



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL CASE NO. 65 OF 2016**

**JACQUELINE RANCE T/A ORLESTON SHIPPING**

**CHRISTOPHER RANCE T/A ORLESTON SHIPPING.....APPELLANTS**

**VERSUS**

**JORAM MUNDA GINSTONE..... RESPONDENT**

**JUDGMENT**

1. This appeal is from the judgment of the senior Resident Magistrate Honourable Gandani (as she then was) delivered on 13<sup>th</sup> April, 2016 in RMCC 1052 of 2008 at Mombasa whereby she found for the Respondent (the plaintiff herein).

2. The cause of action in that case arose on 1<sup>st</sup> September, 2006 or thereabout while on duty aboard a motor vessel and while lowering the vessels flag, the rope used for the purpose caught the Respondent's hand thereby causing him an awkward fall and as a result he injured himself.

3. The Respondent held the Appellants culpable for the injuries he sustained and after the hearing of the case, Hon Gandani awarded the Respondent (plaintiff) Kshs300,000/= as general damages and apportioned liability at 30-70% in favour of the Respondent and Kshs2000/= as special damages.

4. The Appellants found this assessment excessive in relation to the injuries suffered by the Respondent, and aggrieved by the said judgment appealed citing five (5) grounds namely that;

**(a) the learned Senior Resident Magistrate erred in failing;**

**(i) to appreciate and record the significance of the various facts emerging in the evidence of the plaintiff's witness.**

**(ii) to consider or properly consider all the evidence before her and;**

**(iii) to make any or any proper findings on the evidence before her.**

**(b) the learned Senior Resident Magistrate erred in law in awarding the plaintiff Kshs300,000/= for general damages and apportioning liability at 30:70% in favour of the plaintiff and a further Kshs.2000/= for special damages in that the said sum is so excessive in relation to the injuries suffered by the plaintiff and the evidence on record;**

**(c) having satisfied herself in judgment that the Defendant's were only agents of the owner of the vessel the learned Senior Resident Magistrate erred in proceedings to hold the Defendants culpable;**

**(d) the learned Senior Resident Magistrate erred in failing to recognize that the plaintiff's employer was the company and not the defendant herein;**

**(e) the learned Senior Resident Magistrate considered extraneous matters in arriving at her decision to the detriment of the defendant.**

5. On the 19<sup>th</sup> September, 2018 counsel for all the parties appeared before the court for highlighting of submissions whereby they opted to rely on them which submissions.

6. Arguing the appeal in their written submissions, the appellant's counsel faulted the trial magistrate for delving into extraneous issues in arriving at her decision and held the appellants culpable without identifying them as the proper parties to whom rights and obligations arose from the cause of action. Their argument is that the trial magistrate failed to appreciate the paramount principle of law that an agent cannot be said where there is a disclosed principle.

7. They further submitted that the inference to be made therefore is that the Appellant's were first ordinary employees of Orlestone Shipping like the respondent only under different capacities. That the appellant do not in any way possibly were the respondent a duty of care as they were not the employees of the respondent as alleged or otherwise and therefore cannot be vicariously held liable for any action and/or omissions by the motor vehicles masters.

8. The respondent's counsel on the other side submitted tht the trial magistrate was guided by the evidence and facts on record which were largely controverted as the appellants never testified, except from witness who gave hearsay evidence. They also submitted that the appellants were attempting to hide under the corporate veil is an evidence of responsibility inconsistent with the facts on record. They further submitted that the award was very low when considering the nature of the injuries.

9. It is trite law that for a first appeal, on the appellate court has to reconsider the evidence on record before the trial court, re-evaluate it and draw its own conclusion while bearing in mind that unlike the trial court, it neither said or heard the witness to assess the demeanour and should make due allowance in that respect (See **SELLE & ANOTHER -VERSUS- ASSOCIATED MOTOR BOAT CO. LTD & OTHERS**).

10. This was reiterated in **MWANA SOKONI –VERSUS- KENYA BUS SERVICES LTD** where the court added that “an appellate court will normally not interfere with the trial court's findings of fact unless it is based on no evidence, or on a misapprehension of evidence, or if the trial court is shown demonstrably to have acted on wrong principles in reaching that finding.”

