. Each party shall bear its own costs of the appeal and that of the lower court.

31. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF SEPTEMBER, 2021

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent