



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO.251 OF 2011

BETWEEN

KIPKEBE LIMITED APPELLANT

AND

BENARD NYANDEGA NYAMBANE RESPONDENT

*(Being an appeal from the judgment and decree of Hon. J. Were, SPM, dated
3rd day of November 2011, in the original Keroka SRMCC No.212 of 2009)*

JUDGMENT

1. The respondent was the plaintiff in SRMCC NO.212 of 2009 at Keroka. He filed the suit against the appellant claiming general and special damages following an accident that occurred at the appellant's premises on 6th April 2007. In his plaint, the respondent stated that he was an employee of the appellant. It was an implied/express term of contract of employment between the respondent and the appellant that the appellant would take all reasonable precaution for the safety of the respondent while he was engaged upon his work not to expose him to risk of damage or injury which the appellant knew or ought to have known to prevent and maintain a safe and proper system of work.

2. However, on or about the 6th day of April, 2007, the respondent was working at Kipkebe Tea Factory spreading tea leaves when he was hit by a conveyor belt on the 4th finger as a consequence of which the finger was amputated; that the respondent suffered pain, loss and damage.

3. With regard to breach of statutory of care the same were particularized in paragraph 6 of the plaint as hereunder:-

A) Failing to make or keep safe at the respondent's place of work.

B) Employing the respondent without instructing him as to the dangers likely to arise in connection with his work or without providing him with any sufficient training in work or without providing any adequate supervision.

C) Failing to provide or maintain safe means of access to the respondent's place of work.

D) In the premises failing to provide a safe system of work.

4. Similarly, negligence was particularized at paragraph 7 of the plaint as hereunder:-

- a) *Failing to take any or adequate precautions for the safety of the plaintiff while he was engaged upon the said work.*
- b) *Exposing the plaintiff to risk of damage or injury of which they knew or ought to have known.*
- c) *Failing to provide or maintain adequate or suitable plaintiff,(sic) tackle or appliances to enable the said work to be carried out safely.*
- d) *Failing to take any adequate measures to ensure that the respondent was not hurt.*
- e) *Failing to provide the plaintiff with any appropriate protective apparatus e.g. gumboots, gloves.*

5. Lastly, the respondent particularized injuries as hereunder:-

- a) *Amputation on the 4th finger.*
- b) *Pain from the hand*

6. And special damages:-

1. The respondent prayed for judgment against the appellant for:-

- a) *Special damages aforesaid (Kshs.6500/=);*
- b) *General damages to be assessed by the Honourable Court;*
- c) *Costs of and incidental to this suit;*
- d) *Interest on (a), (b) and (c) above at court rates;*
- e) *Any other relief that this Honourable Court may deem fit and just to grant.*

7. The appellant filed a statement of defence and denied the respondent's claim in total. The appellant stated that even if the respondent was its employee, which in any event it denied, then the defendant took all reasonable precautions and prescribed such safety measures as were necessary to ensure that all her employees, without exception the respondent included, were adequately protected from risk of damage and/or injury that was foreseeable and could have accrued in the course of their employment. In the alternative, the appellant pleaded that if ever the respondent sustained any injuries, as alleged or at all, which in any event is denied, then such injuries were sustained elsewhere and the same are unknown to the appellant. Particulars of negligence were set out in the defence and included allegations, *inter alia*, that the respondent failed to apply common sense and due diligence in discharging common duties which do not require specialized training.

8. During the hearing the respondent testified that on 6th April 2007 he was on duty at the appellant company's premises. He produced his work identification card as **P. Exhibit 1** though he admitted to the fact that he no longer works at the defendant company. That on the material day, he was drying tea at the factory when the conveyor belt cut his left finger on the lip as a consequence of which he lost his nail. He blamed the appellant for not providing gloves, as the conveyor belt was not covered and that the gloves would have protected him from the conveyor.

9. Furthermore, he alleged that the conveyor needed fencing to prevent contact with the person working as the fencing would prevent one from getting close to the belt. That his immediate supervisor was one David Nyambairo, he was given First Aid and later he was taken to Kipkebe Dispensary. He produced a treatment card as **P. Exhibit 3** and stated that the original was with the company.