11. I have read through and examined the memorandum of Appeal, pleadings, proceedings and judgment of the lower court, examined the record of appeal, parties submissions, together with the authorities relied upon to support their stand points. The grounds of appeal raise only three issues for determination by this court:

**(a) Whether the Defendants are proper parties to these proceedings;**

**(b) Whether the evidence tendered supported the pleadings;**

**(c) Whether the magistrate Senior Resident Magistrate reached an erroneous finding for the Respondent and awarding him so highly.**

12. The facts of the case are that in the course of his employment in the defendant's vessel on 1<sup>st</sup> September, 2006, when he was instructed to lower vessels flag and the rope used for that purpose caught his hand causing him to fall down and thereby sustained serious injuries. PW2, **DR. JACAB ASHRAF** told the court that, he had examined the plaintiff and had found him to have sustained a fracture of the sycloid process at ulna.

13. The defence, through **MANS JUERGEN ZAHLEN** testified halfway and was never recalled to finish his testimony to be cross-examined. He said that he knew a few things about the case as Mr Rance, the 2<sup>nd</sup> Defendant had briefed him about the case. He claimed that the ships was owned by Orlestone shipping though he did not personally know the owners.

14. In her judgment, the trial magistrate found that:

**“Though the Defendants have denied they were the employees as aforementioned, I have already found they were. The ones who employed the plaintiffs were the local agents of the owner of the vessel. The accident here, having occurred in the course of the plaintiffs employment with the defendant, under common law, the employer is liable. The basic underlying principle and rationale for this is that the employer is the one who instructs the employee. The plaintiff here was not shown to have been injured while on frolic of his own. However, by his own admission, the plaintiff had stated that he was an experienced seaman. We should therefore have taken precautions not to get injured. For above reasons, I now apportion liability as hereunder 30% against the plaintiff, 70% against the defendant jointly and severally.....”**

**I now award the plaintiff Kshs300,000/= (three hundred thousand) being general damages and special damages Kshs.2000/= has been proved.”**

15. On the first issue of whether the Defendants are the proper parties to the proceedings, the Appellants stand point is that the Defendants being agents of a disclosed principle ought not to have been sued and therefore the case against them be dismissed costs.

16. The Respondent's case is that he was employed by the Defendant whom he executed a contract with dated 1<sup>st</sup> December, 2005 (Exhibit P1) and therefore they are proper parties to the suit and ought to be held culpable.

17. The law in Kenya is contained in **The Merchant Shipping Act, 2009 (Act No. 4 of 2009)**. The jurisdiction of the court to resolve a similar dispute is provided for by Section 122(1) which provides as follows:

**“except as proved in Section 140 a crew agreement state not purport to deprive any court of its jurisdiction to hear and determine dispute respecting the agreement.”**

18. Section 140 deals with awards made by Registrar as to wages and which is final as between the parties. The plaintiff has described them as residing and working for gain in Lamu and elsewhere within the Republic of Kenya. I have read the brief amended plaintiff to see anything that would link the Defendants to the ship.

19. Upon perusal of the documents, the letter authored by the 1<sup>st</sup> Defendant dated 2<sup>nd</sup> February, 2007 is about payments and the address given reveals that there is some association with Orleston Shipping who are the owners of the vessels. The address is as follows:

JACQUELINE RANCE

ORLESTON SHIPPING,

P. O BOX 484,

LAMU, KENYA

In the letter, reference to discharge by handing over the Seaman's Book through Dr. Kaala did not mention that the 1<sup>st</sup> Appellant was acting in a representative capacity.

20. The relevant evidence would satisfy Section 2(1) of Merchant's Shipping Act, 2009 as regard Bareboat Charter Registration of the Vessel between the Panama flag and Orleston Shipping who have control of the ship and thereafter any bareboat charter terms between Orleston Shipping and the Appellants. The sea farer signed an agreement of employment dated 1<sup>st</sup> December, 2005 which spelled out terms and the same was signed for on behalf of Orleston Shipping by the Captain, one T. Yohnnes.

21. The definition of owner of ship goes beyond mere parties that are known by Section 2(1) of Merchant's Shipping Act, 2009. The "owner" means "in relation to a ship, or "ships owner" means in respect of a registered ship, the registered ruler and includes a demise charterer and a managing ruler or managing agent".

22. On further scrutiny of the discharge book, I noted that it was signed for by Jacqueline Rance on behalf of S.Y. Sanjeeda and she did so on behalf of the captain and her other card describes her as "General/Manager". On further perusal of the record, I realise that the 1<sup>st</sup> Defendant did not defend the suit against her by filing a defence. The 2<sup>nd</sup> Defendant filed his separate defence dated 8<sup>th</sup> October, 2010.

