



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 48 OF 2010

KENYA NUT COMPANY..... APPELLANT

VERSUS

YATTANI TADI GALGALO..... RESPONDENT

*(Appeal arising from the judgment of Hon. Mrs. L. Mbugua, Principal Magistrate
Karatina in SRMCC No. 51 of 2008)*

JUDGMENT

1. By a plaint file on 27th May 2008 the Respondent sued the Appellant in respect of injuries arising out of an accident on 9th January 2007 while the Respondent was guarding the Appellant's premises at Karatina as a result of which the Respondent was electrocuted as the gate was connected to alive wire thereby occasioning injuries to the Respondent.
2. The Respondent attributed the same accident and subsequent injuries to the negligence of the Appellant which were pleaded in paragraph 5 of the Plaint.
3. On 13th June 2008 the Appellant filed a defence wherein the same denied the contents of the plaint and in the alternative and without prejudice stated that the same was caused by the sole or contributory negligence and or breach of statutory duty on the part of the Respondent.
4. At the close of the pleadings the matter proceeded for hearing when Respondent through PW 1 MAINA NDIRANGU testified that the Respondent got injured when closing the company gate that had been connected to live wire and that at the time of examination the Respondent complained of occasional blurred vision on left eye, numbness and tingling sensation and pain on left side of neck, left upper limb extending to fingers among other injuries which he classified as grievous harm.
5. The Respondent testified that he was a watchman at the Appellant's company. At 9.30p.m. he went to close the gate after the day watchman had left when he was electrocuted. It was his evidence that he had worked before then for three and half years and that the gate is connected to electricity but was not told how it is connected and disconnected. It was his evidence that he had not been informed that there was a risk of the gate having live electricity. Under cross examination he said that he did not know how electrical fence works and that for all the time the gate had no live electricity.
6. In her defence the Appellant called David Kanyago who stated the appellant had no live fence and therefore when the report was made they checked and found live wire and under cross examination confirmed that it was their neighbour who had connected electricity to pass through their gate.
7. Based upon the said evidence L. Mbugua then Ag. PM on liability found the Appellant liable at 100% since the appellant did not join the neighbour and since the Respondent had no way of determining if the gate had live wire and on quantum awarded the Respondent Kshs.350,000/- in general damages.

8. Being aggrieved by the said decision the Appellant file this appeal and raised the following grounds of appeal;-

- (i) The learned magistrate erred in law and in fact by finding that the Defendant was 100% liable.
- (ii) The learned magistrate erred in law and in fact in finding that the Defendant had failed to discharge its duty to the Plaintiff for providing a safe working environment.
- (iii) The learned magistrate in finding that the Plaintiff 100% liable when indeed no negligence had been proven as against the defendant.
- (iv) The learned magistrate erred in law and in fact by ignoring the plaintiff testimony that the alleged accident was an isolated incident which had never occurred and thus not capable of being anticipated and/or provided against.
- (v) The learned magistrate erred in law and in fact in awarding damages that were manifestly excessive in the view of the injuries sustained by the plaintiff.
- (vi) The learned magistrate erred in law and in fact in failing to give due consideration to the contents of the plaintiff's submissions and more specifically the authorities on quantum.

