



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 59 OF 2018

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

VERSUS

STEPHEN NASIALI NYIFU.....RESPONDENT

(from the judgment and the decree of Hon. E. W. Muleka, SRM,

in Butali SRMC Civil Case No. 141 of 2015 dated 19/3/2018)

JUDGMENT

1. The respondent had sued the appellant and another, Joseph Munyifwa (the 1st defendant in the case) at the lower court seeking general and special damages after the respondent was injured in the course of work when working at the respondent's premises while under the contract of the 1st defendant. The trial magistrate entered liability at the ratio of 80:20 in favour of the respondent against the appellant and the 1st defendant. The learned magistrate assessed damages as follows:-

General damages - Ksh. 90,000/=

Special damages - Ksh. 6,000/=

2. The appellant was aggrieved by the decision of the trial magistrate and filed the appeal herein. The grounds of appeal are that:-

1. The learned trial magistrate erred in fact and in law in treating the evidence and submissions before him superficially and consequently coming to a wrong conclusion on the same.

2. The learned trial magistrate erred in fact and in law 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.

3. The learned trial magistrate erred in fact and in law in finding that the respondent had proved their case on a balance of probability.

4. The learned trial magistrate erred in fact and in law in failing to dismiss the respondent's suit with costs to the appellant.

5. The learned trial magistrate erred in fact and in law in ignoring the pleadings and submissions for the defence.

6. The learned trial magistrate erred in fact and in law 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.

7. Without prejudice to the foregoing the award of damages in the circumstances was excessive.

3. The appeal was opposed by the respondent through the written submissions of his advocates, **Z. K. Yego Advocates.**

Case for the Respondent -

4. The respondent was the only witness in the case. His evidence was that the appellant had contracted the 1st defendant to engage services of casual labourers to do work within the appellant's premises. The 1st defendant then retained the services of the respondent as a casual worker.

5. That on the 10th August, 2016 the respondent reported for work and was entailed work of carrying metal beams from the ground floor of the appellant's building to the first floor of the building. His colleagues were Benard Saisi and Ben Imbwaga. That he and a colleague were carrying the beams by each holding the far end of the rods. That at around 12.00 noon as they were carrying the metal beams and had reached the first floor his colleague all over a sudden and without notifying him or waiting for them to place down the beam together let go of the metal beam on the side that he was holding. Due to the excess weight and pressure of the beam that was left on him, the respondent lost his balance and the metal beam came down and cut him on his right leg. First aid was done on him at the appellant's premises. The 1st appellant issued him with a sick sheet and was taken to Kabras Action Group Clinic where he was treated as an outpatient and discharged. Later he was examined by Dr. Sokobe who prepared a medical report for him. He later filed suit against the 1st defendant and the appellant.

6. The respondent blamed both the appellant and the 1st defendant for negligence and breach of duty of care that they owed him as a result of which he suffered damage. That he was not provided with protective gear which would have mitigated the injuries. He blamed the two parties for exposing him to injury by instructing him to work in an unsafe environment. That the appellant had a statutory duty to ensure safety of all persons working within its premises. That the process of carrying heavy metal from the ground floor to upstairs ought to have been done by use of fork lift or crane owing to the danger involved and the heavy weights of the metal rods which also contributed to the occurrence of the accident. That he was instructed to work with a colleague who failed to exercise caution, due diligence, proper workmanship and care thus exposing him to the accident and resultant injuries. That the appellant and the 1st defendant were vicariously liable for the injuries.

7. The respondent stated in his evidence that he was employed by the 1st defendant who had issued him with a gate pass to enable him assess the company premises. He produced the gate pass as exhibit, P.Ex.1. He also produced the sick sheet issued to him by the appellant, P.Ex.2. He produced the medical report as exhibit, P.Ex.3 (a). He said that the costs of treatment at Kabras Action Group were paid by the appellant company.

Case for Appellant and 1st Defendant -

8. The appellant and the 1st defendant denied the assertions by the respondent and particularly that the appellant was an employer, principal and or master to the 1st defendant. The appellant and the 1st defendant denied the particulars of negligence alleged by the respondent. In the alternative the defendants pleaded contributory negligence on the part of the respondent.

9. The appellant called two witnesses in the case – a worker for the appellant at construction department, John Ombisi DW1 and a clinical officer at Kabras Action Group, DW2. It was the evidence of DW1 that they use forklifts and cranes at the construction department to carry heavy metal. That he did not know the respondent. That the persons was not working at his department at the material time. That he used to prepare an attendance register for workers who were in attendance. The respondent's name did not appear in the said register. He produced a copy of the attendance register as exhibit, D.Ex.2.

