



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**HCA 180 OF 2013**

**PAUL ONDERA AKAKA.....APPELLANT**

**-VERSUS-**

**COMPLY INDUSTRIES LIMITED.....DEFENDANT**

**JUDGMENT**

1. The appellant brought the suit herein against the Respondent seeking compensation for the injuries he sustained while lawfully engaged by the Respondent as his employee. The appellant pleaded in his plaint that on the material date while he was lawfully on duty doing his authorized work in the circumstances, he was pierced and seriously injured by a piece of metal.

In his testimony in court, the Appellant stated that he was employed by the Respondent in 2001 as a blade sharpener and that he was trained for the assigned job. On the 2<sup>nd</sup> day of January, 2001 he got injured at work while sharpening a saw, a particle from the grinding stone hit his eye. The Appellant testified that the Respondent failed to offer him with safety apparels and that he was only offered with an apron without garments to protect his eyes from injuries.

**PW2 a Health Records Officer** from PGH corroborated the Appellants claim and stated that he had the records for the Appellant. That the appellant had an eye clinic card dated 26<sup>th</sup> February, 2002 No.1163/02. That the Appellant was treated for foreign body in the right eye and irrigation was done.

2. Plaint dated 30<sup>th</sup> October, 2007 he sued for both negligence and breach of contract as failure to provide a safe and proper system of work, provide protective devices, exposure to imminent injury or damage. He sought general and special damages as well as costs of the suit.

3. In a judgment delivered on 11<sup>th</sup> September 2013 the **Hon. Mwaniki Ag. SPM** awarded the plaintiff Kshs.3,000 being special damages proved less 30% contributory negligence and costs of the suit. In the judgment, the court struck out the part of the claim based on negligence citing the limitation period of 3 years and denied the plaintiff damages.

4. Aggrieved by the judgment, the plaintiff filed this appeal on grounds that:-

**i. That the Learned Trial Magistrate erred in law and in fact in finding that the Appellant had not proven his case on a balance of probabilities to the extent of the Respondent herein being 100% liable.**

ii. That the Learned Trial Magistrate erred in law and in fact in disregarding and/or ignoring the evidence adduced by the Appellant in his testimony, the testimony of all his witnesses, the exhibits produced and his submission against the Respondent.

iii. That the learned Trial Magistrate erred in fact and in law in finding that the Appellant is not entitled to be awarded general damages.

iv. That the Learned Trial Magistrate erred in fact and in law in her assessment of damages awardable to the Appellant by awarding damages that were inordinately low in the circumstances.

5. The appeal proceeded by way of written submissions which the parties duly filed and subsequently highlighted. The gist of the appellant's submissions is that the trial court erred in not finding the respondent 100% liable despite the appellant having proved the case; that the court arrived at a wrong conclusion that the claim for damages was time barred; that there was contributory negligence on the part of the appellant; and, that the award was too low.

6. The respondent on the other hand submitted that the court correctly found the claim based on the part of negligence was time barred; that the court having so found, could not award damages based on tort; and further that the court considered all the evidence before arriving at the judgment.

7. From the memorandum and record of appeal, and the respective submissions of counsel, I consider the following to be issues in this appeal:-

*i. Whether the appellant's claim for damages for right was defeated by limitation of time.*

*ii. Whether the plaintiff proved his case*

*iii. Whether the award was inordinately low*

8. In considering these issues, I am under duty to reconsider and re-evaluate the evidence afresh and reach an independent decision. In so doing I must be conscious that unlike the trial court I do not have the benefit of hearing the witnesses and assessing their demeanor and I must therefore give an allowance for that. See **Selle and Another –V- Associated Motors Company Ltd and others (1968) E.A 123** see also

### Issues

9. Whether the appellant's claim was statute barred or whether the claim under tort negligence would stand.

The respondent argues that the plaintiff's claim for damages was rightly dismissed in the lower court as the same are not payable under a contract claim and the claim based on the tort of negligence was time barred. They are no authorities to back up the submission. The appellant on the other hand submits that the claim was based on both negligence and breach of contract and that the plaintiff was within the 6 year limitation period as provided for in Section 4 (i) of the Limitation of Causes Act. That having proved the contract, the plaintiff was entitled to damages for breach thereof. The cite **Kenya Tea Packers Vs Samuel Motary Joconiah HCC No.255 of 1999 and Kenya Cargo Handling Service Ltd Vs Ugwang (1985) KLR 593** which held that where claim lies in contract and tort, a party can choose to pursue its claim in either contract or in in tort. Finally, they submit that the Employment Act 2007 had not come into operation when the cause arose. The said Act having come into operation on 2<sup>nd</sup> June 2008.

10. The plaint shows that the appellant pleaded particulars of negligence and also contract. In the judgment at page 2 the court stated:-

*“The claim was based on both negligence (tort) and breach of contract. For claim based on*

*negligence (tort) the limitation period is three years. The plaintiff needed to seek extension of time within which to file that claim for under which successful damages are paid in absence of such leave having been granted, the court strikes out plaintiff part of the claim based on negligence”.*

11. Having found that the claim under contract proved the court went ahead to find that no general damages are awarded under contract... That “**general damages cannot be awarded at large for breach of contract. The same must be quantified by the plaintiff.**”

The court went ahead to decline to award any damages at all. As a general rule general damages are not recognized as a remedy for breach of contract. However where the breach of contract results in personal injury, the court may award general damages. In this case there was no dispute that the appellant was employed by the respondent and that the respondent owed him a statutory duty of care to provide a safe system of work and I would therefore award him general damages. See **Makala Mailu Numende –V- Nyali Golf and Country Club 1989 eKLR.**

#### **Whether the case was proved**

12. From my appreciation of the proceedings before the trial court and the submissions of counsel on appeal, it is clear that the case was proved on a balance of probability. The court considered the evidence and arrived at the conclusion that the plaintiff was in the employ of the defendant and that he was injured in the course of lawful duty. It also found that the appellant had not been provided with protective apparel to protect his eyes hence failing to maintain for him a system of work that was safe. I have no reason to differ with these findings. Indeed, I would add that an employer is not merely required to provide a safe system of work but to ensure that employees comply with that safe system of work. See **Mghosi Vs Gaya Engineering Works (1981) KLR 164.** In the present case I would apportion liability at 90:10 in favour of appellant.

#### **Whether the award was inordinately low**

13. The principles to be applied to be applied by an appellate court in **Kemfro Africa Limited t/a Meru Services Gathogo Kanini V A.M.M. Lubia & Another, (1982 – 88) IKAR 777,** it was stated:-

*The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by 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 or account a relevant one, or that short of this, amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damage.*

14. In the present case the appellant was awarded special damages of 3,000 with an apportionment of 70:30 in his favour. As earlier stated no general damages were awarded and as I have found, the same ought to have been in the circumstances of this case. I consider the award to be so inordinately low as to fail to strike a chord of fairness.

Considering the injury sustained which was minor, I would award the appellant Kshs.30,000. The award therefore would work out as follows:-

<b>General damages</b>	-	<b>30, 000</b>
<b>Special damages</b>	-	<b>3,000</b>
<b>Total</b>	-	<b>33,000</b>
<b>Less 10% contribution</b>	-	<b>1,300</b>

**31,700**

The appellant shall also have the costs of this appeal as well as costs of the suit in the lower court and interest at court rates from date of judgment.

***Ruling delivered, dated and signed in open court this 27<sup>th</sup> day of July 2017***

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**R. LAGAT KORIR**

***JUDGE***

In the presence of:

C/A Emojong

Ndichu holding brief for Getanda for appellant

N/A for respondent