REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 61 OF 2018

WEST KENYA SUGAR CO. LTD .....APPELLANT

VERSUS

PATRICK MWAKHA SHIHUNDU .....RESPONDENT

(from the judgment and the decree of Hon. E. W. Muleka, SRM, in Butali SRMC Civil Case No. 124 of 2015 dated 12/3/2018)

JUDGMENT

1. The respondent had sued the appellant at the lower court in claim of general and special damages after the respondent was injured while working in employment of the appellant as a cane loader after the motor vehicle the respondent was travelling in that was loaded with sugarcane overturned thereby causing the respondent to sustain injuries. The respondent blamed the appellant's driver for driving the vehicle carelessly and thus occasioning the accident. The trial court after a full trial found the appellant 100% liable for the accident and awarded Ksh. 120,000/= in general damages and Ksh. 3,000/= in special damages. The appellant was dissatisfied by the judgment of the learned trial magistrate and filed this appeal. The grounds of appeal are that:-

> 1. The learned trial magistrate erred in law and in fact in treating the evidence and submissions before him superficially and consequently coming to a wrong conclusion on the same.
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> 2. The learned trial magistrate erred in law and in fact in ignoring the principles applicable in awarding quantum of damages and the relevant authorities on quantum cited in the written submissions presented and filed by the appellant.
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> 3. The learned trial magistrate erred in law and in fact in finding that the respondents had proved their case on a balance of probability.
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> 4. The learned trial magistrate erred in law and in fact in failing to dismiss the respondents' suit with costs to the appellant.
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> 5. The learned trial magistrate erred in law and in fact in ignoring the pleadings and submissions for the defence.
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> 6. The learned trial magistrate erred in law and in fact in failing to appreciate sufficiently or at all that the evidence tendered in favour of the appellant controverted and rebutted the respondent's evidence thus lowering the respondent's probative evidentiary value.

2. The appeal was opposed by the respondent vide the written submissions of his advocates, **Z. K. Yego Law Offices**.

Case for Respondent/Plaintiff –

3. The respondent testified that he was employed by the appellant as a cane loader. That on the 13/2/2014 he reported to work. That his supervisor called Okatch assigned him and a colleague to work on a tractor registration number KAT 415Y that was hauling a trailer registration number ZD 0748. The driver was a person called Nangabo. They went to Chilovani area where they loaded sugar cane onto the trailer. On their way back to the factory he was seated on the mudguard of the tractor. That the driver was driving the tractor at high speed and recklessly which caused him to lose control as a result of which the tractor overturned. He was thrown to the ground and sustained injuries on the chest. The company sent a motor vehicle that took them to the factory premises where the report was formally reported. He was given first aid. Later on he was treated at Malava County Hospital. Later he was examined by Dr. S. I. Aluda who prepared his medical report. He thereafter filed suit. He blamed the appellant's driver for reckless driving. He at the same time attributed the accident to brake failure. He also blamed the appellant for failing to provide him with a proper motor vehicle to ferry him to and from the sugarcane fields. He contended that the appellant was vicariously liable for the tortuous acts of his servants, employees and/or agents. During the hearing he produced a cane loader pass No. 1047, P.Ex.1 to prove that he was working with the appellant. He produced treatment notes from Malava County Hospital P.Ex.2 and the medical report prepared by Dr. Aluda, P.Ex.3.

Case for appellant/defendant –

4. The appellant denied the respondent's claim. It denied that the respondent was its employee and that he was injured while in their employment. In the alternative it pleaded that the claim was a forgery.

5. The appellant called three witnesses – Hyslop Akhonya DW1 who in 2014 was working as a transport superintendent, Kennedy Oketch DW2 who was at the time the respondent's supervisor and Dr. Okwero, the in charge of Malava Sub-county Hospital in the year 2017. DW1 stated that he knew the respondent but that he was not an employee for their company. That casuals are paid through Mpesa. That the company maintains loader weighment details for casuals which is proof that a person was at work on a particular day. He produced loader weighment detail for 13/2/2014, D.Ex.1 which shows that respondent's name is not in the said details. It means that he was not working for the company on that day. He produced a casual payment listing for 13/12/2014 showing that the respondent's name was not appearing in the list. It means he was not at work on that day. He also produced transport details for tractors/trailers, D.Ex.3, where the tractor/trailer KAT 415Y/ZD 0748 do not appear.

6. Kennedy Okatch DW2 testified that he knew the respondent. That he was an employee for their company but that he had left the employment. That he was his supervisor on 13/2/2014. That he was involved in an accident. He however stated that motor vehicle KAY 415Y was not involved in any accident. That loaders are not issued with gate passes. He stated in cross examination that he cannot remember whether the respondent was at work on the material day nor could he remember whether he was involved in an accident.