10. The witness stated in cross-examination that the company maintains a biometric register but he did not produce a copy of the same in court. He admitted that his document D.Ex.1 was not stamped nor signed. Nor did it bear his name.

11. The clinical officer testified that he was working at Kabras Action Group as a clinical officer. That the clinic used to keep a register of patients received from the appellant company for purposes of billing of the company. That the respondent's name did not appear in the register of August, 2016. He produced a copy of the register as exhibit, D.Ex.2.

12. The witness further stated that the respondent's sick sheet, P.Ex.2, is a document issued by the appellant company and presented to their institution. That the document does not show who attended to the patient and does not show the date the patient went to their facility.

Submissions -

13. The appeal was on both liability and quantum. On liability the advocates for the appellant, **Ogenjo, Olendo & Company Advocates**, submitted that the respondent did not prove that he was an employee of the appellant. That the name of the respondent did not appear in the attendance register from the 5th – 11th August, 2016. That the attendance register is akin to a muster roll. That it was the duty of the respondent to explain why his name did not appear in the attendance register as was held in **Timsales Limited –Vs- Noel Agina Okello (2014) eKLR**. That the people the respondent mentioned, Bernard Saisi and Ben Imbwaga also do not appear in the attendance register. That he did not call them as his witnesses.

14. The advocates further submitted that the respondent did not prove negligence on the part of the appellant. That he was therefore not entitled to the award for general damages.

15. On quantum the advocates urged the court in the event that it is inclined to find in favour of the respondent to reduce the award to Ksh. 50,000/=. They cited the case of **Sinohydro Corporation Ltd –Vs- Hezra Odhiambo (2016) eKLR** where Ksh. 50,000/= was awarded for soft tissue injury to the left foot.

16. The advocates for the respondent on the other hand submitted that he appellant's witness DW1 did not produce any documentary evidence to show that he was an employee for the appellant nor that he was on duty on 10/8/16. That the witness did not state that he was a supervisor to the respondent. That the witness admitted that the appellant maintains a biometric computer system that records daily

attendances but did not produce it in court.

17. The advocates submitted that DW2 admitted that his clinic maintains a patient register that is used to record all patients who receive treatment at the clinic. However that he did not bring the said register to court but chose to bring an excerpt of an accidents register D.Ex.2 emanating from the appellant. That D.Ex.2 did not bear a logo of Kabras Action Group to authenticate it. That the document is not signed nor does it bear the name of its author and his designation.

18. The advocates further submitted that the appellant failed to comply with a notice to produce the biometrics attendance listing for 10/8/16 and the attendance register prepared by the 1st defendant for employees who worked for him on 10/8/16. That the presumption was that had the documents been produced in evidence then they would have been adverse to the appellant's case as was held in **Nguku –Vs- Republic (1985) KLR 412**. The advocates submitted that the respondent had proved his case on a balance of probability against the appellant. They submitted that the award of quantum was commensurate with the injury sustained.

Analysis and Determination -

19. This is a first appeal. It is the duty of a first appellate court to reconsider the evidence adduced at the lower court, evaluate it itself and draw its own conclusions but always bearing in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. That the court is not bound necessarily to follow the lower court's findings of fact if it appears either that the court has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally – See **Selle & Another –Vs- Associated Motor Boat Company Limited & Others (1968) EA 123**.

20. The issues for determination in this appeal are:-

- (1) Whether the respondent was an employee of the appellant.
- (2) Whether the trial court erred on its findings on liability.
- (3) Whether the trial magistrate erred in arriving at his decision on quantum.

Whether the respondent was an employee of the appellant –

21. The appellant contended that the respondent was not its employee. They produced an attendance register, D.Ex.1 that shows that the respondent's name was not registered with them which meant that he was not their employee.

22. The respondent on his part stated that the appellant had contracted the work of engagement of casuals to one Mr. Munyifwa who was the 1st defendant in the case. That Mr. Munyifwa had issued him with a gate pass to enable him gain access to the appellant's premises.

23. The appellant's witness DW1 confirmed in cross-examination that the respondent's gate pass was a genuine document issued by the appellant. He admitted that the workers' register that he produced did not have anything official to show that it was from the appellant. He admitted that the document does not show who prepared it. Neither is it signed or stamped. He stated in cross-examination that Mr. Munyifwa was his colleague. He said that he did not know whether Mr. Munyifwa had recorded a statement denying the respondent's allegations. The witness admitted that the company was at the time using a biometrics system to record attendance of workers. He did not produce it in court.

24. A joint statement of defence was entered by the appellant and the 1st defendant (Mr. Munyifwa). Mr. Munyifwa did not record a statement to deny that he had engaged the respondent as a casual worker on behalf of the appellant. Neither did he testify in court denying so.

