



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 42 OF 2009

NELSON MLEWA

GILBERT MLEWA MKARE as Administrators of

DANIEL MLEWA KALAMA (Deceased).....APPELLANT

-VERSUS-

JOSEPH SALIM KALAMA.....RESPONDENTS

(Being an appeal from the Judgment dated 2nd July 2009 of Honourable J. Nduna, SRM Kilifi delivered on 11th July 2009 by J. Gandani, SRM)

J U D G M E N T

The respondent filed civil suit number 775 of 2007 before the Kilifi SRM court claiming damages against the appellant. It was the respondent's case that he was involved in an industrial accident on 28/7/2003 while working for the appellant. The trial court assessed liability at 70:30% in favour of the respondent and awarded him kshs.300,000/= as general damages.

Being dissatisfied with the award the appellant filed this appeal. The grounds of appeal are that the trial court erred by finding that the respondent was employed by the appellant, that the trial court erred in holding that the respondent had a cause of action against the appellant, that the respondent did not prove his case on a balance of probabilities, that the appellant's submissions were not considered, that respondent's evidence was full of contradictions, that the amended plaint was totally defective and that the award of shs.300,000/= is inordinately high in the circumstances.

Mr. Odhiambo appeared for the appellant. Counsel submit that the respondent did not prove that he was employed by the appellant. The **Employment Act No. 11 of 2007** defines an employee as a person employed for wages or salary and includes apprentice and indentured learner. The respondent testified, that he was employed as a casual labourer. He was born in 1985 and was 19 years in 2008 when he testified. It is submitted that the evidence is contradictory. Further, the respondent testified that he had worked for 1½ years yet he was injured in 2003 which he alleged to be the same year he was employed.

It is further submitted that DW2 is the one who used to operate the posho mill after taking over from PW2. The defence evidence established that the respondent was employed by the appellant. DW2, the appellant's wife was the one running the posho mill and denied employing the respondent. The appellant testified that the respondent was employed in 2007 as a herds boy and used to be paid kshs.1000/= monthly. The trial court erred by holding that the respondent was employed by the appellant. Further, counsel manifests that the amended plaint was bad in law and an abuse of the court process. Counsel faults the court on its findings on liability and the awarded damages. According to appellant, should the court find in favour of the respondent, then the respondent should be held 80% liable and an award of kshs.200,000/= on 100% basis is adequate compensation.

Ms Njoroge Mwangi Advocate appeared for the respondent. It is submitted that the judgment of the trial court is proper. According to counsel the respondent was employed by the appellant. The accident occurred in 2003. DW2 moved to the kiosk and the respondent was the one running the posho mill. None of the defence witnesses were present during the accident. It is the appellant's wife who organized to have the respondent treated. There was oil spillage from the machine and that was part of the cause of the problem.

This is a first appeal and I have to evaluate the evidence adduced before the trial court. Three witnesses testified for the respondent. The respondent testified that on 28/7/2003 he was working for the appellant as a posho mill attendance. He was 17 years then. On that day a chicken entered the machine room and it entered inside the machine. The machine started making noise. He tried to check what was happening but in the process slipped due to the oil spill on the floor. His right hand was trapped by the machine belt and he got injured. He had worked for one year before he got injured. At that time PW2 was working at the kiosk. The appellant's wife paid the medical expenses.

PW2 **Benson Shida Kambi** testified that he too used to work for the appellant. He was employed in 2001 and left employment in 2005.

The respondent was employed in 2003 and PW2 was moved to attend to a kiosk. On the 28/7/2003 he was working at the kiosk when the respondent was injured at the posho mill. The respondent went to the kiosk and PW2 applied spirit to the injured fingers. The appellant's wife organized for the respondent to be taken to hospital in Kilifi. PW2 **Doctor Ajani Adebé** examined the respondent on 26/11/2007. He summarized the injuries as amputation of the 2nd, 3rd and 4th fingers of the right hand. The injury led to permanent incapacity. The amputation resulted in defective power and precision grip.

DW1 **Nelson Lewa Mkare** is the appellant's son. His evidence is that **Benson Shida** (PW2) used to work at the posho mill between 2001 and 2002. In 2002 Benson was moved to the kiosk. The respondent is their neighbour and never worked for his father. DW2 **Patrick Kazungu Nzai** used to be the appellant's employee between 2005 and 2008. It is his evidence that he came to learn that PW2 had been employed as the posho mill attendant before he was employed.

DW3 **Charo Katana Ngala** is the appellant's neighbour. It is his evidence that the respondent was not employed by the appellant. The appellant simply used to help at the posho mill and would be given two packets of maize flour at the end of the day. He confirmed that the respondent was injured on 28/7/2003 at about 2.15pm. DW4 **Selina Ngandi Ngala** is the appellant's neighbour. It is her evidence that the respondent never used to work for the appellant.

