



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CIVIL APPEAL NO.29 OF 2017

(Appeal Originating from Nyahururu CM's Court Civ..No.230 of 2014 by: Hon. V. Ochanda)

LOTHIKE LUKOLUNYOI.....RESPONDENT

VERSUS

1. KUYIA LUDAAM

2. KENYA AGRICULTURAL DEPARTMENT CORRURATION (ADC).....APPELLANT

JUDGMENT

Kenya Agricultural Development Corporation, the appellant, has appealed against the judgment of Hon. Ochanda R.M. where the trial court entered judgment for the respondent for General Damages and Loss of amenities of Kshs.600,000/= plus costs and interest, arising from injuries that the respondent sustained when he was shot by Kuyia Ludaam, an employee of the appellant while he was in the course of his duty.

A brief background of the respondent's case is that on 30/3/2014, while employed by the appellant as a herder, his workmate, Kuyia Ludaam, accidentally opened fire, seriously injuring the respondent. The respondent blamed the employer (appellant) for the said injuries because the employer had negligently given the workmate a firearm which he was not trained to handle.

By his plaint dated 14/11/2014, the respondent claimed General Damages for pain and loss and loss of amenities plus Special Damages of Kshs.3,000/=. By the second defendant's amended defence dated 12/1/2015, the appellant denied that the respondent was its employee or that he was on duty on 30/3/2014 when the accident allegedly occurred. The appellant also denied the occurrence of the accident and denied all the particulars of negligence attributed to the appellant.

PW1 Lothike Lukolunyi testified that on 30/3/2014, he was working at ADC Mutara as a herder, when at about 7.00p.m Kuyia shot him by bad luck; that Kuyia had been issued with a firearm by the manager though he did not have a license. He also said that the appellant had firearms and the appellant usually trains its people to handle firearms. He was injured.

The appellant called DW1 as a witness. He was the Assistant Complainant's Manager. He knew PW1 as a herder with the appellant and that on 30/3/2014 about 8.00 p.m. to 9.00 p.m., he was informed that an employee was injured and the person who shot him had escaped. He denied that the person had been licensed to handle a gun.

He denied that the respondent could have been at work because he works between 8.a.m. to 4.00 p.m. He admitted that there was a duty roster at the place of work which he did not have.

After hearing the parties, the court entered judgment in favour of the respondent, which judgment is challenged in this appeal.

The appellant being dissatisfied with the judgment of the trial court, filed this appeal on 23/2/2018 citing the following grounds of appeal:

(i) That the trial magistrate erred in law and fact in finding the appellant liable contrary to the evidence on record indicating clearly that the respondent did not prove his case to the required standard;

(ii) That the trial court erred in applying the wrong principles and thus arriving at an erroneous award contrary to the pleadings on record;

(iii) That the court erred in making a finding and making an award that is inordinately high and represented an erroneous estimate of the damages payable;

(iv) That the trial magistrate erred by disregarding the appellant's submissions.

The appellant therefore prays that the judgment of the trial court be set aside, be reviewed or reversed and substituted with a judgment of this court; that the court do make any other orders it deems fit and the costs to go to the appellant. The appellant's counsel, Mr. Juma did not appear on the date the submissions were to be highlighted. Mr. Omariba counsel for the respondent went ahead to highlight his submissions.

In the filed submissions, the appellant urged ground 1, 2 and 3 together. He submitted that the respondent claimed to have been working for the appellant as a herder and was at work on 30/3/2014 about 7.00 p.m. when he was shot by Kuyia; that however, the P3 form indicated that the incident occurred at 1943 hours; that the respondent admitted that he could not prove that the gun belonged to the appellant. The appellant's case is that the respondent was injured where he resided but not at his place of work.

It was further submitted that DW1 clearly stated that the respondent used to report to work at 7.00 a.m. to 8.00 am and leave by 4.00 p.m. to 5.00 p.m. That herding never takes place at night and DW1's evidence was not rebutted. It was therefore submitted that the respondent was injured while away from duty and therefore the appellant cannot be held liable.

