



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

HIGH COURT CIVIL APPEAL NO. 80 OF 2015

(From the original civil suit No.471 of 2009 of Principal Magistrate at Keroka)

KIPKEBE LIMITED.....APPELLANT

-VERSUS-

PETERSON ONDIEKI TAI.....RESPONDENT

J U D G M E N T

This is a civil appeal from the judgment and Decree of **Hon. Were (S.R.M.)** dated 15th day of December 2010, in the original **KEROKA SRMCC NO. 471 of 2009**.

The plaint was filed by the Respondent-Plaintiff, Peterson Ondieki Tai on 16th October 2009 at Keroka Court for breach of statutory duty as a result thereof the plaintiff alleges to have suffered injuries at the place of work, at Kipkebe Company Ltd, the Defendant –appellant.

The said Defendant filed his defence and the matter proceeded for hearing. The trial court apportioned liability on the basis of 50% - 50% between the Plaintiff and the Defendant.

In his judgment the trial Magistrate awarded Kshs.100,000 in general damages and 6500 for special damages plus costs of the suit and interest.

The appellant being dissatisfied has now appealed against the said judgment and Decree of **Hon. Were (S.R.M.) at Keroka SRMCC NO. 471 of 2010**.

In his memorandum of Appeal, he sets out his grounds of appeal as follows:-

- 1. The Learned trial Magistrate erred both in fact law when the same entered judgement in favour of the plaintiff whereas there was express admission on the part of the Respondent to the effect that the Appellant and its employees inclusive the Respondent does not work on a Sunday when the accident the subject of the proceedings herein are alleged to have taken place.**
- 2. The learned trial magistrate erred both in law and in fact in failing to find that the Respondent having injured himself and having admitted so, no negligence or liability could be attributed and/or inferred against the Appellant.**
- 3. The learned trial magistrate erred in law and in fact by proceeding to assess and award the Respondent damages whereas the Respondent failed to prove that he sustained any and/or**

the purported injuries, in view of the fact that medical evidence adduced were insufficient and of no probative value.

- 4. The learned trial magistrate erred in law and in fact by awarding the Respondent general damages in the sum of Kshs.90,000/= which damages were excessive in the circumstance and not proved at all.**
- 5. The learned trial magistrate erred in law and in fact by holding the Appellant liable at 50% whereas the evidence on record did not disclose any negligence or breach of any duty of care on the part of the Appellant and neither was the same proved or at all.**
- 6. That learned trial magistrate erred in law and in fact, by failing to dismiss the Respondent's suit with costs to the Appellant.**
- 7. It is proposed to ask this honourable Court for orders that:-**
 - a. The judgment and/or Decree of the learned trial magistrate dated 15th day of December 2010 be set aside and/or quashed.
 - b. The Honourable Court be pleased to substitute an Order dismissing the Respondent suit in the subordinate Court vide the Original **KEROKA SRMCC NO.417 OF 2010**
 - c. Costs of the Appeal herein and those incurred in the subordinate Court be borne by the Respondent.
 - d. Any such/or further Orders that the Honourable Court shall deem just and expedient in the circumstance.

Appellant's Submissions

The issue for determination are as follows:-

- i. Whether the Respondent was on duty on 15th May 2005 and whether he sustained the alleged injuries while on duty.**
- ii. Whether the appellant was negligent and/or in breach of its duty.**
- iii. Whether the award in general damages was excessive and/or inordinately high as to warrant interference by this honourable court**

15th May, 2005 and whether he sustained the alleged injuries while on duty, must be answered in the negative.

This court in its reading of the proceedings, finds the position to be, in the negative.

On issue for determination, that is, whether the appellant was negligent and/or in breach of its duty.

It is trite law in evidence that he who asserts must prove his case. No evidence was adduced by the plaintiff. In such cases, the burden of proof lies with whoever would want the court to find in his favour in support of what he claims.

Section 107 of evidence Act succinctly states:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

And **Section 108 of Evidence Act**, further states thus:

“The burden of proof in a suit or proceeding lies on that person who would fail **if no evidence at all were given on either side.**”

Two legal authorities are pertinent hereto:

1. **Dave .vs. Business machine Ltd [1974] E.A. of where the Court held:**

Now if an appearance had been entered and the defence filed and if only failure on the Defendant's part had been failure to appear, either personally or through his advocate on the day the suit was called on for hearing, then I think the plaintiff ought to have been called upon formally to prove his claim, that is to say, to prove everything the burden of proof of which, on the pleadings, lay on him in order to establish his claim. [He did not do so].

The respondent's counsel, M/s Obaga & Company were duly served with the written submissions by the firm of M/S O.M. Otieno & Company advocates for the appellant, they accepted the service by stamping, dating and signing but did neither put in their submissions nor appeared

The role of the appellate court

This being a first appeal, this court is mandated in law to hear the appeal herein by way of rehearing the case. This court is required to consider the facts and the law as regard the appeal before it. This court is further required to reconsider and reevaluate the evidence adduced before the trial magistrate court so as to reach its own independent decision. In reaching its own decision this court is required to put in mind the fact that it neither saw nor heard the witnesses who testified before the trial magistrate's court (**see Selle .VS. Associated Motor Boat Co. ltd [1968] E.A 123.**)

In the present case, the proceedings reveal that the only testimonies the court relied on were for the Defence. **DW1-Joseph Mbugua**, he admitted that the plaintiff was an employee of the Defendant Company but said no work is done on Sundays. DW2 did corroborate this fact that there was no entry for the plaintiff in O.P.D register for 15/5/2005. DW3 also stated that they don't work on Sundays.

Therefore the first issue for determination that is whether the respondent was on duty or to appear, either personally or through his advocate..... The plaintiff ought properly to have been called upon formally to prove his claim, that is to say, to prove everything the burden of proof of which, on the pleadings, lay on him in order to establish his claim”.

The same was endorsed in case of

(ii) **Susan Mumbi .vs. Kefala Grebedhin (Nairobi HCCC No.332 of 1993) where Justice Juma** stated:

“The question of the court presuming adverse evidence does not rise in civil cases. The position in civil cases is that whoever alleges has to prove. It is the plaintiff to prove her case on a balance of probability and the fact that the Defendant does not adduce any evidence is immaterial”.

From the reading of the court proceedings, the plaintiff did not prove negligence and or breach of duty as alleged in his statement of claim or plaint.

On (iii) issue for determination, that is, whether the award in general damages was excessive and/or inordinately high as to warrant interference by this honourable court.

For the injuries of the soft tissue nature itemized as:

- i. **Deep cut wound on the left leg**
- ii. **Chest contusion**

iii. Bruises on the left shoulder

An award of Kshs.90,000 appears in view, excessive in the circumstances.

Therefore, for me a reasonable award would be Kshs.30,000.

On this aspect of damages, the trial court proceeded on wrong principles, or misapprehended evidence in some material respect.

Therefore the Respondent failed to prove that he was injured on material day, the judgment/Decree of the trial court dated 15th December 2010 be and is hereby set –aside and the appeal hereof be and is hereby allowed.

It is so ordered.

Dated at Nyamira this 18th day of March, 2016

C.B. NAGILLAH

JUDGE

In the presence of:-

Nyamwange hold for O.M. Otieno for the appellant

Obaga (absent) for respondent

Mercy - Court clerk