REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 388 OF 2014

K.K. KEROSENE DISTRIBUTORS LTD T/A

K.K. SERVICES STATIONS.....APPELLANT

-VERSUS-

JOHN NDUNG'U GATHUA.....RESPONDENT

(Being an appeal from the judgment delivered by Honourable R.A. Oganyo (Mrs.) (Senior Principal Magistrate) on 31st July, 2014 in CMCC No. 6385 of 2007)

JUDGEMENT

1. The respondent who was the plaintiff in CMCC NO. 6385 of 2007 filed a suit against the appellant vide the plaint dated 10th July, 2007 seeking for general and special damages for injuries he sustained in the course of his employment with the Appellant.

2. The respondent pleaded that while working as a casual employee for the appellant, he was assigned the duty of applying pressure on a tyre and that a ring from the said tyre burst, thereby resulting in injuries to the respondent's left middle finger, right knee and right ankle.

3. The respondent also pleaded that the appellant had failed to provide him with the necessary equipment to enable him carry out his work in a safe environment. That in failing to do so, it breached its duty of ensuring the safety of the respondent.

4. In its statement of defence dated 28th August, 2007, the appellant denied that the respondent was ever its employee or that the alleged injuries were sustained at its employment premises, adding that no injury was reported on the material day. It was also the appellant's averment that a special machine was ordinarily used in applying pressure on tyres.

5. In his oral evidence, the respondent (PW 1) stated that he was a casual worker at the appellant's premises and that he was paid on a weekly basis. He also testified that he was not issued with an employment contract by the appellant.

6. PW 1 also gave evidence that one Mr. Macharia, who was his supervisor at all material times, assigned him the duty of putting pressure on the tyres on the material day but that he had received no prior training on how to perform his duties.

7. PW 1 added that he ought to have been provided with protective gear as this would have likely prevented or lessened the injuries sustained.

8. Dr. Kimani Mwaura (PW 2), testified stating confirming the injuries sustained by the respondent. He also gave evidence that a section of the respondent's left middle finger was amputated. A medical report indicating the same was produced in court.

9. In support of the appellant's case, Henry Momanyi Wairidi Njabu gave evidence as the sole witness for the appellant. He testified inter alia that he was both an Accountant and Human Resources Manager at the appellant's premises and also said that at the car wash, the appellant had two employees, one of them being Patrick Macharia.

10. DW 1 also averred that no accident was reported as having taken place on the material day and that the appellant did not employ casual employees.

11. At the close of the hearing, parties filed submissions and the trial court delivered its judgment. In the aforesaid judgment, the learned trial magistrate found that the respondent had established on a balance of probabilities that he was an employee of the appellant.

12. The learned trial magistrate further apportioned liability in the ratio of 80%:20% in favour of the respondent.

13. On quantum, the trial court considered the proposals by the parties and went ahead to award the sum of Kshs.300,000/= subject to 20% liability, resulting in the sum of Kshs.240,000/= as general damages and Kshs.2,000/= as special damages.

14. The abovementioned judgment is the subject matter of the appeal. The appellant has filed a memorandum of appeal dated 27th August, 2014 premised on eight (8) grounds. The grounds of appeal essentially challenge the learned trial magistrate's finding that the respondent was an employee of the appellant, as well as the award on general damages.

15. The appeal was disposed of through written submissions. On its part, the appellant submitted that the learned trial magistrate erred in finding that the respondent was its employee in the absence of documentary proof or a witness to corroborate his evidence.

16. It was also the appellant's submission that DW 1 produced a copy of a payroll register and that the respondent's name did not appear therein, therefore confirming that he was not an employee of the appellant, and that this piece of evidence was disregarded by the trial court.

17. The appellant further argued that the trial court failed to take into account its submissions on record in arriving at its decision and that the trial court erred in shifting the burden of proof to the appellant, adding that the award on damages was excessive and should be substituted with an award of Kshs.30,000/=.

18. The respondent in his opposing submissions supported the learned trial magistrate's finding that he was an employee of the appellant. On the subject of the payroll register, the respondent argued that it is questionable that a payroll that had been used for years appeared new when produced in court and could therefore have been fabricated.

19. On quantum, it is the respondent's submission that the award made was reasonable.

20. I have considered the grounds of appeal as set out in the memorandum of appeal, together with the rival submissions and cited authorities.

As earlier indicated, the grounds of appeal are two-fold: **first**, the question as whether or not the trial court's finding on the employment of the respondent was correct, and **secondly**, whether or not the award on damages was reasonable.

