



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 238 OF 2007

S.S. MEHTA & SONS LTD.....APPELLANT

VERSUS

STEPHEN NDUNGU MWAURA and FIDELIS MWERU KAMAU

(Suing as personal representatives of **GEORGE MWAURA NDUNGU**
(Deceased).....**RESPONDENT**

JUDGMENT

1. The Appellants filed CMCC No. 7145 of 2004 as personal representatives of the late George Mwaura Ndungu (“*deceased*”) against the Respondent seeking damages under the Fatal Accidents Act and the Law Reforms Act.
2. It was the Respondent's claim that the deceased was employed by the Appellant as a mechanic. That while in the course of his duty on 23rd July, 2003, the deceased while entering a room where the Appellant charge batteries in order to change his clothes, was electrocuted and as a result was fatally injured.
3. In its statement of defence, the Appellant denied that the deceased was employed as alleged and that the accident occurred due to the Appellant's negligence.
4. None of the Plaintiff's witnesses witnessed the occurrence of the accident. The 2nd Respondent (PW1) testified that the deceased was employed by the Appellant as a mechanic. She produced the deceased letter of appointment dated 26th January, 2001 and stated that the deceased used to earn KShs. 6,689/=. She stated that she and the deceased had two children Elizabeth Wambui and Rosemary Njambi but that Elizabeth was a child from her previous marriage. She said the children were aged 14 and 9 years and produced their birth certificates. It was her testimony that the deceased used to give her KShs. 4,000/= for upkeep monthly.
5. The 1st Respondent (PW2) testified that on 24th July, 2003 he visited the Appellant's premises where he had the chance of seeing the room where the alleged accident occurred. He stated that the room was small, water logged and rough. He stated that he was issued with a letter dated 19th September, 2008 by the Appellant's manager (P. Exhibit 7). He produced the letter to prove that the deceased was an employee of the Appellant. He stated that the Appellant gave out KShs. 8,000/= for the deceased's coffin. That he spent KShs. 10,000/= for transport and food for mourners and announcements and KShs. 3,450/= for mortuary charges. He produced receipts for printing of programme for KShs. 2,500/= and for food for KShs. 4,900/=. He stated that the deceased was aged 34 years at the time of his death. That the deceased had two children by the names Elizabeth and Rosemary and used to give him KShs. 2,000/= per month to pay school fees for the deceased's siblings.

6. Stephen Kihungi Kivoe (PW3) testified that he was the deceased's colleague. He stated that he was called on 23rd July, 2003 and informed that the deceased had been electrocuted and that he was required to report to work. He stated that he found the deceased's clothes and shoes in the work shop where they used to change clothes. He stated that when he got into the room, he found that water had been poured and stated that the floor had been repaired after the incident.
7. Chandana Ratnayaka (DW1) testified that the deceased had problems at work because he was always drunk during end months. He stated that he on 12th June, 2003 he gave the deceased a suspension letter because of his drunkenness. That on 22nd July, 2003 he issued the deceased with another suspension letter for fighting with a co-worker on 16th July, 2003. He stated that the deceased was admitted to hospital after the fight and when he resumed work he was issued with a suspension letter. It was his testimony that the suspension was with effect from 16th July, 2003. He testified that the accident occurred after the deceased services had been terminated therefore the Appellant was not to blame. He stated that the deceased was found in the electric shop which was not a changing room as alleged. He stated that only electricians kept their jackets in the changing room and that the deceased's clothes were never found in the changing room. Referring to the master roll he stated that the deceased's name had been crossed since he was no longer an employee of the Appellant. He admitted that repairs had been done on the floor of the changing room and that there was a faulty electrical installation in the Appellant's premises. On cross-examination, DW1 stated that the deceased went to the Appellant on 22nd July, 2003 and indicated that he would go to work on 23rd July, 2003 and that is when he wrote him a letter. He stated that the letter of termination was served on the deceased on the morning of 23rd July, 2003. He explained that the deceased father was given KShs. 8,000/= by the Appellant as welfare assistance.
8. Lawrence Liboi Omulekuba (DW2) who is a welder/fitter with the Appellant testified that the deceased was fond of reporting to work drunk on the days he had money. He stated that on the material day he saw the deceased in the electric shop but when he called him he did not respond and Mr. Okondo who DW2 was with told him to leave him alone. He testified that there were designated changing rooms and no one was to use the electric shop as the changing room. He stated that he did not know of the deceased's termination from service. He also stated that he did not hear of any electrical fault in the premises.
9. Kennedy Onyango Okoth (DW3) who was an electrician disputed that electric installation at the Appellant's premises was faulty.
10. The learned trial Court heard the matter and found in favour of the Respondent and entered judgment in the following terms:-

Loss of dependency	KShs. 642,187.20/=
Pain and suffering	KShs. 20,000/=
Loss of expectation of life	KShs. 70,000/=
Special damages	KShs.10,250/=
Total	KShs. 742,437.20/=

11. Being dissatisfied with the trial court's judgment, the Appellants filed this appeal on the grounds that:
 - a. *The learned trial magistrate erred in fact and in law by failing to give a concise statement of points of determination and reasons for her judgment pronounced on 8th March, 2007.*
 - b. *The learned trial magistrate erred in law and in fact in holding the defendant liable without any or any sufficient evidence in that regard having been adduced.*
 - c. *The learned trial magistrate erred in law and in fact in failing to dismiss the suit for want of proof fault or negligence on the part of the Defendant.*
 - d. *The learned acting senior principle magistrate erred in law in failing to hold the deceased liable for the accident even after respondent had failed to specifically traverse*

paragraph 6 of the appellant's defence vide a reply to defence which act constituted an admission by the Respondent and therefore necessitated the dismissal of the case.