10. Later, he was seen by Dr. Ajuoga who prepared a medical report for which he paid Kshs.6500/=. Lastly he confirmed that he had not been fully healed as he still felt pain while working. He wanted to be compensated for pain for the injuries.

11. On cross examination, respondent revealed that he was treated at Kipkebe dispensary by Dr. James and that appellant had sent him to Dr. Ajuoga for the LD/04 Part II to be filled. PW1 also later told the court that since Dr. Ajuoga had died, the appellant sent him to be re-examined by Dr. Ogando who prepared another medical report for him on 14th January 2011.

12. PW2 was Dr. Ezekiel Ogando Zoga of Kisii Level 5 Hospital who confirmed to the court that he examined the respondent on 14th January 2011. That he noted that the respondent had an amputated finger and had prior to coming to him (PW2) been treated at the appellant's local Dispensary. Dr. Zoga also testified that from the treatment notes issued by Kipkebe Dispensary, the respondent's injuries were severe. Dr. Zoga charged Kshs.6500/= for the report he prepared upon examination of the respondent on 14th January 2011.

13. On its part, the appellant called 2 witnesses. DW1, George Morara Nyabingu told the court that he was the check roll clerk at the appellant's firm, his work being to take and keep records of workers on duty, make entries enter dates and days worked by each worker on the checkroll and record the attendance. He produced the records for April 2007 which showed that the respondent was an employee of the appellant and was on duty on 6th April 2007. DW2 also confirmed that the respondent was assigned the duty of plucking withered tea leaves ready for processing.

14. It was also DW1's testimony that on the material day, there was no record of any injury to the respondent; that the respondent worked from morning till evening without any report of injury. He also testified that since the respondent worked the whole day on 6th April 2007 it was not possible that he could have been injured on that day or at all. DW2 stated that there was no way he (DW2) could have been unaware of the respondent's injury since it was him (DW1) who issued medical chits for treatment, and that no medical chit was issued for the respondent on the material day. He also testified that the respondent worked for the entire month of April 2007 and that on 6th April 2007, the respondent checked out at 3.00 p.m. DW1 was however unable to avail evidence of the record for signing out for that particular day.

15. DW2 was Daudi Kipchirchir Koech, a clinical officer at the appellant's dispensary. He told the court that his duties included treating appellant's employees, and keeping documents at the clinic. He stated that on 6th April 2007, he was on duty at the dispensary and that the respondent was not one of the two patients he attended to on that day. Regarding **P. Exhibit 3**, (the treatment notes from Kipkebe Dispensary) DW2 testified that the same could not have been prepared without his knowledge. He produced as **D. Exhibit 2**, a copy of the O.P.D. Register for 6th April 2007.

16. On cross examination, DW2 conceded that he was in fact not on duty at the dispensary on 6th April 2007; that he did not make any entries in the OPD register that day and that what he had produced in court had been obtained from the appellant.

17. After carefully analyzing all the evidence on record, the learned trial magistrate, Hon. Mr. J. Were, reached the conclusion that the respondent had proved his claim against the appellant on a balance of probabilities. He assessed general damages at Kshs.120,000/= and allowed proved specials in the sum of Kshs.6500/= plus costs of the suit and interest at court rates until payment in full.

18. The appellant being aggrieved by the above judgment and decree preferred an appeal to this court. In his memorandum of appeal dated 28th November 2011, the appellant has set out the following grounds:-

1) The learned trial magistrate erred both in fact and in law when the same entered judgment in favour of the respondent whereas the respondent failed to discharge the burden of proof to the requisite standard.

2) *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.*

3) *The learned trial magistrate erred in law and in fact by awarding the respondent general damages in the sum of **Kshs.120,000/=**, together with special damages, which damages were excessive in the circumstance and not proved at all.*

4) *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.*

5) *That learned trial magistrate erred in law and in fact, by failing to dismiss the respondent's suit with costs to the appellant.*

19. In light of the above, the appellant prays for ORDERS THAT:-

a) *The judgment and/or Decree of the Learned Trial Magistrate dated **3rd day of November 2011** be set aside and/or quashed.*

b) *The honourable court be pleased to substitute an Order dismissing the respondent's suit in the subordinate court vide the original **Keroka SRMCC No.212 of 2009.***

c) *Costs of the Appeal herein and those incurred in the subordinate court be borne by the respondent.*

d) *Any such and/or further orders that the honourable court shall deem just and expedient in the circumstance*

20. When the matter came before me on 10th March 2014, it was agreed that the appeal be canvassed by way of written submissions to be filed and exchanged. Both counsels have duly filed their written submissions together with supporting authorities. I have read through the submissions.

