



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 145 OF 2017

ZAMZAM INTERGRATED ACADEMY.....APPELLANT

VERSUS

MOHAMED HUSSEINRESPONDENT

J U D G M E N T

1. In the suit before the trial court commenced by the plaintiff dated 8/10/2015, the Respondent as plaintiff there, sued the Appellant here as the defendant then, and sought General Damages for injury occasioned to him when hot oil spilled on his forearm causing to him burns which injuries was blamed on alleged negligence by the Appellant.

2. The particulars of such negligence were then pleaded and particularised. Together with that plaintiff was filed a list of document which exhibited a demand letter dated 10/8/2015, medical report by Dr. Ajoni Adede, treatment notes, receipts for special damages and copy of the plaintiff's identity card. There was also a witness statement by the plaintiff in which it was asserted that the Respondent was injured while in the cause of his employment with the Appellant in the capacity of cook.

3. For the defendant a statement of defence dated 28/10/2015 was filed in which the employment of the Appellant was admitted together with the fact of injury but the injury was pleaded to have been occasioned when the Respondent opted to pursue own ventures of cooking and supplying food to teachers outside his duties and therefore the particulars of negligence and breach of statutory duty were denied. It was then repeated that any injuries suffered were not attributable to the fault of the Appellant and that the Respondent was thus not entitled to any damages as claimed.

4. In support of the matter alleged in the defence the defendant filed two witness statements by HABON TAHLIL ABDI, a director and ADAN MOHAMED AMIN an employee of the defendant in the capacity of a shopkeeper. There was also a handwritten note by Dr. R. A Devani, indicating that the plaintiff was treated by the Doctor on 27/4/2015 for a burn on the forearm and later, at different intermittent eight (8) other dates.

5. At the trial the plaintiff gave evidence produced some of his documents then called Dr. Ajoni Adede who also produced his medical report and the receipts he issued for preparation of the medical report and for court attend in the sum of Kshs.2,000.00 and 3,000.00 respectively. On their side the Appellant called the two witnesses who had filed witness statement.

Summary of the plaintiffs/Respondent's case

6. In his evidence the Respondent said that he was employed by the defendant as a cook and was on the 20/7/2015 on duty preparing tea and mandazi when rusted jiko splashed hot oil at him causing burns to him. He went to see the school Doctor who referred him back to the school accountant to get money for treatment and was given 2000 by the accountant for that purpose. He produced the treatment notes with an objection from the Appellant which objection was rejected by the trial court. He was then referred to Coast General hospital where he was done surgery which resulted in the swelling of the hand. He then said that he was later directed to hand-over the kitchen keys as his employment had been terminated. He then produced the demand letter by his counsel and marked for identification, the medical report and receipts by Dr. Ajoni Adede.

7. He blamed the Appellant for failure to provide him with protective gear. On cross examination the witness explained the difference between his name in the suit papers and that in the identity card to have been due to his conversion to Muslim faith. He confirmed having been employed as a cook to cook using charcoal and that he knew the dangers associated with the job when a rusted jiko is involved but added that he had reported the state of the jiko to the boss some six months before the incident of burning but no remedial steps were taken. He said he knew he ought to have used protective clothes but worked without same having not been given by the appellant.

8. Dr. Ajoni Adede's evidence was brief to the effect that he saw the Respondent after 3 (three) years and found a disfiguration scar on the

left forearm which had been burnt and adverted to having seen medical notes from Coast General Hospital and Dr. Devani's Clinic. He said he charged Kshs.2,000 for the report and Kshs.3,000 for court attendance and thus produced the medical report and receipts as exhibit. On cross examination, the witness said that the treatment documents revealed that the wounds were being dressed but no evidence of surgery undertaken. With the two the plaintiff's case was closed.

The Appellants case

6. DW 1 was one Ali Mohammed Athman, a shopkeeper at the school who gave evidence that on the material day he saw the plaintiff with a burnt hand and when he asked him what had happened he said he had been as he burnt as he prepared mandazi.

7. On cross examination he said he was at the shop next to the jiko on the material day. He said he saw mandazi on the table said to have been cooked by the Respondent and that the Respondent had been given mandate by the Director of the school. On re-examination, the witness said that he was a supervisor and that the Respondent would take from his shop milk, bread and sugar but that he was not selling unga.

8. DW 2 was the director of the school who said that the Respondent was engaged by the school as a cook since 2013. He confirmed employment of Respondent as a cook but denied having asking him to prepare mandazis.

9. He also denied that any mandazi was to be made in the school because the school bought bread but confirmed that he took the Respondent for treatment, allowed him time to heal and paid his salary for two months without deductions. In cross examination the witness said that the employment of the Respondent was verbal and that the role to play in the kitchen was not specified. He confirmed that he would cook using oil which he said burnt the Respondent and that it was his obligation to cook using a charcoal fuelled jiko which was in good order but again confirmed that no protective clothing was given to the Respondent. In re-examination he said the Respondent did not require gloves to do his work. With the said evidence, the defendant's case was also closed and parties then sought to file written submissions. The plaintiffs submissions are to be found at pages 23-25 while thereby the defendant are at pages 26 – 41.