21. In arriving at her decision on employment, the learned trial magistrate took into account the respondent's testimony that he was a casual employee who was never issued with a letter of appointment or a written contract for that matter. The learned trial magistrate also considered the evidence given by one Mr. Macharia who was the respondent's supervisor at all material times. The appellant's witness, while disputing that the respondent was its employee, confirmed that Mr. Macharia was one of its two (2) employees assigned to the car-wash area.

22. Further to the above, the trial court noted DW 1's evidence that whereas every employee was issued with a letter of appointment, the said witness on cross-examination admitted that he himself did not have a letter of appointment. This particular witness also admitted that there was nothing to show that the payroll register produced as a defence exhibit belonged to the appellant, further acknowledging that the payroll was not signed on a daily basis.

23. After a careful re-evaluation of the evidence presented before the trial court, I am convinced that the analysis made by the learned trial magistrate was in line with the evidence presented to her and that she duly considered the written submissions of both parties. Whereas the respondent did not call any witness to corroborate his version of events, he clearly stated that he was a casual employee who neither signed a contract nor the payroll register.

24. It is apparent that the respondent categorically stated that Mr. Macharia was his supervisor during the course of his employment; with the appellant's witness confirming the said Mr. Macharia's employment with the appellant. It is noteworthy that Mr. Macharia was not called as a witness by either of the parties to either corroborate or rebut the respondent's evidence, which left the trial court to rely on the evidence given by the two (2) key witnesses.

25. The respondent clearly stated that he knew Mr. Macharia and the trial court was satisfied that he had established on a balance of probabilities that he worked under the abovementioned person. In view of this, the burden of proof then rightly shifted to the appellant.

26. I have also looked at the payroll register and it is evident that there was no way of determining whether the same belonged to the appellant or not. It is therefore impossible to verify the authenticity of the said register.

27. The appellant's witness admitted that he did not have a letter of appointment despite testifying that the appellant only hired permanent employees as opposed to casual and issued them with letters of appointment. It is clear that the appellant's case was marked with inconsistencies and uncertainties, which I believe was the trial court's reasoning as well. From the foregoing, I am satisfied that the learned trial magistrate rightly found that the respondent was employed by the appellant on a balance of probabilities.

28. This brings me to the second limb on the award on general damages since this is what has been disputed by the appellant. It is well established that the award on damages by a court ought not to be interfered with save in certain special instances.

In the case of *Kemfro Africa Ltd t/a Meru Express Services 1976 & Another [1976] v Lubia & Another (No. 2) [1985] eKLR* the court restated the applicable principles as follows:

> ***"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that***

the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

29. The appellant took the view that the award made by the trial court was excessive in comparison to the injuries sustained by the respondent. It is the appellant's submission that an award of Kshs.30,000/= would have sufficed. In arguing so, the appellant cited two (2) authorities including the abovementioned case of *Ndumberi Dairy Farmers Co-operative Society Ltd* =vs= Boniface Kinyanjui Muthee (205) eKLR wherein the court awarded a sum of Kshs.100,000/=.

30. The respondent on the other hand cited the case of *Sino Hydro Corporation v Daniel Atela [2016] eKLR* where the sum of Kshs.600,000/= was award as general damages on appeal for injuries of a more severe nature than those sustained in the present instance.

31. In her judgment, the learned trial magistrate noted that the respondent had proposed an award of Kshs.400,000/= whereas the appellant proposed an award of Kshs.30,000/= which the said magistrate found to be on the lower side.

32. In my humble view, the award proposed by the appellant was indeed on the lower side and in any case, the authorities cited by it exceed the proposed sum.

33. The medical report adduced as evidence confirmed that the injuries sustained by the respondent were as pleaded in the plaint. The medical report also termed the respondent as being disabled to some extent and that he would be a long term patient in addition to being dependent on drugs for life.

34. I have considered comparable awards. In the case of *Josephat Kaliche Ambani v Farm Industries Limited [2016] eKLR* the court awarded the sum of Kshs.200,000/= as general damages for a blunt soft tissue injury to the knee. In *Kings Bakery Limited v Eaphael Onjoro Oloo [2012] eKLR* where a similar award of Kshs.200,000/= was upheld for blunt injuries sustained to the respondent's left fingers.

35. It is important to note that in the authorities I have just referred, the injuries sustained by the relevant parties were less severe than those sustained by the respondent herein.

36. It is also noted that the learned trial magistrate took into account the authorities cited by the respective parties and I am satisfied that she also considered economic fluctuations and the passage of time in awarding the sum of Kshs.300,000/= less 20% contributory negligence.

37. In my considered view I find that the award on general damages was reasonable and I see no need to interfere with the same.

38. Consequently, the appeal is dismissed with costs to the respondent.

Dated, Signed and Delivered at Nairobi this 27th day of March, 2019.

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J. K. SERGON

JUDGE

In the presence of:

……. for the Appellant

……. for the Respondent