



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CORAM: A.K NDUNG'U, J

CIVIL APPEAL NO. 344 OF 2017

HAGGAI MULTICARGO HANDLING SERVICES.....APPELLANT

VERSUS

EPHRAIM KATAKA ACHESARESPONDENT

(Being an appeal from the judgement of Hon. G.A Mmasi (Mrs), SPM

delivered on the 7th June, 2017 in Milimani CMCC No. 1331 of 2014)

JUDGEMENT

1. This is an appeal arising from the judgement of the Senior Principal Magistrate in Milimani CMCC No. 1331 of 2014.
2. The respondent had sued the appellant for damages arising from an alleged industrial accident on the 20/9/2013.
3. At the conclusion of the trial, the appellant was found 100% liable and general damages were assessed at Sh. 350,000.
4. As a first appellate court, I am enjoined to re-evaluate the evidence and make my own conclusions thereon alive to the fact that I neither heard nor saw the witnesses. This is as held in the case of Selle –vs- Associated Motor Boat Co. Ltd [1968]EA 123 where it was held;

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of appeal acts are that the 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 the court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed in 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.”

5. In brief, the respondent’s evidence was that he was working with the appellant company as a general worker. On the material day, he was working on a machine when a co-worker pushed the grinder that cut the respondent’s right index finger. He produced an employer’s ID card to show he was employed by the appellant.
6. On cross examination the respondent stated that he did not sustain a fracture.
7. For the appellant, DW 1, Humphrey Obworo testified that he works for the appellant. He ensures that all workers get preventive apparels and in case of injury, he takes them to hospital. He stated that it was not the work of the respondent to rotate the machine. On cross examination DW 1 admitted that he did not produce a register for issuance of protective gear. He blamed the respondent for undertaking a task that was not his.
8. From the foregoing the issues for determination crystallize to;

1. Who was liable for the accident.

2. What damages if any were awardable.

3. Who bore the costs of the suit.

9. I have re-evaluated the evidence on record and considered the rival submissions.

10. The issue of whether the respondent was working for the appellant is settled by the evidence of DW 1 who acknowledged that he knew the respondent save to state that the respondent's work was to carry papers from the machine.

11. The duty by an employer to an employee to provide a safe working environment is not in doubt. The Court of Appeal in **Purity Wambui Muriithi –vs- Highlands Mineral Water Co. Ltd [2015]eKLR** summarised the duty as follows;

“Section 6(1) of the Occupational Safety and Health Act provides:

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

It, therefore, follows 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. Does this mean that the employer would always be liable in all circumstances regardless of what caused the accident in question? We do not think so. We say so because where an accident happens due to the employees own negligence it would be unfair to hold the employer liable. Further section 13(1) (a) of the Occupational Safety and Health Act provides:-

13(1) Every employee shall, while at the workplace-

(a) Ensure his own safety and health and that of other persons who may be affected by his acts or omissions at the work place.”

Therefore, the employee is also required to take reasonable precaution to ensure his/her safety at the workplace while performing his/her duties.

12. It follows therefore, that the employer's duty is not absolute. The Court of Appeal in **Mwanyule –vs- Said T/A Jomvu Total Service Station [2004] 1 KLR 47** observed;

“The employer owes no absolute duty to the employee and the only duty owed is that of reasonable care against risk of injury caused by events reasonably foreseeable or which would be prevented by taking reasonable precaution.”

13. In our instant suit, the respondent's evidence is that he was sent to remove stuck paper from the machine and that Hamisi rotated the machine thus injuring the respondent. The respondent stated that he was not provided with protective gear at the material time.

14. DW 1's evidence is that he issues preventive apparels to the workers. He says he was at the scene when the incident happened. He fascillates from this position in cross examination where he states that he was informed of the accident by Hamisi Wakulo. He did not produce the register for issuance of protective gears to show that the plaintiff had been issued with the same.

15. DW 1 added that Supervisor Mweu told him how the accident occurred. This corroborates the respondent's assertion that he and Hamisi had been directed to work at the machine by Supervisor Mweu. Mweu was not called as a witness to rebut this position.

16. The question then to ask is whether the appellant had taken reasonable care against a foreseeable risk or whether it had taken reasonable measures or precautions to avoid harm on the respondent.

17. The ready answer flowing from the evidence on record is that the appellant had not taken reasonable care against a foreseeable risk or taken reasonable measures or precautions to put the respondent out of harm's way.

18. First, the appellant's supervisor one Mweu sent the respondent to remove stuck paper from the machine in company of one Hamisi. By the admission of DW 1, Hamisi was not a trained machine operator. He rotated the machine leading to injury on the respondent. This would have been avoided had Mweu, an agent of the appellant taken steps to ensure a skilled operator worked on the machine.

19. Secondly, the respondent was not supplied with protective gear. DW 1 confirms as much as he did not produce a register to show issuance of protective gear to the respondent.

20. In the obtaining circumstances, though I appreciate that **S.13 (1) of the Occupational Safety and Health Act** provides that an employee shall while at the workplace ensure his own safety and health and that of other persons who may be affected by his acts or omissions at the workplace, I find no act or omission on the part of the respondent that led to his injury.

21. I have re-evaluated the evidence and I am satisfied that the findings of the trial court on liability are supported by the evidence on record.

22. On quantum, it is submitted for the appellant that the Doctor who examined the respondent did not produce X-ray films which he relied on to ascertain that the plaintiff had sustained a fracture. It is further urged, and this is borne out of record, that the respondent on cross examination stated that he did not sustain a fracture and he did not have an X-ray film that would prove he sustained any fracture.

23. The principle upon which an appellate court would interfere with an award of damages by the trial court is well settled. In **Butt –vs- Khan [1981]eKLR 349** it was stated;

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived on a figure which was either inordinately high or low.”

24. In our instant suit, the trial court proceeded to assess damages on the basis that the plaintiff sustained;

- a) Deep laceration of the right index finger.
- b) Fracture of the right index finger.

25. Yet, from the evidence the existence of a fracture was not proved.

26. It follows therefore that the trial court misapprehended the evidence in some material respect to warrant this court disturbing the award of general damages awarded.

27. For the appellant, it is submitted that Ksh 50,000 would be adequate compensation for the respondent. The respondent is of the view that the award by the trial court is appropriate.

28. It is strange that at the trial court the appellant had proposed an award of Kshs 250,000 but now propose Kshs 50,000 in general damages.

My view is that by the time the proposal of Sh 250,000 was made, proper consideration must have been given to the injuries suffered by the plaintiff. Assessment of damages is not a try by error exercise. The appellant cannot be allowed to blow hot and cold at the same time.

29. Having found that the award of damages herein ought to be disturbed, I will set aside the award of Sh 350,000 in general damages made by the trial court and substitute thereof the sum proposed by the appellant at the trial court being Ksh. 250,000 in general damages.

30. With the result that the appeal herein is partially successful. I allow the same to the extent stated and make the following orders;

- 1. The judgement on liability is upheld.**
- 2. The award of general damages is set aside and substituted with a sum of Ksh. 250,000.**
- 3. Special damages are upheld.**
- 4. The respondent shall have half the costs of the appeal.**

Dated, signed and delivered at Nairobi this 27th day of February, 2020.

A. K. NDUNG'U

JUDGE