7. Dr. Okwere DW3 produced the outpatient register for Malava District Hospital for 13/2/2014, D.Ex.4 and said that the name of the respondent does not appear on the said outpatient register. He said that the outpatient number on the respondent's treatment card, No. 1012/14 was not issued on 13/2/2014 as shown in the card. That one can say that he was not treated at the facility because his name is not on outpatient record. The witness however stated that he was not working at the said hospital in 2013. He said in cross-examination that the hospital has many registers that could run to as many as 20. That the hospital was at the time known as Malava District Hospital and not as Malava County Hospital as indicated in the card.

Submissions –

8. The appeal is on both liability and quantum. On liability the advocates for the appellant, **Ogejo, Olendo & Co. Advocates** submitted that the respondent did not prove that he was an employee of the appellant. That the name of the respondent does not appear in the appellant's documents D.Ex.1, 2 and 3. That if the respondent was working for the company on the material day, his name should appear at least in one of the documents. That the names of his alleged co-loader Hezron Lucheli and his driver Nangabo are also not appearing in the documents. That the respondent did not call these people as witnesses in the case. That the inference is that if they were called their evidence would have tended to be adverse to the respondent's case.

9. It was further submitted that the appellant's documents D.Ex.1, 2 and 3 are akin to a muster roll as they capture all the relevant details of employment. That the documents are computer generated. That the respondent did not attempt to challenge them.

10.That the name of the respondent did not appear in the outpatient register of Malava County Hospital of 13/2/2014. That the treatment notes P.Ex.2 are not signed and do not indicate the person who treated the respondent. That the trial court did not attempt to address the issues raised in the treatment notes and thus erred in finding that the respondent had been treated at the said facility.

11. Further that the respondent did not prove particulars of negligence he alleged against the appellant. That there was no justification in attributing blame on the appellant at 100% when there was no evidence to lay the blame on the appellant.

12. The advocates for the respondent on the other hand submitted on liability that the witness who produced the appellant's documents DEx.1, 2 and 3 was not the author of the said documents nor did the documents bear a signature nor a stamp to authenticate them. That DW1 said in his evidence that the casual workers are paid after 14 days yet he did not produce the casual listing payment for the period of 14 days. That DW1 did not confirm the employee who had been allocated loader No. L. 1047. That DW1 confirmed that the tractor and the trailer in issue belong to the appellant. That though DW1 admitted that they kept a record of the accident's register, he did not produce it in court.

13. That DW2 admitted that the respondent was an employee for the appellant but said that he left employment but he did not state when he left. That he confirmed that loaders used to be supplied with gate passes. That the defence witnesses DW1 and DW2 failed to produce crucial documents even after a notice to produce was served upon the appellant. That this raised the presumption that had the documents been produced that would have been unfavourable to the appellant. The advocates cited the case of **Kebirigo Tea Factory –Vs- Jared Raini, Kisii HCCA. No. 179 of 2000** where the appellant had alleged that the respondent was not in its employment at the material dates of the accident but failed to produce the initial muster roll and the court held that the duty to disprove lay on the appellant producing the relevant original Muster Roll.

14. The advocates submitted that the treatment notes P.Ex.2 were produced by consent of the parties. That the appellant now cannot question its authenticity. That the doctor DW3 was not at Malava County Hospital when the document was made in 2014. That the doctor said that they have many registers in use at any given time but only chose to avail one register. That the doctor did not confirm from all the registers whether the respondent's name was not in any of them. That the doctor said that the outpatient numbers are issued by clerks and that the outpatient number cannot invalidate the clinical notes. That the treatment notes are therefore genuine. That in the absence of any cogent rebuttal evidence, their authenticity cannot be put into question.

15. The advocates further submitted that the appellant's driver was not availed to rebut or controvert the respondent's case. That the appellant did not discharge their evidential burden.

16. On quantum the advocates for the appellant submitted that in the event that the court is inclined to find in favour of the respondent to

reduce the award to Ksh. 30,000/=. They cited the case of **Ndungu Dennis –Vs- Ann Wangari Ndirangu & Another (2018) eKLR** where Ngugi J. reduced an award of Ksh. 300,000/= to Kshs. 100,000/= where the respondent had sustained soft tissue injuries to the lower right leg and to the back. The advocates for the respondent on their part submitted that the award made by the learned trial magistrate was commensurate with the injury sustained and took into account proper legal principles. That the appeal is without basis.