25. The respondent had by a notice to produce dated 24/8/2016 asked the appellant to produce documents among them the muster roll. In a letter dated 11/5/2017 the appellant denied that they were in possession of the required documents.

26. The appellant's witness DW1 in his evidence admitted the existence of a biometrics register which is in itself a muster roll that records the attendance of workers. The appellant as an employee is under statutory duty to maintain a muster roll. For the appellant to refuse to produce the biometrics register and produce a discredited piece of paper leads to the presumption in law that had the biometrics register been produced it would have been adverse to the case for the appellant. The respondent had a worker's gate pass issued by the contractor on behalf of the appellant. The appellant did not call Mr. Munyifwa who had engaged the respondent to deny that he had indeed engaged him. It is apparent that Mr. Munyifwa was an agent for the appellant. The respondent had on a balance of probability proved that he was in employment of the appellant.

Whether the respondent had proved particulars of negligence –

27. The respondent explained in detail how the accident occurred. He produced a sick sheet that is in the letterhead of the appellant. The sick sheet is shown to have been signed by the company's head of department where the respondent was working and the company's Human Resource and Administration Manager. The appellant did not call its said employees to deny that they are the ones who issued the sick sheet. I agree with the trial magistrate that the respondent had proved that he was injured while in employment of the appellant.

28. The sick sheet indicates that the respondent was attended to at Kabras Action Group Clinic at 12.30 p.m. There is a signature of the doctor/clinical officer who attended to him. The clinical notes indicate that the cut wound on the right leg was cleaned and dressed. The clinical officer who testified for the appellant, DW1 did say that he is the only clinical officer at the facility. He did not disown the signature and the handwriting on the sick sheet that they do not belong to any doctor/clinical officer at their clinic. He did not produce the whole of the patients' attendance register of the day to show that the respondent was not treated there. He only produced a billing register to the appellant which document does not show the particular dates when the patients attended the clinic. The document then does not prove that the respondent was not treated at the said clinic on 10/8/2016. The respondent did prove that he was treated there.

29. In the foregoing the respondent proved that he was injured while in employment of the appellant. He proved the particulars of negligence against the appellant. It cannot be true that the work of lifting heavy metal was at the time being done by forklifts and cranes. When DW1 recorded his statement he never mentioned that. He only came to mention it in his evidence in court. If the respondent was not injured in the course of carrying heavy metal then the appellant should state how he sustained the injuries since they issued him with a sick sheet after sustaining the injury. The respondent sustained the injury in the manner that he explained. The appellant owed the respondent a statutory duty of care. The appellant exposed the respondent to danger by requiring him to carry heavy metal from ground floor to the first floor. They failed to provide him with a safe system of work. The trial court did not err by holding the appellant partly liable for the accident and apportioning liability in the ratio of 80:20.

Quantum –

30. The respondent had sustained a cut wound on the right leg. The trial court awarded Ksh. 90,000/= in general damages and Ksh. 6,000/= in special damages. The advocates for the appellant contended that the trial court had ignored the principles applicable in awarding quantum of damages and the authorities that they had cited. The advocates for the respondent supported the award.

31. The principles under which an appellate court may disturb an award for damages were stated by the Court of Appeal in **Kemfro Africa Limited t/a Meru Express Services –Vs- A. M. Lubia & Another (1982-88) 1 KAR 777** that:-

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either 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 high that it must be a wholly erroneous estimate of the damage.”

32. The advocates for the appellant urged the court to reduce the award to Ksh. 50,000/=. They cited the case of **Sinohydro Corporation Limited –Vs- Hezra Odhiambo (2016) eKLR** where an award of Ksh. 50,000/= was upheld for soft tissue injury to the left foot.

33. At the lower court the advocates for the respondent had cited the case of **Catherine Wanjiru Kingori & 3 Others –Vs- Gibson Theuri Gichubi in Nyeri HCCC No. 320 of 1998** where Khamoni J. (as he then was) had awarded Ksh. 300,000/= for soft tissue injuries.

34. I have considered other authorities where awards for soft tissue injuries were made. In **Hantex Garments (EPZ) Ltd –Vs- Haron Mwasala Mwakawa (2017) eKLR** an award of Ksh. 100,000/= was upheld for bruises, blunt trauma and tenderness on right leg. In **Ndungu Dennis –Vs- Ann Wangari Ndirangu & Another (2018) eKLR**, the award was reduced from Ksh. 300,000/= to Ksh. 100,000/= where the respondent had sustained soft tissue injuries to the lower leg and soft tissue injuries to the back.

35. I find that the award of Ksh. 90,000/= was not excessive.

The upshot is that the appeal has no merit and is accordingly dismissed with costs to the respondent.

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

30 days right of appeal.