21. This court, being conscious of its role as the first appellate court as stated in **Selle -vs- Associated Motor Boat Co. Ltd. [1968] E.A. 123**, has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and reach its own conclusions. The court must, however bear in mind that it neither saw nor heard the witnesses and hence make due allowance for that.

22. According to the memorandum of appeal, this court was urged to interfere with the trial court's findings on both liability and quantum of damages. On the issue of liability, it was the respondent's case that he was on duty at the appellant's firm drying tea at the factory when the conveyor belt cut his left finger on the tip leading to loss of nail. He blamed the appellant for not providing him with gloves, since the conveyor belt was not covered and also contended that the fact that the conveyor belt was not fenced off exposed him to great risk as there was nothing to keep him away from being too close to the conveyor belt. PW2 the doctor who examined the respondent confirmed that the respondent's last part of the ring finger was amputated.

23. The appellants in their defence did not deny the fact that the respondent was their employee at the material date and also the fact that at the material date he was on duty. However, DW1 who was a supervisor in the appellant's company confirmed to the court that he (DW1) was not infact on duty on the material date when the respondent was injured. Furthermore DW1 as the supervisor did not rebut respondent's evidence of the fact that he was not provided with any gloves while operating the conveyor belt and also the fact that the surrounding of the conveyor belt were not fenced. Moreover, DW2 the clinical officer in his evidence admitted to the fact that he was not on duty on the material date when respondent was injured and subsequently treated at the appellant's dispensary.

24. All the above facts in my humble view point to the fact that indeed the respondent sustained the injuries alluded to in the plaint and evidence and that he did so in the course of his employment where he worked without necessary protection. A copy of the treatment card was produced as **P. exhibit 3**.

25. In Kipkebe Limited -vs- Moses Kauni Masaki – Civil Appeal No.127 of 2004 (unreported) Musinga J (as he was then) sitting in Kisii held:-

“Where a defendant wishes to contest evidence of a plaintiff, the defendant is under an obligation to adduce such evidence as would be sufficient to controvert that of the plaintiff. The appellant having failed to do so, the trial court was right in holding that the appellant was fully liable for the occurrence of the accident. I hold that on a balance of probabilities, the respondent proved the first limb of his case.”

26. That is exactly happened in the instant case. I only hasten to add that according to the respondent's employment card, he had been working in the appellant's firm since 1998. He never led any evidence to show that that was his first time to operate the conveyor belt and neither did he demonstrate what he himself did to protect himself from injury. Thus I agree with the learned trial magistrate's observation to apportion liability at a 50:50 ratio.

27. Regarding quantum of damages, the learned trial magistrate did not expressly state the authorities that he considered before he arrived at an award of Kshs.120,000/=. However, he stated that he had carefully re-evaluated the evidence and considered the written submissions that had been filed by both parties. Need I interfere with the award? Counsel had filed several authorities in their submissions. In Kemfro Africa Ltd t//a Meru Express and another -vs- A.M. Lubi & another (No.2) [1987] KLR 30, it was held:-

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

28. In my humble view, an award of Kshs.120,000/= was not inordinately high nor was it shown that the learned trial magistrate took into account an irrelevant factor in his assessment of damages. In such circumstances, this court will not interfere with the exercise of discretion by the learned trial magistrate. Consequently, I dismiss this appeal and award costs thereof to the respondent.

Delivered, dated and signed at Kisii this 23rd day of October, 2014

R.N. SITATI

JUDGE.

In the presence of:-

Mr. Soire h/b for O.M. Otieno for Appellant

Mr. Nyangosi (present) for Respondent

Mr. Bibu - Court Assistant