



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL APPEAL NO. 15 OF 2012

KENYA TEA PACKERS LTD.....APPELLANT

VERSUS

JARED KIPLANGAT KIRUI.....RESPONDENT

JUDGMENT

Jared Kiplangat Kirui, the Respondent herein, filed a compensatory suit against **Kenya Tea Packers Co. Ltd**, the Appellant herein, for the injuries he sustained while in the course of employment with the Appellant. The Respondent accused the Appellant for breaching its statutory and contractual duty to provide him with a safe working environment or a safe system of work. The Appellant defended the suit. The case was heard by Hon. M.O.Okuche vide Kericho C.M.C.C.no.22 of 2011, who in the end gave judgment in favour of the Respondent. The Respondent was awarded Ksh.100,000 as general damages and Ksh. 5,000 being special damages plus costs and interest. The Appellant was dissatisfied hence this appeal.

On appeal, the appellant put forward the following grounds in its Memorandum of Appeal:

1. **That the learned Magistrate erred in law and in fact in finding that the Defendant was 90% liable for the accident the subject matter of the suit.**
2. **That the learned Magistrate erred in law and in fact in awarding Kshs.94,500 ad damages.**
3. **That the learned Magistrate completely erred in granting judgment of aforesaid when the Plaintiff had completely failed to prove his claim.**
4. **That the learned Magistrate erred in law in failing to appreciate that the burden of proof rests on the Plaintiff throughout.**
5. **That, the learned Magistrate misdirected himself and arrived at a wrong decision.**

When this appeal came up for hearing, learned counsels appearing in the matter recorded a consent order to have the same disposed of by written submission.

I have considered the rival submissions. I have also re-evaluated the case that was before the trial court. I think it is convenient at this stage to set out the brief facts of the appeal. I have already stated that the Respondent's claim before the subordinate court was that at all meteriae times he was employed by the Appellant as a casual worker to receive and load packed tea for export at its factory in Kericho. It is the Respondent's argument that the implied term of his employment with the Appellant is that it was the Appellant's duty to take reasonable precaution for his safety while he was engaged upon his work not to

expose him to risk or damage or injury which the Appellant knew or ought to have known to provide and maintain adequate and suitable measures for the safety of the Respondent at work. The Respondent alleged that the appellant breached those statutory and implied terms and as a result he was injured. The appellant denied the respondent's claims. The appellant specifically stated that the respondent was not its employer. It also denied breaching any contractual nor statutory duty to the Respondent. The Appellant further alluded that the Respondent was negligent himself. The learned Senior Resident Magistrate considered the evidence presented by both sides and in the end he awarded the Respondent Kshs.94,500 as net damages. Three witnesses testified in support of the Respondent's case. The Respondent told the trial court that on 23/11/2010 he was loading tea on a truck in the appellant's premises when he got injured. He alleged that the forks of the fork lift were lifted off the trailer making him to lose balance thus falling down. His left foot got into the moving parts of the forklift and was crushed. The Respondent produced a form signed by the Appellant's supervisor showing he was in the Appellant's employment. The Respondent's evidence in cross-examination indicates that the trailer the Respondent was loading belonged to a contracted transporter known as Mutai Transporters. He also indicated that the injury has completely healed. **Dr. Chumyai** (P.W.2) prepared a medical report on the Respondent which indicated that the Respondent suffered the following injuries

- **cut wound to the sole of the left foot**
- **contusion to the left foot**
- **cut tendon on the left foot**

P.W.2 confirmed that the Respondent would heal with no permanent disabilities and classified the injuries as harm.

Geoffrey Sigei (P.W.3), claimed he worked on the material date i.e on 23/11/2011 together with the Respondent for the Appellant. P.W.3 explained how they jumped off the forklift leaving the Respondent remaining on top of the forklift. P.W.3 said that there was no place one can hold on the fork lift as it rotates and that is how the Respondent lost balance and fell down. In cross-examination P.W.3 admitted there were warning signs fixed on the fork lift and that he and his colleagues knew the meaning of those warning signs. The Appellant summoned **Dennis Kipkoech Mutai** (D.W.1) a forklift operator, to testify. He denied knowledge of the accident. D.W.1 claimed that the loaders were not supposed to stand on the for lift but were meant to jump off from the edge of the truck. D.W.1 claimed that on that material date he operated a fork lift when he heard screams. He later learnt it was the Respondent who was screaming. He blamed the Respondent for being negligent and not following signs. Having set out in brief, the case that was before the trial court I now turn my attention to the substance of this appeal. Though the Appellant put forward a total of five grounds, the same may be summarised to two main grounds:

- i. **The Respondent had failed to prove his case on a balance of probabilities.**
- ii. **The award of Kshs.94,500 was unjustified.**

On the first ground, it is the Appellant's submission that the learned Senior Resident Magistrate erred when he gave the judgment in favour of the Respondent yet the Respondent had completely failed to prove his case. I have critically examined the evidence tendered. Though the Appellant denied having employed the Respondent, it comes out clear from the evidence tendered from both sides that the Respondent got injured on 23/11/2011 while in the course of the employment of the Appellant. The Appellant was bound by the statute and contract to ensure that the Respondent worked in a safe working environment. The question is whether the Appellant was negligent. It is clear from the evidence of D.W.1 that the Respondent got injured by the forklift D.W.1 was operating. There is also evidence showing that the forklift had affixed on it warning signs given to the workers. The warning signs was clearly understood by those who worked. The Respondent's colleagues jumped off the forklift but the Respondent remained on top and was later injured. In my humble assessment of the evidence I am convinced the learned Senior Resident Magistrate erred when he found the Appellant 90% liable. The Appellant in my view took all precautions to ensure that its workers were safe. However, D.W.1 the Appellant's forklift operator did not take due care while operating the forklift. He should have first checked whether or not someone was on top of the forklift before moving it. The Respondent's other

colleagues were vigilant and that is why they quickly jumped off the forklift when they noticed it was moving. The Respondent was caught unawares. I find the Respondent 50% liable.

On the quantum, the Appellant avers that the award of Kshs.100,000 was not justified because the Respondent had completely failed to prove his case. Having found the Appellant 50% liable, an award damages must be made. The learned Senior Resident Magistrate was therefore perfectly right to make the award. The Appellant appears not to question the figure given for damages. I have on my part compared the figures given and I am satisfied the same is not excessive nor exorbitant.

In the end, the appeal partially succeeds. For the avoidance of doubt, the appeal is allowed to the extent that the award of damages i.e Kshs.100,000 are general damages plus Kshs.5,000 representing special damages making a total of Kshs.105,000 is adjusted by 50%. The award payable to the Appellant should be 52,500 plus costs and interest. The Appellant is given half the costs of the appeal.

Dated, Signed and delivered in open court this 26th day of June, 2014.

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J.K.SERGON

JUDGE

In the presence of:

N/A K.T.K for Appellant

Mr. Motanya holding brief for Mr. Koko for Respondent