



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 443 OF 2006

KENYA NUT COMPANY LTD APPELLANT

VERSUS

JOSEPH KABATI MBUGUA RESPONDENT

JUDGMENT

The respondent herein was the plaintiff in the lower court while the appellant was the defendant. In the lower court the respondent pleaded that he was employed by the appellant and while on duty loading coffee, the tractor driver drove off without notice whereby the respondent was hit on the leg and shoulder resulting in him falling down. He sustained injuries to his leg and teeth.

He brought this suit against the appellant for damages and blamed the company for failing to ensure his safety at his place of work and also blamed the appellant for failing to provide or maintain safe means of work. He also pleaded that the appellant did not instruct him on the dangers likely to arise in connection with his work or sufficient training and supervision. In the premises he was not provided with a safe system of work.

The tractor driver was blamed for driving without due care and attention to other workers and in particular the respondent. He was therefore careless, negligent and reckless. It was also pleaded that he drove at an excessive speed in the circumstances and thereby causing the accident.

The plaintiff therefore prayed for general damages, special damages, costs and interest. The defendant denied the claim and called for strict proof. Particulars of negligence and injuries suffered by the respondent were also denied.

On the other hand it was pleaded without prejudice that if the respondent suffered any injuries, he was the sole cause or substantially contributed to the same. In that regard, he was accused of failing to exercise due care and diligence in the performance of his duties, thereby exposing himself to the risk of danger or injury which he knew or ought to have known.

It was also alleged that he performed his duties sloppily, carelessly and negligently. He did not keep any or proper look out and failed to have any or any due regard to his own safety.

After the hearing the learned trial magistrate found in favour of the plaintiff and awarded him Kshs. 100,000/= general damages, Ksh. 3000/= special damages costs and interest.

The appellant was dissatisfied with the decision of the lower court and lodged this appeal. The appellant

faulted the trial magistrate for not giving consideration to the defence and failing to appreciate its submissions. The judgment is said to have been based on wrong premises given the facts of the case and that the award of general damages was a mis-direction. The finding of the defendant's liability was contrary to the evidence.

The respondent testified in the lower court and called Dr. Kiama Wangai as his witness who produced the medical report on him. The appellant called one Peter Okemwa Okari said to have been a supervisor of the appellant on the day the alleged injury took place.

Both counsel have filed submissions which I have noted. As to the occurrence leading to the injuries to the respondent, the only evidence is that of the plaintiff which is resisted by the defence witness. So it is his word against that of the defence witness.

As required of me following the evaluation of the evidence on record, I note that although employees of the appellant were supposed to sign some contracts, which is confirmed by the evidence of the defence witness, no such contract was produced because these documents were retained by the appellant.

There was a copy of a master roll which was produced by the defence witness but the appellant's stamp does not appear thereon. It is the appellant's case that the respondent was not on duty on the alleged day and therefore his claim cannot be sustained. On the other hand the respondent asserts that he was on duty and was injured in the way he had described. He was a casual employee but did not have any document.

He gave the name of the tractor driver as Ndungu and stated that the names of employees were not being recorded. They were paid upon loading the coffee. The defence witness who was on duty on the day the respondent says he was injured said he knew the respondent. Although he was at the loading point in his words,

"I did not see the plaintiffs get injured". That statement appears incriminating in that it refers to the presence of the respondent at the scene although this witness did not see him being injured.

The respondent told the lower court that after the injury he went to Kirwara supposedly a medical clinic after being given Kshs. 200/= by the manager. This was on the following day. He tendered treatment notes MF I which was marked by the court. In addition to the foregoing, in his plaint he gave the registration number of the appellant's tractor as KTW 908 which the defence witness admitted belonged to the appellant.

On a balance of probability the respondent proved he was performing duties for the appellant as pleaded and that he was injured. In his position on the ground, there is no way he could have controlled the starting and driving of the tractor and therefore the driver was solely to blame. The appellant being the owner of the tractor is vicariously liable.

The respondent suffered a blunt injury to the right foot and mouth leading to loose teeth. These were soft tissue injuries and confirmed by Dr. Wangai who produced the medical report on the plaintiff. There is no evidence of possible denture replacement which is mentioned in the doctor's report

Going by the authorities cited and addressed by the learned trial magistrate, the award of Kshs. 100,000/- a general damage was within the range of comparable injuries. I have no reason to disturb the same. Special damages were pleaded and specifically proved. I see no merit on this appeal which is hereby dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 14th Day of June, 2016.

A. MBOGHOLI MSAGHA

JUDGE