



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 107 OF 2018

BIASHARA MASTERS SAWMILLS LIMITED.....APPELLANT

VERSUS

STEPHEN MWANGI KIMUNYU..... RESPONDENT

(Being an appeal from the judgment and decree of the resident magistrate honorable R. Amwayi in Molo SPMCC no 210 of 2012 delivered on 11th July 2018)

JUDGMENT

1. This appeal arises from the suit filed by the plaintiff against the defendant by plaint dated **7th September 2012** seeking general and special damages for the injuries he sustained on 25th February 2012 while working for the defendant.
2. The defendant filed defence dated 8th November 2012 denying allegation that plaintiff was its employee and stated that the defendant did not therefore have any contractual obligation towards the plaintiff; and further denied that an accident ever happened at the Defendant' work premises. The defendant urged the court to dismiss the claim.
3. The trial Court found the defendant 100% liable and awarded general damages of kshs 120,000 and special damages of kshs 5,000 plus costs of the suit and interest.
4. The defendant being aggrieved by the decision of the trial Court filed this appeal on the following grounds: -
 - a. *That the learned magistrate erred in law and in fact in finding the appellant liable contrary to the evidence on record.*
 - b. *That the learned magistrate erred in law and in fact in finding the respondent had proved his case to the required standards contrary to the evidence on record.*
 - c. *That the learned magistrate erred in law and in fact by failing to evaluate the evidence and also consider the submissions as filed on behalf of the appellant.*
 - d. *That the learned magistrate erred in law and in fact by exhibiting extreme bias against the appellant and manifestly failing to be impartial in his judgment.*
5. The appellant urged the Court to allow the appeal and review, set aside, and/or revise the judgment of the lower court on both liability and quantum.
6. Parties herein agreed to proceed by way of written submissions.

APPELLANT'S SUBMISSIONS

7. The appellant submitted that the respondent was the author of his own misfortune as he was aware that when repairing the lorry spring, it could spring off and injure him and he therefore needed to take caution to prevent the metal bar from slipping from his hands; that the respondent had a duty to take care of himself while at work.
8. The appellant further submitted that the respondent ought to have proved that the provision of the safety attire was mandatory and he had requested for the same but was not provided.
9. The appellant submitted that the accident did not occur as alleged as the respondent had left employment at 5.00 pm and that he failed to

lead evidence connecting his injuries to the act or omission on the part of the employer.

10. The appellant further submitted that the respondent failed to meet the burden of proof required as per **section 107 (1) of the Evidence Act**. The respondent failed to adduce evidence to show the negligence of the employer on a balance of the liability and cited the case of **Muthuku vs Kenya Cargo Services (1991) KLR 468** where the court held as follows: -

“It is for the appellant to prove upon a balance of probability, one of the forms of negligence as alleged in the plaint, our law has to reach the stage of liability without fault.”

11. On assessment of damages by the trial court, the appellant relied on the case of **Scope Ltd & Anor vs Mbuni Transport Co. Ltd & Anor HCCC No. 54 of 1991** where the plaintiff was awarded damages of Kshs 20,000/= for pain and suffering; had suffered soft tissue injuries of the shoulder and upper back and hospitalized for 3 days.

RESPONDENT SUBMISSIONS

12. The respondent submitted that the accident occurred during overtime at 6.30 pm when the supervisor had left and therefore defence witness DW1 could not ascertain whether any accident occurred; further that the clamp that was supplied to the respondent to aid in the repair work as it was worn out and defective leading to the occurrence of the accident; that the appellant did not adduce any evidence to the contrary.

13. The respondent further submitted that the appellant was under a duty to ensure the respondent's safety while at work as per **section 6(1) of the Occupation Safety and Health Act** which provides that, every occupier shall ensure safety, health, and welfare at work of all persons working in the workplace. The respondent cited the case of **Purity Wambui Muriithi vs Highlands Mineral Water and Co. Ltd (2015) eKLR Civil Appeal 58 of 2014** where the court held that: -

“It is therefore follows 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.”

14. The respondent submitted that the appellant failed to produce evidence to disprove the respondent's claim; that the appellant failed to prove that the respondent was not an employee of the appellant nor that the accident did not happen at the appellant's place of work. The appellant having denied the respondent's claim, it was under duty to disapprove the respondent's claim.

15. In respect to injuries sustained, the respondent submitted that he produced treatment notes from Njoro Hospital, medical report prepared by **Dr. Omuyoma** and special damages of Kshs 5,000/= was proved.

16. On the issue of general damages, the respondent submitted that the award of Kshs. 120,000/= was proper and commensurate to the injuries sustained and cited the case of **Joseph Kaliche Ambani vs Farm Industries Ltd (2016) eKLR Civil Appeal No. 11 of 2015** where the plaintiff was awarded Kshs. 200,000/= as general damages for soft tissue injuries (cut wound) on his left knee.