- e. *The learned trial principal magistrate erred in fact and in law in disregarding the submissions filed by the Appellant and in particular on the issue of damages both under the Law Reform Act as well as The Fatal Accidents Act i.e. pain and suffering 20,000/= for loss of expectation of life in the sum of 70,000/= and loss of dependency in the sum of 642,187.20*
 - f. *the learned trial magistrate erred in awarding special damages without considering whether the Respondent was entitled to the special damages or not.*
12. This being a first appeal, it is my duty to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of hearing the witnesses testify. (See: **Peter v. Sunday Post (1958) at pg. 429**).
13. It was submitted on behalf of the Appellant that the Respondent did not establish that the accident occurred in the course of the deceased employment with the Appellant. That no evidence was tendered to establish that the alleged electrocution of the deceased warranted the trial magistrate to find fault on the Appellant. It was submitted that the Respondent never filed a reply to defence constituting an admission thereby necessitating the dismissal of the suit. On damages, it was argued that there was no evidence as to the exact time the deceased died therefore no award should be made under pain and suffering. It was also argued that the magistrate erred in awarding both under the Fatal Accidents Act and the Law Reform Act. It was further argued that special damages were not proved.
14. On its part, the Respondent submitted that PW3 demonstrated that the deceased was electrocuted while in the changing room inside the Appellant's workshop. It was submitted that there was sufficient evidence that the room was water logged and rough at the material time. It was further argued that receipts were produced to prove special damages that were awarded.
15. It is an undisputed fact that the deceased was electrocuted within the Appellant's premises. The evidence establishing liability is that of PW3 and DW1. PW3 who stated that he was called after the deceased had been electrocuted stated that he found the deceased's clothing in the changing room within the workshop. He stated that the changing room was water logged a fact that has not been controverted by the Appellant. DW1 on his part confirmed that in deed there was a fault in electrical connection occasioning the deceased's death. In my view therefore the question that begs is whether the deceased was at the time an employee of the Appellant and if so to what extent is the Appellant liable. The Appellant produced a number of letters to establish that the deceased was at the time not their employee. While DW1 stated that the letter of termination of employment was served in the morning of 23rd July, 2003, and that the accident occurred after the deceased had been served with the letter. That aside, it came out in the Appellant's evidence that the deceased had been in hospital for having fought with a colleague. The Appellant did not bother to bring that colleague to testify to satisfy that indeed the deceased was in hospital and not at work as alleged and that the deceased's services were terminated as a result of the alleged fight; secondly, the Appellant did not avail Mr. Okondo whom DW2 stated that he was with the deceased. In light of the foregoing, it is my analysis that the failure to avail such vital witnesses was deliberate since their testimonies could be detrimental to the Appellant. I say so because it is a presumption in the law of evidence that a party who has in his possession evidence which he fails to call, that evidence is presumed to have been adverse to him. It was never suggested that the two were no longer in the employment of the Appellant or they could not be found to clarify the issues. In the absence of such an explanation, my view is that the deceased was in the employment of the Appellant at the material time and that the electrocution was caused as a result of an electrical failure as stated by DW1 and I find the Appellant liable. On apportionment of liability I find the Appellant fully liable for the reason that it did not maintain a safe working environment as required. The deceased could not have anticipated the dangerous condition of the room i.e. it being waterlogged as it were. Secondly it was very negligent to leave a room waterlogged with a faulty electric connection. Having so stated I see no reason to interfere with the trial court's decision on liability. On quantum, I am guided by the pronouncement in **Loice Wanjiku Kagunda v. Julius Gachau Mwangi C A No. 142 of 2003 (UR)** where the Court held:-

“We appreciate that the assessment of damages is more like an exercise of

judicial discretion and hence, an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (See Mariga –vs- Musila (1984) KLR 257.)

16. The Appellant took issue with the manner in which the trial court awarded damages under the Law Reform Act and the Fatal Injuries Act, particularly it was the Appellant's position that their submissions before the trial court was that the exact time of the deceased's death was unknown therefore an award under pain and suffering was unsustainable. From the evidence on record the time frame of the accident could be inferred. I agree with the Appellant that it is hard to for sure tell how much time it took before the deceased died after being electrocuted. However, this is not to say that he did not undergo any pain at all. An conventional award of KShs. 20,000/= as awarded by the trial court was in my view sufficient and I see no fault in the said award. On special damages, I am of the view that the receipts produced met the requirement of section 5 of the Stamp Duty Act, Cap 480 Laws of Kenya and was therefore admissible in evidence. Having said so I uphold the award on special damages as granted by the trial court. In the circumstances, this appeal fails. The Respondent will have the costs of the appeal.

Dated, Signed and Delivered in open court this 22nd day of April, 2015.

J. K. SERGON

JUDGE

In the presence of:

.....**for the Appellant**

.....**for the Respondent**