



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

Civil Appeal 48 of 2005

*(Being an appeal from the Judgment/Decree of Hon. Thuita, Principal Magistrate in Naivasha
SPMCC No. 416 of 2003 delivered on 10th February, 2005)*

BEAUTY LINE LIMITED.....APPELLANT

VERSUS

DAVID NJUGUNA GICHARI.....RESPONDENT

JUDGMENT

The Respondent sued the Appellant in Naivasha SPMCC No. 416 of 2003 for inter alia -

- (1) *general damages for pain and suffering and loss of amenities,*
- (2) *special damages,*
- (3) *costs of the suit,*
- (4) *interest on all the above.*

Following the taking of both the plaintiff's and evidence of the Defence, the learned trial magistrate in a judgment delivered on 16th March 2003, awarded the Respondent a global sum of Ksh 220,000/= as general damages for pain suffering and loss of amenities as well as special damages of Ksh 1,500/= and costs of the suit.

Aggrieved with the said judgment, the Appellant filed on 5th September 2007, a Memorandum of Appeal against the learned trial magistrate's judgment on six grounds -

(1) THAT the learned trial magistrate erred in law and in fact in off handedly ruling that the Applicant's witness's evidence was not credible while Ruling that the Respondent's evidence was credible notwithstanding the fact that she is not the one who took the Respondent's

evidence and only took the appellant's witness's evidence and as such could not competently rule on the credibility of the respondent's evidence especially the Respondent's demeanour in court.

(2) THAT the learned trial Magistrate erred in law and in fact in ruling that the Respondent's evidence was credible despite the inherent contradictions in the same.

(3) THAT the learned trial Magistrate erred in law and in fact in failing to consider the evidence as a whole and in analyzing the Appellant's evidence in favour of the Respondent's case without considering the extent to which that very Appellant's evidence rebutted the Respondent's allegations.

(4) THAT the learned trial Magistrate erred in law and in fact in holding the Appellant 100% liable without giving reasons for such a finding and in total disregard of the Respondent's duty to act with due care and the principles applicable in a claim for negligence.

(5) THAT the learned trial Magistrate erred in law and in fact in failing to consider the very elaborate evidence of the appellant's during trial which prima facie showed that the respondent was at fault.

(6) THAT the learned trial Magistrate erred in law and in fact in failing to consider the Appellant's submissions.

and prayed that part of the judgment and decree of the trial court of 16th March 2005 be reviewed and/or set aside, and that the Respondent do bear the costs of the Appeal.

Unhappy with the quantum of damages, the Respondent too filed on 21st November 2007, a Cross-Appeal dated 13th November 2007 on the grounds -

(1) That the learned trial magistrate erred both in law and in fact in awarding a very low award on damages considering the severity of the injuries sustained, and

(2) that the learned trial magistrate erred both in law and fact by failing to consider the Respondent's submissions on quantum and medical reports produced in court as evidence,

And prayed that part of the judgment/decree of the trial court dated 10th February 2005 be reviewed and/or be enhanced, and that the Appellant (*Respondent in the Cross-Appeal*) do bear the costs of the Appeal.

In addition to the two Memoranda of Appeal and Cross-Appeal, counsel for the parties also filed written submissions upon which counsel asked me to write a judgment.

Under Section 78 of the Civil Procedure Act (*Cap. 21, Laws of Kenya*), it is the duty of this court as the first appellate court to consider the evidence before the lower court and determine the matter in terms of the law and the evidence adduced before the lower court. The cases of **KIILU & ANOTHER VS. REPUBLIC [2005] KLR 174** and **SALIM VS. KITANA [1989] KLR 534** are to the same effect. In this regard I have considered the pleadings before the lower court together with the evidence of both the Appellant and the Respondent's witnesses together also with the submissions before the lower court and made before this court. The issue which is raised by the Appellant is that there was no negligence on the part of the Appellant, and that the lower court ought not to have found the Appellant negligent to any extent.

On his part, the issue raised by the Respondent in the Cross-Appeal is whether the learned trial magistrate erred in law in making an award which was too low taking into account the evidence and injuries sustained by the Respondent/Cross-Appellant.