23. In the testimony given in court, DW1, stated that the 2<sup>nd</sup> defendant HANS Juergeen Zahren, was in control, having been hired as captain by the said defendant. Nothing is said of the 1<sup>st</sup> defendants role here in this matter,

24. In its judgment, court rendered itself as follows:

**"The plaintiff stated that he was employed by the Defendants not the owners of the vessel herein. Though there was an agreement signed that showed that the employer was Orleston Shipping ... from exhibit P4, it is clear that Jacqueline was either an agent or owner of the Orleston Shipping. She is the one who even paid the plaintiff terminal dues."**

25. The correct position is that the documents referred to satisfy the requirements of Section 2(1) of the Merchant Shipping Act, 2009 which describes and defines an owner to include an agent or manager, the class of the Appellants.

26. The Appellants did provide court with very scanty testimony and which focused on ownership and which as observed herein, elsewhere, unwittingly is proof that the Appellant's evidence which they would tender is one that would rebut bareboat charter terms appointing them to be in charge of the vessel Sanjeeda and (or with their relationship with the captain and the registered owners shipping agreements are controlled by the law and differ from the strict requirements under ordinary contracts because of the mature charters.

A sea farer will sue an immediate person who appears to be the master and in-charge of the vessel.

27. Having considered the submissions of parties on this matter and the authority supplied by the Appellants, **VICTOR MABACHI & ANOTHER VRS NUPTUN BATES LTD (2013) eKLR** is not helpful.

I therefore hold and find that the Appellants are the right parties to have been sued in the pleadings herein. As a result thereof, this holding disposes of grounds No. 1, 2, and 4 of the Memorandum of Appeal and issues numbers 1 and 2 as framed herein.

28. As regards the issue Number 3, on whether the trial Magistrate arrived at an erroneous finding for the Respondent and granting a very high award. The Appellant submitted in the lower court on quantum and sought for Kshs600,000/= as general damages plus costs and interest. He relied on an authority decided in 2006. **IN GEORGE KING'OINA MARANGA & SAMMY KINYANJUI VERSUS LUCY NYOKABI (2006) eKLR** where the plaintiff suffered the following injuries.

(a) Dislocation of the right wrist;

(b) Fracture of the right radius in the distal one third;

(c) Fracture of styloid process of the right ulna;

(d) Injury to the forehead resulting into the swelling of the right side of the face.

29. The Respondent herein sustained a fracture of the styloid process of the right hand which healed into non-union causing a further operation. In the authority cited, the Respondent had multiple injuries.

The Appellant did not supply any evidence or authority to challenge the figure except that the payment made while the Respondent was hospitalised having been believed to have been adequate according to the Appellant. I wish to state that on the outset the assessment of general damages does not take into account special damages pleaded as incurred by the parties. It is either in addition to general damages or separate.

30. The Honourable learned magistrate stated as follows:

**“The Defendant’s advocate purported that the plaintiff should not be awarded any damages because the defendant had paid for his physiotherapy, medicines, full surgery upto end of contract yet he had not worked from September,2006. The issues are not the consideration a court must note when awarding damages.”**

31. I agree with the learned trial magistrate and there being no guideline to the contrary, given the nature of the single severe injury the Respondent sustained. I do hold that the learned magistrate was correct and I do not wish to disturb the award.

32. On the issue of apportionment of liability, the law on sailors differs from any other law that govern seamen. The hand deck workers follow strictly orders given by the master as he is the one responsible for the safety of everyone on board a vessel. At page 13 of the proceedings (P113) of the record of appeal, the Respondent testified as follows:

**“We were from Kisangu Island Lamu and were hrading to Lamu island, the ship M.V Sanjeeda got trapped in the sand due to shallow water. Jacqueline the manager asked the captain to order us to raise the sail so that wind can help us pull out the vessel. There was a lot of wind....”**

33. There is no evidence tendered to contradict this piece of evidence. The raft of condition in the contract of employment specify parties obligations. The Appellant never called any evidence to show breach by the Respondent of anyone of the terms.

34. I do believe the Respondent is not responsible on his injuries. The 1<sup>st</sup> Appellant did not challenge, the suit in the lower court and never called evidence to deny the Respondent’s testimony. I find and hold the Appellant jointly and severally liable at 100%. The final analysis that commends itself is that the appeal is dismissed with costs and make the following orders;

(a) Judgment on general damages is confirmed and interest shall accrue to the date of final payment.

(b) Finding on appointment of liability is reversed and the Appellants are jointly and severally liable 100% to the plaintiff/respondent.

(c) Costs of the suit in the lower court and the appeal to the Respondent.

**Judgment DELIVERED, DATED & SIGNED this 20<sup>th</sup> day of December, 2018.**

**D. CHEPKWONY**

**JUDGE.**