The appellant supported his submission with ***Salmond on the Law of Torts 17th Edition and Halbury's Laws of England 4th Edition Vol.16 paragraph 562*** where it was emphasized that the employer cannot be liable for injuries suffered outside the course of an employee's course of duty.

It was also the appellant's submission that the appellant failed to establish that the gun used belonged to the appellant or that it was being used to perform the appellant's duties and that causation was not proved.

The appellant relied on the case of ***Statpack Industries v James Mbithi Munyau HCA.152/2003*** and ***Timsales Ltd v Stephen Gachie HCA.79/2000*** where the courts held that it was the duty of the respondent to prove that the injuries occurred as a result of the appellant's negligence i.e. proof of causation.

On the award of general damages for pain and suffering, it was submitted that the trial court took into account irrelevant facts and erred in awarding Kshs.400,000/= as general damages and Kshs.200,000/= as loss of amenities under separate heads yet it was claimed under one head. Counsel relied on ***Beena Khambaita v Talvinder Sagoo & 3 others HCA.107/05 (2015) eKLR*** where it was held that loss of earning capacity is a general damage claim and one cannot claim both. It was the appellant's view that the award of Kshs.200,000/= was not merited.

In opposing the appeal, Mr. Omariba, counsel for the respondent also filed submissions and highlighted them. Mr. Omariba submitted that it is not in dispute that the respondent and 1st defendants were employees of the appellant; that the respondent was injured while on duty while at the appellant's premises; that DW1 was not on duty on the said date and that that DW1's manager who was present was never called as a witness; and his evidence was hearsay and cannot controvert that of PW1. It was counsel's submission that the judgment should not be interfered with and that the assessment of damages is an exercise of judicial discretion which should not be interfered with unless it is shown that the award is inordinately high or low or that it is based on the wrong principles – see ***Kemfro Africa Ltd v Lubia & another (1984) KLR 1999***.

This being a first appeal, it behoves this court to re-evaluate all the evidence afresh, analyze it and make its own determinations – See ***Mariara v Kenya Bus Service Ltd (1987) KLR 440; selle Associated Moter Boat Co. Ltd (1968) E.A. 123***.

Although the appellant had denied that the respondent worked for it, it is clear from the submissions that that fact is not denied and it was confirmed by DW1 that the respondent worked with the appellant as a herder and that on 30/3/2014 he was called and found the respondent was injured. The scene was his place of work.

PW1 (the respondent) recalled how he was shot and injured while at work on 30/3/2014. The fact that PW1 was injured is not disputed. DW1, the appellant's complaints manager admitted to having been called to take PW1 to Hospital on the fateful night. The treatment notes, P.Ex.No.1 medical evidence in terms of the P3 form were produced by consent. It is recorded in the P3 that the right foot was amputated up to the mid front level leaving only the big toe intact. The offending weapon was said to be a high velocity sharp object. The report made to the police on same day was that PW1 was shot by a gun.

The next question is, therefore, who shot PW1? PW1 named Kuyia Ludaam, his workmate as the culprit. DW1 admitted that indeed Kuyia was also employed by the appellant as a herder. DW1 confirmed that the said Kuyia escaped after the incident and that he has not been arrested since.

DW1 denied that Kuyia had ever been issued with a gun but that only people who were licensed through the unit manager had guns. It is therefore true that there were guns at the appellant's premises. PW1 alleged that he was shot by an employee of the appellant who was armed with a gun. PW1 cannot manage to access the records of the appellant to ascertain who was issued with a gun on that fateful day and who was not.

Since that knowledge is only within the appellant's domain, it would only be the appellant to produce the records to confirm that no such gun was issued. This being a Civil matter, the burden of proof is on a balance of probability and I am satisfied that the appellant should have produced its records of the day to prove PW1 otherwise.

DW1 was not present when the incident occurred. He does not know how it all happened because he was only called to the scene between 8.00 – 9.00 p.m.