I was treated to many authorities as to why the Appellant ought not to have been found negligent. I have heard sentiments such as that an employer is not required or expected to "baby sit" an employee", that an employer is not liable in damages suffered by an employee outside the scope of his employment; that an employer's duty in negligence is not absolute, that an employer is not liable for an employee's own negligence in execution of such employment, (**MWANYULE VS. SAID T/A JOMUN TOTAL SERVICE STATION [2004] 1K.L.R. 47**), that a court of law will not just award damages to a citizen because it is sympathetic to him due to an injury which he may have received in his place of work and in the course of his duty if he was under obligation to prove negligence and/or breach of statutory duty and he failed to do so. (**AMALGAMATED SAW MILLS LTD VS. TABITHA WANJIKU**) (*Nakuru HCCA 272 of 2004*, and **TIMSALS LTD VS. STEPHEN GACHIE** (*NAKURU HCCA NO. 79 OF 2000*)). These holdings are in their context in order, but do not with respect apply to all occasions, all the time.

In my view, actionable negligence consists in the neglect of the use of the ordinary care and skill towards a person to whom the defendant owes a duty of observing ordinary care and skill by which neglect the Plaintiff, without contributory negligence on his part, thus suffered damage (Brett M. R. in **Heaven vs. Pander (1883), 11QBD** at p. 507. 36 Digest, 8, 9.

The tort of negligence is the breach of a legal duty to take care, resulting in damage to the plaintiff or claimant which was not desired by the Defendant.

"The omission to do something which a reasonable man, guided upon considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. Blyth vs. Birmingham Waterworks Co. (1856) 11 Ex 781. The burden of proof is generally with the claimant."

In **DONOGHUE VS. STEVENEON [1932] AC 562**, Lord Atkin said -

"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor. Who, then is my neighbor? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in my contemplation as being affected when I am directing my mind to acts or omissions which are called into question."

An employer has a duty to his employees, not only to provide a reasonable amount of work to enable the employee to earn that which the parties must be taken to have contemplated, to indemnify the employer against liabilities and losses properly incurred in the performance of his work; to provide adequate material and proper systems and effective supervision, that is to say, safe place of work, safe systems, safe plant.

If there is failure in these duties, the employer will be liable in damages to employees for personal injuries sustained in the course of employment. In general, an accident arising out of the course of employment will be deemed, in the absence of evidence to the contrary, to have arisen out of that employment.

In this case, the Respondent and Cross-Appellant was an employee of the Appellant. He was on duty on the material day and at the material. He was working with three of his colleagues, DW1, DW2 and DW3. These witnesses being employees of the Appellant disowned the circumstances of the accident under which the Respondent suffered what the Doctors (*for the Respondent and Appellant, both agreed*) were severe injuries, and causing 10% permanent disability to the Respondents arms at the elbows.

The material facts were not in dispute. The Appellant is the owner of a large flower farm at which the Respondent worked as a sprayer. On the material day, he was working with DW1 and DW2 who were also sprayers, and DW3 who was the tractor driver cum supervisor (*of his sprayers*).

Counsel for the Appellant made a gallant effort in his submissions to describe both the

configuration as well as the manner in which a sprayer called a "boom sprayer" operates. The primary equipment is the tractor. A boom sprayer is then mounted on the rear of the tractor and is ran (*driven*) by the tractor's take off shaft and that such shaft mounted at the rear of the tractor has multiple functions. It can run a sprayer, a posho mill, a water pump, a maize thresher or fodder cutter among other implements. The hose pipes each measuring 80 metres are mounted with the sprayer at its edges, and were being operated by the Respondent and his colleague DW2 with the assistance of one Hezron Hungurani. This Hezron was referred to by DW3 but was not called to testify either by the Appellant or the Respondent. There is no dispute both to the equipment used, and the persons at work on that equipment. It was the Respondents DW1, DW2 and DW3. DW4 was not present. He does not know what transpired. His evidence was of no probative value as to what happened, except to say, that the Respondent was given all protective gear.

It was the evidence of the Respondent that he was on duty on the material day. He was spraying flowers, using the tractor and hose pipe. There was a rotating machine, that the rotating machine was not well covered. His colleague (DW3) asked him "to go up" and check on the chemical but there was no stair (*on which presumably to climb up to the top of the sprayer*). The Respondent managed to do so. However when he opened the can lid, the pressure hit him, he lost balance and fell down. His colleague, the driver (DW3) had operated the machine and he fell on the rotating machine which was not well covered. The machine grabbed his sweater and his hands were held, and "*Muchangi saw what happened and switched off the machine and took him from where he had fallen.*" He sustained injuries on both arms.

He was taken to Dr. Khan where he was given first aid by way of injection and then Dr. Khan informed him that he had a fracture of the leg. He was admitted Mt. Longonot Hospital, and the question of his treatment is not in dispute.

