



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

HIGH COURT CIVIL APPEAL NO.71 OF 2015

[From the original Civil suit No.107 of 2009 of Principal Magistrate at Keroka]

KIPKEBE LTD.....APPELLANT

-VERSUS-

SAMWEL NYATOERA.....RESPONDENT

J U D G M E N T

1. This is the judgment of the **Civil Appeal No.71 of 2015**. The Appellant is Kipkebe Limited. The Respondent is **Samwel Nyatoera**.

2. In a **Civil Case No.107 of 2009** at Keroka, the Plaintiff, Samwel Nyatoera sued the Defendant for general and Special damages arising out of an industrial accident in which the Plaintiff suffered injuries on 24th April 2005 while working at the said Defendant company as an employer thereof. It was his case that that the Plaintiff was spreading tea leaves when a metal bar fell from above and hit him on the forehead whereby he sustained wound on the forehead and a piercing trauma into his eye. He averred that that accident was solely caused by the Defendant's breach of statutory duty of care, negligence and or breach of duty/contract of employer, as a result of which he suffered pain, loss and damage.

3. After fully fledged trial, the trial magistrate entered judgment in favour of the Plaintiff, against the Defendant in the following terms:

(a) General damages for pain/suffering	-	Kshs.140,000
(b) Special damages	-	<u>Kshs. 65,000</u>
Total		<u>Kshs.146,000</u>

4. Being aggrieved and dissatisfied with the said Defendant Kipkebe Limited has now appealed against the said judgment.

5. The appellant's grounds of appeal are:

1. The Learned Trial Magistrate grossly misdirected himself in treating the defendant/appellant's evidence and submissions on liability and quantum before him superficially and consequently coming to a wrong conclusion on the same.

2. The Learned Trial Magistrate did not in the alternative consider or sufficiently consider the

demand of contributory negligence based on the evidence adduced and the submissions filed by the defendants.

3. The Learned Trial Magistrate misdirected himself in ignoring the principles applicable and the relevant authorities in the written submissions presented and filed by the defendant.

4. The Learned trial Magistrate erred in not sufficiently taking into account all the evidence presented before him and in particular the evidence presented before him on behalf of the defendant.

5. The Learned Trial Magistrate erred in failing to hold that the plaintiff had failed to prove negligence on the part of the defendant.

6. The Learned Trial Magistrate erred in law by introducing extraneous factors and consequently applied wrong legal principles and precedents and as such foisted liability on the defendant without any basis in law or fact.

7. The Learned Trial Magistrate erred in law and fact that the plaintiff was injured while working for the defendant without proof of the same.

8. The Learned Trial Magistrate erred in law and fact in finding that the plaintiff was an employee of the defendant despite the evidence tendered on behalf of the defendant.

6. Both parties agreed to canvass this appeal by way of written submissions. Accordingly the appellant's submissions were duly filed on 14th April 2016 and the Respondent's submissions were filed on 29th July 2016.

7. SUBMISSIONS

The appellant's submission deals with two issues:

(a) Liability and

(b) Quantum

1. On liability

From the proceedings Page 54, 55 of the record of appeal, PW1 avers that that he was injured on 24/04/2005 at 17.00p.m. and after injury he went to hospital for treatment.

However on **Page 58** of the record of appeal, DW – David Kipchirchir Koech, states there was no patient that day. He said we don't issue treatment cards in reference to P. Exhibit 2.

DW2 says on 24th April 2005, Page 57, Samwel Nyatoera was off. That there was no work that day.

2. On Quantum

According to Dr. P.M. Ajuoga, the injuries a cut wound on the forehead and piercing trauma into his eye. The award of Kshs.140,000 appears excessive according to the appellant's submissions. He refers the court to the case of Elias Munioki –vs- Said Juma & Another Mombasa, HCCC No.53 of 1990.

8. The Respondent opposes this appeal. Nyangosi for the responded deals with two issues in this regard:

(a) Was it proved that the respondent sustained the alleged injuries? and

(b) Whether the accident did occur on the 24/04/2005?

(c) Whether award of damages was excessive?

The treatment card [**chit**] occurs that the respondent was on duty on 24/4/2005 and that he sustained injuries while on duty and in the course of his employment.

The exhibit 2 was produced in evidence by consent, this confirms that the respondent was on duty and that he was injured and attended at the appellant's dispensary.

Counsel referred to HCCC Appeal No.125 of 2008 – Josephine Angwenyi –vs- Samwel Ochillo. The principle here is that the appellate court must be satisfied that either the trial court in assessing the damages took into account an irrelevant factor or left out of account a relevant factor or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.

Therefore the damages as given by the trial court should stand undisturbed.

9. First Appeal

This is a first appeal. As the first appellate court, this court is under a duty to reconsider and evaluate the evidence a fresh with a view to reaching its own conclusion in the matter. It is to be remembered however, that this court neither saw nor heard the witnesses who testified during the trial. The court must therefore and with circumspection before concluding that the judgment of the trial court is to be overturned. See Selle & Another –vs- Motor Boat Co. Ltd & Others [1968] E.A. 123.

10. Analysis of the Evidence and Issues for determination

Careful analysis of the testimonies in the proceedings by **D1** and **D2** shows that PW1 was not on duty on that day. **D1- George Morara** says: On **24/04/2004** he [PW1] was on off. He was not on duty and injured as alleged. In cross-examination, he said: At that time on 24/04/2005, there was no supervisor for the plaintiff because they were not working on that date.

DW2- David Kichirchir Koech from Kipkebe a clinical officer. He is also a custodian of the medical record including the register and treatment cards. He says at Page 58, on 24th April 2005, the OPD register is blank. It was weekend and most of the workers were off. It was Sunday to be precise. On that day I was however at work. I never treated any patient on that day. We do not issue treatment cards at our clinic facility. On P. Exhibit 2, we do not issue it because we did not issue treatment cards.

11. Issues for determination

1. Was the Respondent an employee of the appellant?
2. Was the Respondent injured on 24/04/2005?
3. Was the damages awarded by the trial Magistrate excessive?

12. Findings

1. It is not in dispute that the respondent was not at the material period i.e April 24/04/2005 in the employment of the Appellant.
2. Even the analysis of the proceedings testimonies, especially **D1 & D2**, the respondent was neither at the place of work, at the material day as it was a Sunday, a day of rest. Neither did he attend the dispensary as alleged. The treatment card he produced in court does not emanate from the appellant's dispensary as P.M testimony of **D2** – a clinical officer then employed at the said

dispensary.

3. The description of the injuries on the respondent, cut wound and piercing of eye pain by the doctor, would in my view, attract no more than Kshs.30,000 in general damages.

Therefore, I would award damages as follows:

General damages	-	Kshs.30, 000
Special damages	-	<u>Kshs. 6, 500</u>
		<u>Kshs.36, 500</u>

13. Conclusion

Therefore the Trial Magistrate erred in law in not sufficiently taking into account all the evidence presented before him and in particular the evidence presented on behalf of the defendant.

For those reasons, this appeal has merit. Therefore the appeal be and is hereby allowed with costs.

Dated and delivered at **Nyamira** this 31st day of **August** 2017.

C. B. NAGILLAH

JUDGE

In the presence of:-

N/A for the Appellant

N/A for the Respondent

Mobisa - Court Clerk