9. Directions were given that the appeal herein be determined by way of written submissions which have now been filed.

APPELLANT'S SUBMISSIONS

- 10. On behalf of the appellant it was submitted that there was no negligence on the part of the same and that negligence was not proven by the Respondent. It was submitted that it was the Respondent's evidence that for 3½ years there had never been electricity on the fence and that nobody had been electrocuted. It was therefore submitted that it was an isolated incident.
- 11. It was submitted that the Respondent did not need evidence to show how the Appellant was negligent and what the Appellant should have done to avoid the said accident. It was therefore submitted that there was no link between Appellant's conduct and lack thereof that led to the Respondent being injured and in support thereof the case of TIMESALES LTD V STEPHENE GACHIE HIGH COURT AT NAKURU CIVIL APPEAL NO. 79/2000 was relied upon. Reliance was further placed on the case of EVANS V MORRIS MOTORS (1961)2QB385.
- 12. On quantum it was submitted that the trial magistrate erred in law and in fact in awarding damages that were manifestly excessive and based on the case of GREAT LAKES TRANSPORTERS CO LTD V KRA MOMBASA HIGH COURT CIVIL APPEAL NO. 106 OF 2006. It was submitted that the trial court misapprehended the evidence given by PW 1 the Clinical Officer since the injuries suffered by the Respondent were not chronic as was taken by taken by court.
- 13. It was further submitted that the magistrate did not take into account the submissions and authorities on quantum and in particular their submissions for an award of Kshs.40,000/- based on the cases of REGINA NAMATAKA BENNERS VS FARMERS CHOICE CO LTD & ANOTHER of 2005 eKLR and Civil Appeal No. 496 of 2003 NAIROBI HIGH COURT CENTRAL ELECTRICAL INTERNATIONAL CO LTD V MAURICE OMONDI.

RESPONDENT'S SUBMISSIONS

- 14. It was submitted that the danger was foreseeable and real and it was incumbent upon the Appellant to ensure that such danger was averted. The Appellant failed to inform the Respondent of the inherent danger. It was therefore submitted that the Appellant owed a duty to provide a safe system of work to the Respondent and the same breached that duty. Reliance was placed on the case of WALKER VS NORTHUMBERLAND COUNTY COUNCIL (1995) 1 ALLER 737 and

THE WAGON MOUND (2) (1966) 2 ALLER 709.

15. On the issue of quantum it was submitted that the Respondent suffered the pleaded injuries and therefore there was no justification to interfere with the award as per the case of LUKENYA RANCHING COOP SOCIETY LTD V KAVULOTO [1971] EA page 414.

ISSUES

16. From the submissions herein the court identified two issues for determination on the appeal;-

- a. Whether the Respondent had proved his case against the Appellant on liability.
 - b. Whether the award of general damages was manifestly high to be identified now by the court.
1. It is trite law that he who alleges must prove. It was upon the Respondent to prove his case on a balance of probability and to this the Respondent testified that the gate is connected to electricity but was not told how it is connected or disconnected and DW 1 confirmed that when they went to the scene there was a live wire and blamed it upon their neighbour whom as stated by the trial magistrate they did not join as a third party.
 2. It was the duty of the Appellant to inform the Respondent on how to operate the gate in such a way that would not have resulted into injuries and since the Respondent's evidence is that he was not informed how to connect and disconnect the power I therefore find no fault with the trial court holding on liability and would therefore dismiss this ground of appeal.
 3. On quantum according to the medical report produced and as stated herein above as result of the said accident the Respondent developed post traumatic neuralgia of the left side of the body and his left side of the body had partial paralysis as a result of which his service with the Appellant were terminated.
 4. The Appellant court will usually be slow to interfere with the award of damages unless the awards are inordinately low or high. In arriving at an award herein the learned magistrate stated it was based upon the fact that his total recovery had not been achieved and his condition is termed as chronic, I am therefore of the considered opinion that the award of Kshs.350,000/- was rather high taking into account the nature of the injuries sustained by the Respondent.
 5. I would therefore allow the appeal on quantum and reduce the award in quantum to a sum of Kshs.250,000/- having taken into account the case of ELDORET STEEL MILL LTD V Gilbert NGANYI NEHEMIA KAKAMEGA HIGH COURT CIVIL APPEAL NO. 47 OF 2003 (2005) eKLR where in Justice Dulo confirmed an award of Kshs.200,000/- in respect of the Plaintiff who sustained burn injuries.
 6. In the final analysis I dismiss the appeal on liability and partially allow the appeal on quantum by reducing the award on general damages to Kshs.250,000/- with costs and interest from the date of judgment of the lower court.

Dated and delivered at Nyeri this 27th day of June 2014.

J. WAKIAGA

JUDGE

Court: Ruling read in open court in the absence of the parties and the advocates.

J. WAKIAGA

JUDGE

27/6/2014