10. In those submissions the Respondent offered very little on the liability of the Appellant just being content with the fact that an industrial accident did in fact occur. It was then submitted that a sum of Kshs.300,000 would be an adequate compensation in damages. On special damages it was submitted that a sum of Kshs.5,000 was proved by receipts.

12. For the defendant elaborate submissions were offered which stressed the position that nobody instructed the plaintiff to make the mandazi and that even breach of duty to provide protective gear was not proved to have been the cause of the injury hence no damages were due to the Respondent. The decision in *STATPACK INDUSTRIES VS JAMES MBITHI MUNYAO [2005] eKLR* was cited in support of the submission.

13. On the defective jiko, on account of rust, the Appellant submitted that the plaintiff acknowledged the burden of taking care of self while on duty together with the fact that he assumed, voluntarily, the risk of using a defective jiko. It was therefore urged that the plaintiff be found to have contributed to the accident and his injuries at 100%.

14. In the alternative the Appellant made submissions that if the court was minded to find for the Respondent, the court was urged to take into account the fact that the Respondent achieved full recovery and a sum of Kshs.50,000/= was sufficient for compensation. The decision in *EASTERN PRODUCE LTD vs JOSEPH MAMBOLEO KHAMADI [2015] eKLR* was cited in support of damages in the sum of Kshs.50,000/=. For special damages the Appellant contended that only Kshs.2,000/= had been strictly proved.

15. Having considered the submissions offered, the trial court found the Appellant to have been wholly liable and a worded general damages of Kshs.130,000/= together with special damages of 2,000/=.

16. That decision has provoked this appeal in which there is raised six grounds. Of the six grounds, five challenge finding on liability while the last one challenges the assessment of damages for having been excessive.

Analysis

17. This being a first appeal, the court proceeds by way of a rehearing with a duty and mandate to re-evaluate the entire evidence and come to own conclusive while being cautious not to freely interfere with factual findings and being appreciative of the fact that the task of assessment of damages invokes judicial discretion and known to be difficult.

18. On liability of the Appellants challenges the decision on two broad grounds; that there was no evidence to support finding of liability at 100% but the same should have been apportioned and that the plaintiff had been on a frolic of his own. Both grounds boil down ask the question whether there was an error in the finding on liability.

19. The evidence adduced was to the effect that the plaintiff was indeed employed to work in a kitchen and to engage in cooking using a charcoal jiko and to employ oil in his cooking. It was also agreed that he was not given protective gear and that his duty there was never circumscribed. The only point of departure was whether it was the plaintiff duty to cook mandazi. The appellant contended that the respondent was duly informed and made aware of the duty he was engaged to perform was all alone in handling the jiko and merely that he was not given protective gear befitting the work he was to perform would not be ipso facto and on a balance of probabilities, enough to hold the Appellant wholly liable. To the contrary the respondents position that the admitted fact that the protective gear was an admission of breach of statutory duty and ipso facto evidence and proof of liability.

20. The totality of the defence when mirrored against the evidence established, on a balance of probabilities, that the Appellant owed a duty

of care to provide the protective gear which duty was admittedly breached.

21. Unlike the principle set in *Statpack Industries vs James Mbithi Munyao (supra)*, here the use of cloths may not have erased the entire prospect of injury but would have mitigated the severity. I have however not found sufficient evidence to convict the respondent with the oil splashing upon the Respondent and therefore I do find that having been the person in charge of handling the jiko, which he had done for more than a year, he was not wholly blameless for his injuries. I do find that he had a duty to mind his own safety and in the absence of how the jiko caused the injury, I do find that his contribution for the injury was equal to that occasioned by the Appellants breach of statutory duty. I do thus set aside the finding on liability and substitute therefore a judgment apportioning liability at 50:50%.

22. On assessment of damages, I do appreciate the principle that the duty invites judicial discretion and that this court can only interfere where a clear error in principle of assessment of damages is demonstrated or where it is shown that the sum awarded was too high and excessive as to manifest outright error.

23. That has not been demonstrated here and it is not enough that had I sat at trial I would have awarded less. To the contrary I do find that the sum of Kshs.130,000/= awarded was modest and reasonable and deserve no interference.

24. On special damages, even though the sum of Kshs.5,000/= was proved by receipts, only Kshs.2,000/= was pleaded hence that is the sum the court was entitled to award as it did.

25. Accordingly I do allow the appeal on the limb of liability only but dismiss the limb on quantum of damages. Thus the judgment of the lower court holding the Appellant wholly liable is set aside and in its place substituted with a judgment apportioning liability at 50:50%.

26. The effect is that the sum assessed as general and special damage stand to be discounted at 50% in favour of the appellant. That sum shall attract interest at court rates from the date of judgment of the lower court till payment in full.

27. On costs, the plaintiff having succeeded only halfway, I award to him half of the costs of the appeal but the respondent gets costs of the suit at trial.

Dated and delivered at Mombasa this 30th day of May 2019.

P.J.O. OTIENO

JUDGE