Analysis and Determination –

17. This is a first appeal. The duty of a first appellate court was explained in the case of **Kiruga –Vs- Kiruga & Another (1988) KLR 348** where the Court of Appeal observed that:-

> ***"An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution."*** See also Selle & Another –Vs- Associated Motor Boat Co. Ltd and Others (1968) EA 123.

18. The questions for determination in this appeal are –

(1) Whether the respondent had proved that he was an employee of the appellant.

(2) Whether the respondent was treated at Malava Sub-County Hospital.

(3) Whether the appellant was liable in damages.

(4) Whether the respondent proved negligence on the part of the appellant.

(5) Whether the trial court erred in its award of damages.

Whether the respondent was an employee –

19. The appellant contended that the respondent was not their employee.They produced three documents to show that the respondent's name did not appear on any of them and therefore that he was not their employee.

20. The respondent on the other hand contended that he was an employee of the appellant. He produced a loader's gate pass to prove that he was in employment of the appellant.

21. The documents produced by the appellant D.Ex.1, 2 and 3 are computer print outs. Before such documents could be admitted as evidence in the case, there had to be evidence of a certificate compiled in compliance with Section 106 B (4) of the Evidence Act that provides that:-

> ***"(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—***
>
> ***(a) identifying the electronic record containing the statement and describing the manner in which it was produced;***
>
> ***(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;***
>
> ***(c) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate),***
>
> ***(d) dealing with any matters to which conditions mentioned in subsection (2) relate; and shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it."***

22. In this case there was no such certificate. The witness who testified on the documents DW1 said that the documents were generated at the weighbridge and checked by the Human Resource personnel. He was therefore not involved in the generation of the documents. He did not adduce evidence as to the device that made the documents and how the documents were produced. He simply did not know how the documents were made. The evidence on the documents were thereby inadmissible. They could not be relied on to hold that the respondent was not an employee for the appellant.

23. The trial court in its judgment held that the status of the respondent as an employee of the appellant was proved by the loader's pass, P.Ex.1. That this evidence was corroborated by the supervisor for the respondent, Kennedy Okatch DW2 who stated that the respondent was their employee. The evidence of DW2 was as follows:-

> ***"I know Patrick Mwakha Shiundu. He was our employee but he left. On 13/2/2014 I was his supervisor on that day. He was involved in an accident ……"***

24. This evidence was in direct contradiction of the evidence of Hyslop Akhonya DW1 who was categorical that the respondent had never been their employee. It is worthy of note that DW2 was the immediate supervisor of the respondent. His evidence that the respondent was their employee was the more credible as DW1 was only relying on some inadmissible documents to counter the allegation that the respondent was not in their employment. DW2 as the immediate supervisor of the respondent is the one who knew better. DW2 however stated that the respondent left their employment. He did not adduce evidence as to when the respondent did so. If the respondent was the appellant's employee and left it was for the appellant to show that at the time of the accident, the respondent had left their employment. They did not do so.

25. The respondent's advocate had served the appellant with a notice to produce, inter alia, the muster roll, accident register and payment sheets for the month of February, 2014. The appellant declined to produce the documents. It is a statutory duty for the appellant to keep such documents. The failure to serve the advocates for the respondent or even to produce the documents in court led to the presumption that had the documents been produced they would have been adverse to the appellant's case. Though the appellant denied that the respondent was allocated loader's pass No. 1047 they did not state the person who was allocated that number. In view of the foregoing I am in agreement with the trial court that the respondent had proved on a balance of probability that he was an employee of the appellant at the time of the accident on 13/2/2014.

Whether the respondent proved particulars of negligence –

26. The particulars of negligence by the appellant's driver were stated in the plaint. The respondent in his written statement that was filed with the plaint blamed the driver for driving at very high speed and recklessly as a result of which he was thrown off the mudguard as the tractor overturned to its left side. In his evidence in court he said that the cause of the accident was that the brakes failed and that he was blaming the company for failing to repair the vehicle's brakes. He never raised any issue about the driver driving the vehicle at high speed.

27. The question then is whether the cause of the accident was as alleged in the respondent's statement that it was due to over speeding or was it due to brake failure as alleged in his evidence in court. The respondent did not allude to brake failure in his plaint. Which of the two versions given was the cause of the accident? The discrepancies in the evidence of the respondent creates doubt as to the cause of the accident, if at all there was such an accident. The respondent admitted that he did not report the accident to the police. I find that the respondent did not prove particulars of negligence against the appellant.

