



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

CIVIL APPEAL NO. 49 OF 2013

JEREDI UKILU OSANGO.....APPELLANT

-V E R S U S-

GEOWAVE SHIP CONTRACTORS LTDRESPONDENT

(Being an appeal from the Judgment and Decree of Mombasa Resident Magistrate Hon. A. K. Gachie delivered on 2nd April 2013 in RMCC NO. 1332 of 2011)

JUDGMENT

1. **JEREDI UKILU OSANGO**, the Appellant sued Geowave Ship Contractor Ltd, Respondent, for compensation for injuries suffered while he was at the employment of Respondent. The trial Court dismissed his suit and hence this appeal. The duty of this Court as the first Appellate Court was correctly discussed by Appellant in his written submissions as follows-

“The duty of this Court as the first Appellate Court was set out in the case of *Selle Vs Associated Motor Boat Company Ltd & Others* 1968 EA 123 at 126 as-

‘An appeal to this Court from the trial Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial Judge findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanor of a witness is inconsistent with the evidence generally.’

The aforesaid Court of Appeal decision at Zanzibar reasoning was adopted by our own Court of Appeal in Ndiritu Vs Ropkoi & Another (2004)eKLR where the Court of Appeal

held-

‘As a first Appellate Court we are not bound by findings of fact made by the Superior Court and we are under a duty to re-evaluate such evidence and reach our own conclusions. We should however be slow to differ with the trial Judge and the caution is always appropriate as O’connor P. stated in Peters V Sunday Post Ltd 1958 EA 424 at page 429:-

‘It is a strong thing for an Appellate Court to differ from the finding on a question of fact, of a Judge who tried the case and who has had the advantage of seeing and hearing witnesses.’

‘This Court will however interfere where the finding is based on no evidence, or a misapprehension of the evidence or the Judge is shown demonstrably to have acted on the wrong principles in reaching the finding he did.’

2. Appellant presented the following grounds of Appeal-
 1. **That the learned trial erred in law and infact in holding contrary to the preponderous of evidence on record that the Plaintiff had not proved its case on a balance of probability and or on a preponderance of evidence.**
 2. **The learned Trial Magistrate erred in law and in fact in failing to appreciate the scope and extend of the employers duty of care under the statute and in common law and in failing to appreciate that the employer is liable for every foreseeable risk which the employer fails to take any precautionary measures to guard the employee against.**
 3. **The learned Trial Magistrate erred in law and in fact in failing to appreciate the evidence that was placed before him and in taking into account extraneous issues in reaching a decision hence arrived at a decision that was erroneous and against the evidence that was placed before him.**
 4. **The learned trial Magistrate erred in law and in fact in failing to appreciate that, it was not in dispute that the appellant was in a master – servant relationship with the Respondent hence the duty of care could be inferred.**
 5. **The learned Trial Magistrate erred in fact in law in failing to assess the damage even after he dismissed the suit.**
 6. **That the learned Trial Magistrate erred in law and infact in failing to analyze and appreciate the submissions, case law and judicial precedent that was placed before him.**
 7. **That the learned trial Magistrate erred in law and in fact in making a decision that did not take into account the Respondents defence as set out in the defence, witness statements, DW1’s evidence and the Defendants submissions hence made a decision based on issues that had neither been pleaded nor placed before him for determination.**

Long winded as those grounds are, they, in my view call upon this Court to determine three issues as follows-

- i. **Was there an employer employee relationship at the time the accident occurred?**
- ii. **Was the liability for the accident on the Respondent or another third party?**
- iii. **What is the quantum of damages?**

FIRST ISSUE

3. The Appellant stated in evidence that on 23rd November 2010, the material date of the accident, he was working for the Respondent as a casual worker at Kenya Port Authority (KPA). The Respondent requested KPA to issue him, along with others temporary port passes. Appellant exhibited that Port request to KPA in evidence and his name was amongst those that were to be issued with temporary Port pass. On the material date he was given duty by the Respondent to tie bags of maize of 40kg for loading onto a Ship.
4. Appellant's cross examination by Counsel for Respondent centered on whether or not the injury he suffered while at KPA was caused by KPA employees. No question was put to Appellant during cross examination, that at the material time of the accident he was not in active duty on behalf of the Respondent.
5. Respondent's first witness, Daniel Gitonga Wambugu stated that he was employed by the Respondent. Contrary to the cross examination of the Appellant by the Respondent's Counsel, and on what seems to have been on a tangent of his own this witness stated that Appellant's shift was due to start at 3.00pm but that Appellant had arrived at 2.00pm at KPA on the material date. That since he had not commenced duties he had not been issued with a helmet.
6. That evidence of Gitonga contradicted his own statement filed in Court on 14th July 2011 where he stated-
 - **Am a foreman at GEO WAVESHIP CONTRACTORS LIMITED.**
 - **I do recall that on 23rd November 2010 I recruited casual labourers to tie 90kgs bags of maize together into a stack from a lorry.**
 - **That at around 10:00 one of the casuals by the name JEREDI UKILU OSANGO was injured by a metal bar falling from an adjacent lorry.**
7. The testimony that Appellant was not yet on duty at the time the accident occurred also contradicted the Respondent's defence. In that defence Respondent denied the accident occurred and attributed Appellant's injuries to his own negligence.
8. I do therefore find and hold that Appellant was in employment of Respondent when the accident occurred and the attempt by Gitonga in oral evidence to state that Appellant's shift had not commenced is a mere after thought and is rejected.

SECOND ISSUE

9. Appellant in evidence stated that a crane while loading a Ship hit a metal bar which bar was on a lorry which in turn hit Appellant injuring him.
10. Gitonga, Respondent's witness stated in evidence-

“The lorries were parked besides the Port. The crane knocked a metal bar and it hit Jeredi The crane belonged to KPA.”

