



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL APPEAL NO. 148 OF 2013

RUPA MILLS LIMITED.....APELLANT

VERSUS

VINCENT MOREKWA OMBANE.....RESPONDENT

(An Appeal from the Judgment and decree of the Resident Magistrate Honourable B.J BARTOO in Eldoret Civil Case NO. 559 of 2012, dated 1st November, 2013)

JUDGMENT

1. The appellant, then the defendant was sued by the respondent, then the plaintiff in Eldoret SPMCC No. 559 of 2012. The respondent sought both general and special damages for injuries sustained in the course of his employment with the appellant. He also prayed for costs of the suit and interest.
2. It was the respondent's case that he was employed by the appellant as a machine operator and on 29th March, 2011, he was assigned the duty of grinding metal with a grinder. As he was working, the metal slipped and the machine cut his finger causing him injuries. He sustained a fracture and a deep cut on the left thumb. He blamed the occurrence of the accident on the negligence of the appellant, its servants or agents and/or breach of contract of employment and /or statutory duty.
3. The appellant in its statement of defence dated 7th August 2012 denied all allegations made against it by the respondent including the claim that he was its employee and that he had been injured in the course of his employment. But on a without prejudice basis, it claimed that if the accident occurred as alleged, it was solely caused or contributed to by the respondent's negligence.
4. After a full trial, the learned trial magistrate entered judgment on liability in favour of the respondent against the appellant at a 100%. She also awarded the respondent general damages in the sum of Ksh 350,000 and special damages of Ksh 1,500 together with costs of the suit and interest.
5. The above is the decision that precipitated this appeal. In its memorandum of appeal dated 18th November 2013, the appellant challenged the trial court's decision on both liability and quantum and relied on four grounds of appeal. They are as follows;

a) That the learned trial Magistrate erred in law and in fact in awarding damages whereas the Plaintiff did not prove his case on a balance of probabilities.

b) That the learned trial Magistrate erred in law and in fact in applying wrong principles and/or misapprehending the evidence while assessing damages.

c) That the learned trial Magistrate erred in law and in fact in shifting the burden of proof to the defendant contrary to the law.

d) That the learned trial Magistrate erred in law and in fact in awarding damages which were inordinately excessive in the circumstances.

The appellant prayed that the appeal be allowed and judgment and decree of the trial court be set aside with costs.

6. The appeal was prosecuted by way of written submissions: those of the appellant were filed on 6th October, 2015 while those of the respondent were filed on 30th October, 2015. The submissions were briefly highlighted before me on 12th July, 2016. At the hearing, learned counsel *Mr. Kagunza* appeared for the appellant while learned counsel *Mr. Nyolei* represented the respondent

7. This is a first appeal to the High Court. As such, it is an appeal on both the law and facts. As the first appellate court, I have a duty to re-evaluate and re-examine the evidence presented before the trial court in order to reach my own independent determination. In doing so, I should be careful to remember that unlike the trial court, I did not have the benefit of hearing or seeing the witnesses and give due allowance for that disadvantage.

See: *Selle V Associated Motor Boat Company (1968) EA 123; Arrow Car Ltd V Bimomo and 2 others (2004)2 KLR 101*

8. I have carefully considered the pleadings, the evidence on record, the judgment of the learned trial Magistrate and the submissions made on behalf of both parties. I have also scrutinized the court record.

9. The respondent has challenged the validity of the appeal on grounds that the decree appealed from arose from a consent duly executed by both parties and adopted as an order of the court. The respondent argued that it was not open for the appellant to challenge its own consent on appeal since both parties were bound by its terms. The appellant in its response submitted that the consent was not valid as it was not sanctioned by the appellant.

10. From the record of proceedings in the lower court, it is clear that even before judgment was delivered by the trial court, the parties had on 20th September, 2013 entered into a consent on liability at the ratio of 85:15 in favour of the respondent against the appellant. The record further shows that the consent was recorded on behalf of the parties by their learned counsel on record and it was adopted as an order of the court on the same day. The appellant cannot now turn around on appeal and claim that the consent was recorded without its instructions.