The Respondent contended in his evidence in-chief "*I blame the Defendants (Appellants), for providing me with unsafe place of work. They could have made stairs.*"

In cross-examination, the Respondent testified that though his job did not entail operating a tractor, but rather to hold the hose pipe while his colleague DW2 held the nozzle, "*our supervisor (DW3) told me to go up to the pump and observe the gauge,*" and that though he could observe the gauge "*without going to the power take-off shaft*", the gauge had blocked and "*I had to climb up to check*". "*When I climbed the supervisor had put the tractor off but he came and switched it on when I was up. When I opened the lid because the gauge was faulty the pressure hit me, I fell on the power take off shaft. I do not agree I went on my own to the power take off shaft*", the employer should have had a good gauge. That was the Respondent's evidence.

The evidence of DW1, DW2 and DW3 with regard to the operations of the boom sprayer, and their respective roles or duties, confirmed the evidence of the Respondent.

It was the evidence in-chief of DW1, that he was the Respondent's fellow sprayer and as such sprayer the Respondent had no business being near the power take off shaft - "*unless the supervisor tells one to operate the shaft, one does not touch it.*"

In cross-examination by the Respondent's counsel, DW1 testified - "*I was holding the nozzle in the flower bed. I heard the plaintiff screaming. I saw his hand caught by the power take off shaft.*"

It was however the evidence of DW2 that though he too was a sprayer like the Respondent, he did not witness the accident, he was too busy, that the boom sprayer has no ladder, that a person can stand on top of the boom sprayer, that the boom sprayer has a gauge which he did not check that day, and he could not tell whether it was working or not. More importantly DW2 testified that he did not witness the accident, he was unwinding (*the hose*) from the tractor, and he did not see the accident, he only heard the tractor being switched off, but saw the Respondent and DW3 the supervisor.

In his evidence DW3 the Supervisor confirmed both his role as the driver of the tractor as well as

the roles or duties of the Respondent, DW1, DW2, and one Hezron who was present, but was not called to testify on behalf of the Appellant or the Respondent. He was the driver of the tractor. He would switch it on and off from time to time. He contradicted the evidence of the Respondent as to how the accident occurred. He did not assign any duties to the Respondent to operate the tractor or the boom sprayer. He was at the end of the flower bed about 80 metres away, and not 10 metres as contended by the Respondent, when he heard a noise and ran to switch off the engine of the tractor. He put the blame for the accident upon the Respondent. He did not assign any duties upon the Respondent to check the gauge.

However in cross-examination DW3 stated -

"I may not have been correct on duties", and added that, he found the Respondent's hand caught in the shaft, and had to switch off the engine. He stated that workers were provided with goggles, gloves and boots.

ANALYSIS OF THE EVIDENCE

I will begin with the Appellant's witnesses, commencing with the evidence of DW4, the human resources manager. He described himself as the custodian of the Appellant's Register of workers on a daily basis. According to his evidence, the Respondent was provided with a pair of spraying suits, goggles and gumboots *"on 8/05/2002,"* and that the Respondent signed for the items.

In cross-examination, DW4 testified that he neither knew the Respondent nor his signature, and did not know who wrote the Register, and that no effort was made to find the persons who wrote the register.

It was common evidence of both the Respondent, DW1, DW2 and DW3 that the accident occurred on 6th June 2002. DW4 refers to the issue of spraying suits, goggles and gumboots on 8th May 2002, more than a month before the accident! He neither knew the Respondent, nor his signature. His evidence in relation to the accident was therefore absolutely valueless to the trial as well as this court.

The evidence of DW1, DW2 and DW3 is clear. The accident occurred. They all blame it on the Respondent. He had no business going behind the power shaft. DW2 however confirmed the evidence of the Respondent that the *"Boom Sprayer"* had *"no stairs"* or ladder, being 2 or so metres from the ground. DW1 saw the Respondent's hands caught in the power shaft. They did not know how they got there. He however testified -

"unless the supervisor tells one to operate the shaft, one does not touch it. It was the duty of the supervisor, the Plaintiff (Respondent) should have explained what he was doing in a Section he was not authorized."

This was candid evidence. It was corroborated by DW2, that the Respondent had no duties at the shaft, unless as DW1 stated, the supervisor tells one to operate the shaft. DW3 denied any instructions to the Respondent to go and check the gauge. DW2 however confirmed the boom sprayer had a gauge - which he did not check but is generally checked from time to time - but he would not know whether it was working or not.

DW3 avoided any challenge to the evidence of the Respondent that he had asked the Respondent to check on the gauge, and had at the time of asking the Respondent to do so, switched off the tractor engine. However according to the uncontroverted evidence of the Respondent, DW3 switched on the engine as he opened the lid, and the pressure from the Boom Sprayer was so sharp and strong that it hit him right on the face and as he yanked himself from the heat of the pressure, he lost balance and fell on the rotating power shaft and sustained injuries which both the Respondent's and the Appellants' doctors stated were *"severe or grievous harm"*.