DW1 told the court that herding of cattle takes place between 8.00 a.m. – 4.00 p.m. He told the court that there was a schedule for handing

over but none was availed to show that PW1 was not on duty at the time. Again, for that reason, the court will believe PW1's testimony that he was at work about 7.00 p.m. when he was injured.

On the issue of causation, the appellant had relied on the case of Statpack (Supra) where Visram J said:

“Coming now to the more important issue of “causation”, 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 his injury. The plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is a necessary result of someone’s negligence. An injury per se is not sufficient to hold someone liable for the same.”

As earlier noted, PW1 was on duty. There is evidence that he was shot by another herder who was not licensed to handle guns. There is evidence that the appellant had guns that it used to issue to its licensed members. Under Section 111 Evidence Act, the people to whom the appellant issued guns are only within the knowledge of the appellant since it keeps records. It would be unfair to expect PW1 to get those records. Having been on duty as a herder, the appellant was vicariously liable for the acts of Kuyia, its employee, had the duty of care owed to PW1 to ensure that he was safe as he discharged his duties of herding.

As to whether the said gun was being used by the 1st defendant as an agent of the appellant, the trial court found guidance in Mwona Ndooy v Kakuzi Ltd (1982 – 88) I KAR where Chesoni Ag.J.A. held:

“It was not established that the employee was on a frolic of his own since there was no evidence as to what he was doing on that road and how far that road was from the estate, without that evidence, the reasonable presumption is that he was on his master’s business.”

Since the incident occurred at the appellant's premises, this court presumes that the 1st defendant was using the said firearm as an agent of the appellant and therefore the appellant is vicariously liable for the 1st defendant's actions.

I am satisfied that the issue of liability was proved as against the appellant.

As to whether the respondent is entitled to the award of Kshs.600,000/=, it is trite law that an appellate court will not interfere with a trial court's assessment of damages unless it is shown that the trial court applied wrong principles such as taking into account an irrelevant factor or failing to take into account a relevant factor or that the award was inordinately high or inordinately low See Kemfro (Supra).

In arriving at the award, the court correctly addressed itself by considering the nature of injuries sustained with comparable awards made in recent cases and also warned itself of restraint from making exorbitant awards. The plaintiff sustained amputation of the 2nd, 3rd & 4th toes; a bruise on right leg and left, below the knee joint.

The magistrate considered the decision in Mwaura Muiru v Suera Flowers Ltd HCC.189/2009 and Samba Mohamed Mweri v Kenya United Steel Co. Ltd HC.82/1998 (Mombasa) where a person suffered amputation of four toes and the court made an award of Kshs.500,000/= in 1998. Before making the award, the appellant has taken issue with the award of Kshs.200,000/= as damages for loss of earning capacity for the reason that it was not pleaded. I am guided by the case of Beena (Supra) where the court said:

“Thus the claim for loss of earning capacity is a general damage claim as such it is deemed to flow directly from the claim and need not be pleaded specifically. In this case, the plaintiff pleaded that head together with general damages for pain, suffering and loss of amenities and therefore I shall not award it under a separate head albeit in her submissions there was an attempt to separate the two heads.”

In light of the above, the award under the two heads is not tenable. It was enough that the respondent pleaded a claim for general damages. I hereby set aside the claims of loss of earning capacity.

I have seen the decisions that the trial court took into account, i.e. Mwaura Muiruri and Samba Mohamed (Supra). The award in the Samba case was made in 1998 – about 20 years ago, the court has to take into account incidents of inflation. I think an award of Kshs.600,000/= on the claim for damages was fair and I will enter judgment for general damages of Kshs.600,000/=.

In the end, I allow the appeal to the extent that I set aside the award on loss of earning capacity. Having considered all the above, I hereby enter judgment for the respondent for the same sum of Kshs.600,000/= for damages plus ½ of the costs of the appeal and the lower court.

Dated, Signed and Delivered at NYAHURURU this 29th day of March, 2019.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Omariba for respondent

Ms. Wangeci holding brief for Mr. Ombui for appellant

Soi – Court Assistant