17. Respondent submitted that the trial Court did not proceed on wrong principles neither did the Court misapprehend the evidence on record and urged this court to dismiss the appeal with the costs to the respondent.

ANALYSIS AND DETERMINATION

18. This being the first Appellate Court, I have a duty to re-evaluate the evidence on record afresh and arrive at an independent determination as was held by the Court of Appeal in **Selle & Anor v. Associated Motor Boat & Co. Ltd & Anor [1968] EA 123** where the Court held as follows: -

“The court's duty is to evaluate and re-examine the evidence adduced in the trial court and make its own finding giving allowance that it did not have an opportunity to hear or see the witnesses. Further, this court does not have to interfere with the lower court's decision on a finding of fact unless the same is founded on wrong principles of fact and or law, and or it was based on no evidence. “

19. Further in **Makube v. Nyamuro [1983] KLR, 403 – 415, at 403** the court held as follows: -

“A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

20. In view of the above, I have perused the proceedings of the trial court and identify the following as issues for determination: -

- i. Whether the Respondent proved his case on a balance of probabilities
- ii. Whether this court should interfere with damages awarded?

(i) Whether the respondent Proved his case on a balance of probabilities

21. **Section 107 (1) & (2) of the Evidence Act** provides for the burden as follows:

(1) 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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

22. **Section 108 of the Act** provide as follows: -

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

23. The respondent was required to prove is he worked overtime and was actually injured while working. His contention was that, the accident occurred at the time when he was working overtime and produced the treatment notes from Njoro Hospital, a medical report, and availed an officer from Njoro Hospital. The documents availed indicate injury on the day the incident is alleged to have occurred.

24. Defense witness DW1 **Nicodemus Maseke** a mechanic with defendant confirmed that the plaintiff was the defendant’s employee and that he was the plaintiff’s supervisor at the material time. He further confirmed that the plaintiff reported on duty on the material day at 8.00am.

25. The defendant denied occurrence of accident during working hours but I note that DW1 who was plaintiff’s supervisor did not avail any document to show that the plaintiff did not work overtime on 25th February 2012. It is common knowledge that records of work are normally in the custody of the employers and DW1 should have availed documents to show that the respondent never worked overtime on the material day and that he was supplied with protective equipment and also avail accident register to confirm that no accident was recorded on the material day.

26. The plaintiff attributed the occurrence of the accident to the negligence of defendant as well as the breach of the contract by the defendant for failing to provide the plaintiff with a safe and proper system of work, as well as protective equipment.

27. From the foregoing, I find that the defendant failed to controvert the respondent’s evidence to the effect that he got injured while working overtime.

(ii) Whether this court should interfere with damages awarded?

28. The question as to whether to interfere with award of damages was reiterated in the case of **Gitobu Imanyara & 2 others vs Attorney General (2016) eKLR** where the court of appeal held:

“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance, they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.”

29. In the instant case, the trial magistrate awarded respondent Kshs. 120,000/= damages for pain and suffering, which amount the appellant contend is inordinately high. The respondent agrees with the trial magistrate’s assessment of damages.

30. There is no doubt that compensation is evaluated by determining the nature and extent of the injuries suffered by the victim and comparable awards made in the past. In **Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another [2017] eKLR** the court said that:

“On the issue of damages, it is settled that the award of damages is within the discretion of the trial court and the Appellate Court would only interfere on the particular grounds. These grounds were and are;

(a) that the court acted on wrong principles or that the award is so excessive or so low that no reasonable tribunal would have awarded or

(b) that the court has taken into consideration matters which it ought not to have or left out matters it ought to have considered and, in the result, arrived at wrong decision.

31. An award of damages is not meant to enrich a victim but it is aimed to compensate the victim for the injuries suffered. The award should be commensurate with the injuries suffered. The respondent suffered a deep cut wound on the right index finger and severe soft tissue injuries of the right index finger. The Court proceeded to award Kshs. 120,000/= damages for pain and suffering and Kshs 5,000/= as special damages.

32. I have taken into account the time the assessment of damages was done and in my view, the award of kshs 120,000/= as general damages are adequate compensation for injuries suffered by the respondent. I will therefore not interfere with the award.

33. FINAL ORDERS

a. This appeal is hereby dismissed

b. Costs of the appeal to respondents.

JUDGMENT dated, signed and delivered via zoom at **Nakuru**

This **23rd** day of **September**, 2021

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RACHEL NGETICH

JUDGE

In the presence of:

Jenifer - Court Assistant

Ms. Obura holding brief for Murimi for Appellant

Ms. Nganga for Respondent