11. It is my view that the appellant by its conduct demonstrated that it had sanctioned the consent because though the consent was for some reason overlooked by the learned trial magistrate in her judgment delivered on 1st November, 2013, the parties subsequently filed a consent dated 5th November, 2013 in which they adopted the terms of the earlier consent on liability in the ratio of 85:15% and reduced the amount awarded as damages to the respondent by 15%. The subsequent consent was adopted as an order of the court and a decree was issued to that effect.

12. The record also reveals that the learned trial magistrate did not take into account the consent recorded on 20th September 2013 as she did not make any reference to it in her judgment. This was obviously an error on her part which error could have been corrected on review but the parties appear to have corrected the error by entering into a subsequent consent which removed the percentage of the damages the respondent would have shouldered if the terms of their earlier consent had been effected by the court in its judgment. If the appellant had not sanctioned the consent, instead of executing the consent of 5th November 2013, it would have either immediately sought a review of the trial court's judgment or appealed against the entire judgment without entering into further negotiations with the respondent.

13. In view of the foregoing, I am satisfied that the parties executed a valid consent on 5th November, 2013 in which they validated the terms of their earlier consent on liability and in which they agreed on the damages payable to the respondent.

This means that the appellant consented to the quantum of damages that had been awarded to the respondent by the trial court. It is not disputed that the decree which is the subject of this appeal was issued pursuant to the latter consent. In the circumstances, I agree with the respondent's submissions that the appellant in filing the instant appeal sought to challenge the terms of its own consent.

14. The law is however very clear on whether a party can be allowed to appeal against a consent judgment. The starting point is a reference to *Section 67 (2)* of the *Civil Procedure Act* which in no uncertain terms prohibits the filing of such appeals. The Section states that;

“No appeal shall lie from a decree passed by the court with the consent of parties”.

It is therefore clear that an appeal which seeks to challenge a consent judgment would be incompetent and ought not to be entertained by any court unless it seeks to demonstrate that the impugned consent was invalid ab initio.

15. The Court of Appeal in ***Board of Trustees National Security Fund V Michael Mwalo Civil Appeal No. 293 of 2014 (2015) eKLR*** had occasion to pronounce itself on the interpretation of *Section 67 (2)* of the *Civil Procedure Act*. It adopted the interpretation given by Gicheru J (as he then was) in ***Wasike V Wamboko*** where the learned judge stated as follows;

“ The Civil Procedure Act (Cap 21) Section 67 (2) is not an absolute bar to challenging a decree passed with the consent of the parties where a party seeks to prove that the decree is invalid ab initio and should be rescinded or that there exists circumstances to warrant varying the decree.”

The appellant in this appeal did not challenge the validity of the consent that gave rise to the decree appealed against. Infact, the appellant did not make any reference to the consent except when responding to the respondent's oral submissions.

16. It is also trite law that a consent order or judgment cannot be varied or set aside by a court except in circumstances that would warrant the varying or rescinding of a contract. This is because a consent which is duly executed by the parties or their advocates is equivalent to a contract and parties are bound by its terms. The circumstances which would warrant variation or setting aside a consent includes where the consent was procured by fraud, collusion, misrepresentation of facts or where the consent is against the policy of the court, say for instance where it is executed in furtherance of an illegality. – See: ***Board of Trustees National Security Fund V Michael Mwalo (Supra) ; South Nyanza Sugar Company Ltd Vs David Ojwang Okebe & 2 others Civil Appeal NO. 139 of 2008 (2013) eKLR.***

17. The appellant has not demonstrated that any of the above circumstances existed in this case. In the premises, there is no basis upon which this court can vary or set aside the decree issued by the lower court pursuant to a consent reached by the parties.

18. In the result, I find no merit in this appeal and I accordingly dismiss it with costs to the respondent.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 23rd day of February 2017

In the presence of:

Mr. Kagunza for the Appellant

Mr. Lobolia Court Clerk

No appearance for the Respondent though duly notified.