Whether the respondent was treated at Malava County Hospital –

28. The respondent did not state the date when he was treated at Malava Sub-county Hospital. He only stated that it was "*later*".

29. The treatment notes, P.Ex.2, indicate that he was treated at the hospital on 13/2/2014. They however do not indicate the name of the medical officer who attended to him at the hospital. The treatment notes are not signed by the person who attended to him. The question was whether the document is genuine.

30. The appellant adduced evidence to show that the respondent was not treated at the above said medical facility on 13/2/2014. They adduced evidence to show that the outpatient number 1012/14 was issued to one Nancy on 24/1/2014. The respondent did not counter this evidence. Though his advocate submitted that this could have been occasioned by mistakes by clerks who issue the numbers, they did not adduce evidence that this was a genuine mistake. This coupled with the fact that the treatment notes were not signed creates doubt as to the authenticity of the treatment card.

31. Signing of a document signifies that one owns the document and its contents. Failure to do so would mean that one does not want to take responsibility over the contents of the document. If there were many registers in use at the hospital at the same time, the respondent should have looked for the register that contained his outpatient number. That he said in his evidence and also in his written statement that he went for treatment at Malava Sub-County hospital "later" is an indication that he did not attend treatment there on the date of the accident. The document may therefore have been procured later as the respondent looked for evidence to support his case. The medical report prepared by Dr. Aluda was made in reliance of the treatment notes, P.Ex.2. If the treatment notes are not genuine then the medical report cannot support the injuries.

32. In the final end, the respondent did not prove that he was treated at Malava Sub-county Hospital on 13/2/2014. Though he had proved that he was involved in an accident while travelling aboard the appellant's motor vehicle, he did not prove that he sustained any injuries during the accident. The trial court did not attempt to analyse the evidence on the contentious issue as to whether the medical card was genuine or not. The trial court erred in that respect. The respondent did not prove that he was entitled to an award of damages. The suit ought to have been dismissed.

Quantum –

33. The principles under which an appellate court may disturb an award of general damages have been settled. In **Simon Muchemi Atako & another –Vs- Gordon Osore (2013) eKLR**, the Court of Appeal held that:-

> "*Be that as it may, it is a well-established principle that an appellate court will not interfere with the trial court's award on general damages unless it is shown that the sum awarded was demonstrably wrong or that it was based on a wrong principle or was so manifestly excessive or inadequate that a wrong principle or a misapprehension of the evidence may be inferred. See* ***Shabani –Vs- City Council of Nairobi, (1985) KLR 516*** *and* ***Kiragari –Vs- Aya, (1985) KLR 273)***.

34. Where the court dismisses a claim for damages, it is required to assess the amount of damages it would have awarded a claimant had his case been successful - See Mordekai Mwangi Nandwa –Vs- Bhogals Garage Ltd (1993) KLR 448. The respondent was said to have sustained pain and swelling on the chest. The trial court awarded Ksh. 120,000/= in general damages. The court did not cite any authorities.

The advocates for the respondent had at the lower court prayed for a sum of Ksh. 350,000/= while making reliance on the case of **Catherine Wanjiru Kingori & 3 Others –Vs- Gibon Theuri Gichubi, Nyeri HCCC No. 320 of 1998** where Khamoni J. (as he then was) awarded a sum of Ksh. 300,000/= for soft tissue injuries.

35. The advocates for the appellant had at the lower court made submissions in support of Ksh. 50,000/= in general damages. They cited the case of **Chanan Agricultural Contractors Ltd –Vs- Fred Barasa Mutayi (2013) eKLR** where Ksh. 150,000/= was awarded for blunt injury to the chest and head and cut wound to the left leg. In this appeal they urged the court to reduce the award to Ksh. 30,000/= while making reliance on the case of **Ndungu Dennis –Vs- Anne Wangari Ndiragu & Another (Supra).**

36. I have considered the award in the case of **Maji Mazuri Flowers Ltd –Vs- Samuel Momanyi Kioko (2016) eKLR** where the court upheld an award of Ksh. 80,000/= for slight tenderness to the chest, pains on the chest and the back. It is my considered view that an award of Ksh. 80,000/= would have been sufficient compensation for the respondent.

37. The upshot is that the appeal is allowed. The judgment of the trial court is set aside and the respondent's case is dismissed with costs to the appellant.

Delivered, dated and signed in open court at Kakamega this 19th day of June, 2019.

J. NJAGI

JUDGE

In the presence of:

Mr. Nyikuli holding brief for Olendo for appellant

Mr. Obilo holding brief for Yego for respondent

Appellant - absent

Respondent - absent

Court Assistant - George