DW5 **Grace Mlewa** is the appellant's wife. Her evidence is that on 28/7/2003 she saw the respondent running from the posho mill. He was injured. He told her that he had been injured by the posho mill. She organized two people to take the respondent to hospital. At that time it was PW2 who was the one attending to the posho mill. The respondent was about 17 years then. She paid the hospital bill. DW6, **Daniel Mlewa Mkare** used to work with the customs department. He is the appellant. He testified that he employed the respondent in 2007 as a herds boy paying him kshs.1000/= per month. He denied employing the respondent as a posho mill attendant.

The issue for determination are:-

- 1) Whether the respondent was injured on 28/7/2003.*
- 2) Whether the respondent was employed by the appellant*
- 3) Whether the respondent was entitled to damages and if so whether the award by the trial court is excessive.*

It is the evidence of the respondent that he was injured by the posho mill on 28/7/2003. That evidence is corroborated by the evidence of PW2, DW3, **Charo Katana Ngala** and DW5, the appellant's wife. PW3, the medical Doctor also confirmed that the respondent's three fingers were amputated. It is established that the respondent was indeed injured while at the posho mill.

The appellant contends that he did not employ the respondent. It is clear from the evidence that there was no formal employment letter. The evidence on record does not confirm that the respondent was the one operating the posho mill when the accident occurred. DW5, the appellant's wife testified that she saw the respondent running from the posho mill stating that he had been injured by the posho mill. The main contention by the appellant is that it was PW2, **Benson Shida Kambi**, who was expected to run the posho mill. This contention is easily outweighed by the fact that PW2 was at the material time running the kiosk. There is no evidence that one could run the kiosk and the posho mill simultaneously. DW2 **Patrick Kazungu's** evidence does not help the appellant's case. He was employed in 2005 after PW2 had left. He was not conversant with the events of 2003. Further, the evidence of the two neighbours cannot assist the appellant's case. They did not know the arrangement between the appellant and the respondent. According to DW3, the respondent was simply assisting. How did he know that he was simply assisting and had not been employed.

In my view the respondent was employee of the appellant. It does not matter whether the respondent was below 18 years or not. The respondent was the one running the posho mill while PW2 was running the kiosk. The evidence proves an employer - employee relationship between the two.

It is the respondent's evidence that while the posho mill was running, a chicken entered and it was trapped. The machine was making noise. While trying to check he slipped and his hand was caught by the posho mill belt. There is no rebuttal from the appellant that there was no oil spillage on the floor of the posho mill. It was possible for the respondent to switch off the mill first before checking. That is why the trial court apportioned blame on the respondent. However, there is the element that the posho belt had not been covered, there was no protective gear like gumboots or gloves and the floor was slippery. These issues are pleaded in the plaint and were proved.

The original plaint was dated 5th December, 2007. It was filed on 20/12/2007. The appellant entered appearance on 7/1/2008 and filed defence on 18/1/2008. A reply to the defence was filed on 28/1/2008. An amended plaint was filed on 22/1/2008. The amendments include change of the respondent's surname from **Mkala** to **Kalama** and introduction of paragraph 7 which indicates that the respondent was right handed and lost use of the right hand. The body of the amended plaint indicate that the amendment was done by consent on 2/10/2008. The proceedings of 2/10/2008 did not capture that. However, there is an amended defence that was filed on 20/2/2008. It is clear to me that parties must have dismissed on the issue of amendment. I see no issue with the amended plaint.

The last issue involves the amount of general damages awarded by the trial court. There is no dispute on the injuries suffered by the respondent. The respondent was 17 years old and he will have to live the rest of his life with that permanent disability. In the case of **SINO HYDRO CORPORATION LTD -V- DANIELA ATELA KAMUNDA [2016]eKLR**, kshs.600,000/= was awarded on 4/4/2016 for amputation of two fingers of the right hand. In the case of **JAMES KURIA IRUNGU -V- MURANGA TIMBER LTD [2004]eKLR**, KSHS.200,000/= was awarded for amputation of 2nd, 3rd and 4th fingers of the left hand.

Given the injuries of the respondent, I do find that the award of kshs.300,000/= is not excessive. The trial court was fair in the circumstances.

In the end, I do find that the respondent was employed by the appellant. The respondent was injured while on the course of his duty. The appellant was mainly to blame for the accident. The appeal lacks merit and is dismissed with costs.

Dated and signed at Meru this.....day of.....2017.

SAID CHITEMBWE

JUDGE

Dated, signed and delivered at Malindi this 17TH day of OCTOBER, 2017

WELDON KORIR

JUDGE