11. Respondent had a burden of proof as stated in Sections 107 to 112 of the Evidence Act Cap 80 to prove that the crane and or the lorry did not belong to it. That burden was discussed in the case **NDIRITU –Vs- ROPKOI & ANOTHER (2004)eKLR** as follows-

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(1) of the Evidence Act Cap 80, which provides-

“107. (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence. That is captured in Sections 109 and 112 of the Act, thus:

“109. The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing or disproving that fact is upon him.”

12. The Respondent ought to have proved; (i) that the crane belonged to KPA; and (ii) that KPA was negligent which negligence led to the accident. Most importantly they could only prove the above if they had joined KPA as third party in the lower Court proceedings. That is what Order 1 Rule 15(1) of the Civil Procedure Rules provides. That Rule provides as follows-

“15. (1) Where a Defendant claims as against any other person not already a party to the suit (hereinafter called the third party)-

- a. **That he is entitled to contribution or indemnity; or**
- b. **That he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the Plaintiff; or**
- c. **That any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the Plaintiff and the Defendant and should properly be determined not only as between the Plaintiff and the Defendant but as between the Plaintiff and Defendant and the third party or between any or either of them,**

he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.”

13. Having, however, found in this judgment that the Appellant was on duty of the Respondent at the material time the Respondent owed him a duty of care. This was well set out by the Court of Appeal in the case **RUTH NTHENYA KILONZO –Vs- STANDARD CHARTERED BANK KENYA LTD (2007)eKLR** as follows-

“With respect to such a duty of [care] the employer, whether or not it is duly discharged, and so the employer bears no liability in the tort of negligence, is determined not on any absolute standards, but on the basis of, firstly, the circumstances prevailing, and secondly, reasonable degree of care. This principle is well captured in Blyth v. The Company of Proprietors of the Birmingham Waterworks, Vol. CLVI E.R. 1047, at p. 1049 (Alderson, B.):

“The Defendants [would be liable if] they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done.”

14. As an employer, Respondent knowing that goods were being carried above the heads of the employees by the crane, ought to have taken reasonable precautions to ensure that the employees were not hurt. The Respondent ought to have provided protective helmets to the Appellant. That responsibility was also considered by the Court of Appeal in the case **MUMENDE –Vs- NYALI GOLF & COUNTRY CLUB [1991]KLR**. The Court held-

1. It is an implied term of employment that an employer will make the conditions of employment to his employee absolutely safe and will not expose his employees to any danger to avoid any negligence but will not be responsible of the employee's own negligence in execution of such employment.
2. The employer was aware of the danger that the employee was subjected to and it failed to do what was required of it and for that reason it was negligent.
3. Just because an employee accepts to do a job which happens to be inherently dangerous is no warrant or excuse for the employer to neglect to carry out his side of the bargain and ensure the existence of minimum reasonable measures of protection.
4. In measuring the degree of care one must balance the risk against the measures necessary to eliminate the risk.

15. In regard to the second issue I find that Respondent was liable for the injuries suffered by Appellant.

THIRD ISSUE

16. The Learned Trial Magistrate failed, as he ought to have assessed the damages he would have awarded Appellant. Learned Trial Magistrate should have assessed those damages even though he dismissed Appellant's suit. On this I refer to the case **GLADYS WANJIRU NJARAMBA –Vs- GLOBE PHARMACY & ANOTHER [2014]eKLR** where the Court stated-

“It is trite law that the trial Court was under duty to assess the general damages payable to the Plaintiff even after dismissing the suit. This position is confirmed by the Court of Appeal in the case of MORDEKAI MWANGI NANDWA v BHOGALS GARAGE LTD CA NO. 124 OF 1993 report in [1993]KLR 4448 where the Court held that the practice that damages be assessed even if the case is dismissed does not imply writing an alternative judgment and in the case of MATIYA BYABALOMA & OTHERS v UGANDA TRANSPORT CO. LTD UGANDA SUPREME COURT CIVIL APPEAL NO. 10 OF 1993 IV KALR 138 where the Court held that the Judge erred in not assessing the damage he would have awarded had the appellant been successful in her claim. From the above authorities it is clear that the trial Court fell into error by not assessing the award of general damages he would have awarded to the Appellant had she been successful in proving her case.”

17. Respondent did not submit on the damages. Appellant, as he did at the trial Court, relied on the case of **JOHN MBURA KAHENYA v LEONARD KAMAU KIRUMBA & ANOTHER HCCC NO. 408 OF 1998 NAKURU**. The Plaintiff in that case decided in the year 2000 was awarded Kshs. 120,000/-. He had soft tissue injuries to the knee and a scalp laceration. He was healed without permanent incapacity.

18. Appellant also suffered soft tissue injuries on the head which healed leaving 4cm scar. In my view bearing in mind the award relied upon by Appellant I would award Appellant Kshs. 180,000/-.

19. Having made the above determinations I am persuaded that I need to interfere with the trial Court's judgment as follows-

a. **The Trial Court's judgment dismissing Appellant's suit is set aside and is substituted with judgment as follows-**

i. **Appellant is awarded general damages of Kshs. 180,000/- with interest from the date of this judgment until payment in full.**

(ii) **Appellant is awarded Kshs. 1,500/- with interest from the date of filing suit until payment in full.**

(iii) Appellant is awarded costs of the suit and costs of this appeal.

It is so ordered.

DATED and DELIVERED at MOMBASA this 20TH day of NOVEMBER, 2014.

MARY KASANGO

JUDGE