



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 117 OF 2015

BEDI INVESTMENT CO. LTD.....APPELLANT

-VERSUS

PATRICK SANGARA ONGECHE.....RESPONDENT

(Being on appeal from the judgment/Decree of Hon. R. AMWAYI, Resident Magistrate, Nakuru, delivered on 16th September, 2015 in Nakuru CMCC No. 799 of 2010)

JUDGMENT

1. The plaintiff (now respondent) sued the defendant (now appellant) for special and general damages arising out of injuries he allegedly sustained whilst in the course of employment in the defendant's company on 12th November, 2009. He was employed on permanent terms as unskilled employee performing general duties. He is alleged to have slipped and fallen while carrying a box from one place to another within the defendants' warehouse. He was treated at the Nakuru Provincial Hospital.

2. The trial court found in favour of the respondent whom it awarded general damages at Kshs. 80,000/= and special damages at Kshs. 5,000/= with the appellants bearing total liability.

3. The appellants were aggrieved and filed the present appeal on grounds that:-

(i) THAT the learned trial magistrate erred in law and in fact in finding that the plaintiff had proved his case on a balance of probability notwithstanding that there was evidence on record to the contrary hence arrived at an erroneous conclusion in the circumstance.

(ii) THAT the learned trial magistrate erred in law and in fact in finding that the defence evidence was an allegation yet the same was supported with documentary proof in rebuttal of the plaintiff's own exhibit thereby arriving at an erroneous conclusion.

(iii) THAT the learned trial magistrate erred in law and fact in finding that the plaintiff was injured on duty yet there is evidence on record that the plaintiff was treated for an ailment and not a work related injury.

(iv) THAT the learned trial magistrate erred in law and in fact and misdirected herself in fact and law by concluding that the defendant did not produce a sample of cards that were being used at the alleged time yet there was DEX-1 on record to the contrary.

4. Parties took directions to prosecute the appeal by way of written submissions. The appellants' submissions are dated 1st March 2017 while those of the respondent are dated 25th May 2017. From my consideration of the record and the submissions, I see three issues in this appeal. The first is whether the plaintiff proved that he was injured at the work place. The second is whether liability, if proved, ought to have been apportioned and the third is whether the damages awarded were reasonable.

5. I proceed on this appeal on the principle espoused in various authorities that a first appellate court must evaluate and consider the evidence afresh and draw its own conclusions. Secondly, that an appellate court would not normally interfere with the findings of fact by a trial court unless it is based on no evidence or on a misapprehension of the evidence or that the decision was plainly wrong. See **Selle vs. Associate Motor Boat Co [1968] EA 123; Ndiritu Vs. Ropkoi & Another [EA 334]**.

6. I am also conscious of the caution stated in **Kemfro Africa Limited t/a Meru Services Gathoni Kanini V A.M.M Lubia & Another, [1982 – 1988] IKAR 777**, that the assessment of damages is an exercise in discretion and that an appellate court would not normally disturb an award unless it is shown that the trial court took into account an irrelevant factor or left out a relevant factor or that the award was inordinately high or low.

7. The respondent's claim in the trial court was based both on the statutory duty of care under contract and on negligence. An employer is deemed to bear a statutory duty of care. The fact of employment therefore becomes a critical issue. For a claim based on negligence to succeed, the plaintiff must show that the defendant owed a duty of care. It must be shown that such duty was breached either by an act or omission of the defendant. It must be shown that the defendant failed to create and maintain a safe system of work. In sum, the plaintiff must prove on a balance of probability negligence against the employer. See **Kiema Muthuku v. Kenya Cargo Handling services Ltd. [1991] KLR 644; kirugi & another vs. Kabiya & others [1987] KLR 347.**

8. In the present case, it is contested that the respondent got injured at the work place or at all. The appellant in this case argues that the respondent did not prove that he was injured while at work. The muster roll [D Exhibit 3] produced by the office administrator of the appellant company (DW1) showed that the respondent worked from 8.00am to 1.00pm and on the material date he did not report back to work at 2.00pm. The appellant further states that DW1 testified that the respondent turned up at work the following day with a hospital card showing that he had been treated for malaria and flu. That in the face of this evidence, there was no basis for the court to believe that the respondent was injured while at work.

9. The evidence relied on by the court in finding that the respondent got injured while at work was provided by the respondent himself. He testified that he got injured at the workplace, sought time off to go for treatment and was treated at the Nakuru Provincial General Hospital. He produced an outpatient card number 18092/09 serial No. 149/45 [D. Exhibit No.1] which showed that he had been treated for chest injuries. The respondent's submission is that he was injured while on duty and that his claim was backed by the evidence of DW1 who confirmed that he (the Respondent) came back with a treatment card showing that he had been injured while on duty and was consequently given three days off duty.

10. The Appellant on the other hand called the company supervisor (DW1) who denied knowledge of any accident at their premises, saying that no report was made by the plaintiff/respondent. The defence also called one Josephat Kariuki (DW2) an officer from the Rift Valley General Hospital Nakuru who confirmed that the treatment card serialized as OP Number 18092/09 produced by the defence was genuine. He cast doubt on the authenticity of the plaintiff's card stating that it appeared tampered with.

11. I have carefully looked at the two treatment cards [P. Exhibit No. 1] and [D. Exhibit No 1] produced by the parties respectively. Both bear the hospital letter head. The suggestion by the defendant that the plaintiff's exhibit was a forgery is not supported by any evidence. As submitted by the plaintiff, the defendant having made the allegation ought to have provided proof. They should have produced the hospital's original register for examination by the court.

12. In the end, I have found no evidence to reject the plaintiff's treatment card showing that he was treated for injuries and not malaria on the material date. I find, as the trial court did, that the plaintiff proved the fact of injury while on duty at the appellants' warehouse on a balance of probability.

13. The second issue is whether the appellant was solely liable for the accident or fall of the respondent and the injuries he sustained. The respondent testified that he had worked for the appellant for some time as an unskilled labourer. On the particular day, he slid and fell while carrying boxes. He did not say what made him slide and fall on that day. The floor may have been wet, or there may have been an obstacle that tripped him or he may just have failed to move about carefully. An employee is also required to take reasonable precaution to ensure his safety at the work place while performing his duties.

14. In **Shalimar Flowers Ltd V Noah Muniango Matianyi(2011) eKLR**, the court held that "the respondent should have known that it was risky walking in the long grass and that he exposed himself to danger". The court went ahead and apportioned liability. Similarly in the present case, it is my view the negligence that caused the respondent to fall on the day cannot be wholly attributed to the appellant. I apportion liability at 70:30 in favour of the respondent.

15. The third issue is whether the damages awarded were reasonable. I am guided by the principle set out in **Kemfro Africa Ltd** case cited above. Further, it has been stated that damages must be within limits set out by decided cases and that is against public policy to award inordinately high damages. See **Joseph Musee Mua v. Julius Mbogo & 3 others [2013] eKLR**. I have considered the submissions made by the parties in the trial court with respect to comparable injuries and awards. I find that the trial court properly exercised its discretion. The award was neither too high nor too low to warrant interference. The same is upheld.

16. In the end, the appeal partially succeeds to the extent only that liability is apportioned as above. The award therefore shall be:

General Damages	80,000
Special Damages	<u>5,000</u>
Total	<u>85,000</u>
Less 30% contribution	<u>25,500</u>
	59,500

The respondent shall have costs and interest as awarded in the lower court while the appellant shall have half the costs of the appeal.

Orders accordingly.

Judgment signed at Garsen on 23rd day of July, 2018.

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R. LAGAT KORIR

JUDGE

Judgment delivered dated and Counter signed at Nakuru this 31st day of July, 2018.

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A.K NDUNGU

JUDGE

In the presence of

.....CA

.....for applicant

.....for respondent