One Hezron Hungurani who was the other sprayer present on the date of the accident, may have shed light on what exactly happened. The Appellant did not deem it advisable to call him in evidence.

So the court had to choose between the Respondent's account as to what happened, and the Appellant's witnesses, not that the accident did not occur, but rather, that it was all due to the fault of the Respondent as he was in the wrong place, while at work.

Having reviewed the evidence as detailed above, the learned trial magistrate was quite justified in concluding that the evidence of the Appellant's witnesses was not credible. On the contrary I find and hold that the evidence of the Respondent as to the circumstances of the accident was credible as against that of the Appellants' witnesses. There was no evidence as to the ingredients used for spraying flowers. There is however no doubt that such ingredients would include some pesticide with an appropriate quantity of water. It would be stupid of the Respondent to climb the sprayer boom for any other reason other than to check the gauge. So the supervisor (DW3) would have had to instruct him, and temporarily switch off the tractor engine to stop the mechanic parts (*power take off shaft*) from operating or rotating. The Respondent's explanation that the tractor engine had been switched off when he climbed to check the gauge, and the "switch on" of the tractor is what caused the pressure to blow to his face causing him to lose balance and fall on the rotating shaft thus causing him severe injuries. For those reasons: - I find no merit in the Appellant's contention otherwise. Grounds one, three and five of the Appeal therefore fail.

There were no contradictions in the Respondent's evidence. Ground 2 of the appeal has therefore no merit, and it fails also.

Having considered the evidence at length, I am satisfied that the learned trial magistrate came to the correct conclusion on liability of the Appellant on the ground of negligence.

There are many ways of expressing negligence. According to Halsbury's Laws of England (Vol. 37, 3rd Edn.) p. 122 -

"Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which can be reasonably foreseen to be likely to cause physical injury to persons or property, and, if the lack of care causes injury, the person who failed to exercise such care is liable in tort to an action for negligence."

In the old case of **Heaven vs. Ponder** (1883) 11 Q.B.D. 503, Brett MR said at p. 507 -

"Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the Defendant owes the duty of observing ordinary care and skill, by which the neglect, the plaintiff, without contributory negligence on his part, has suffered injury to his person or property."

And in **SNOOR VS. GRAND JUNCTION WATERWORKS CO. LTD** (1886) 2 T.L.R. 300, per Huddleston B. at p. 309 -

"It is said you cannot have liability for negligence except it is founded on a duty. The duty however, is that you are bound not to do anything negligently so as to hurt a person near you, and the whole duty arises from the knowledge of that proximity. Whether the negligence is your personal act, or arises from using your property in a particular way, the rule equally applies, and you must so use your personal powers or property as not to injure any other person is by exercise of reasonable care you can avoid so doing."

In this case, the Appellant being a fiction of law, did not itself do the act of negligence. The Appellant was found vicariously liable. In the words of Hodson L. J. in **BROOM VS. MARGAN** [1953] 1 ALL E.R. 849, at 856 (also reported in [1953] 1 Q.B. 597 at 612 -

"The expression "vicarious liability", or perhaps, more accurately, vicarious act, is, in my opinion, apt to cover all cases whether the act is in the masters sphere or not, - that is to say whether he is liable directly or merely through the servant, he is liable vicariously for the negligent act of the servant done in the course of his employment."

In this case, the negligent act of the DW3, in switching on the tractor engine while the Respondent was checking the gauge on the Boom Sprayer was the direct cause of the pressure which hit the Respondent causing him to fall on to the power shaft which was rotating as DW3, a servant of the Appellant had switched on the tractor engine. If he had not done so, the Respondent may still have fallen, but would not have fallen upon a rotating power shaft. The act of DW3, a servant of the Appellant was negligent, and the Appellant was, and is vicariously liable therefor.

In the premises, I find no merit in grounds four and six of the appellants grounds of appeal.

All the grounds of appeal having failed, the appellants appeal is therefore dismissed with costs to the Respondent. It is so ordered.

There was however a cross-appeal basically on quantum, that the learned trial magistrate erred in law in failing to consider the Respondents' submissions on quantum and medical reports produced in court.

In this regard, there were two opinions, one by the Appellant's counsel and the other by the Respondent's counsel. While the Appellant's counsel argued that the award of Kshs 220,000/= for the fracture of the radius and ulna was generous, the Respondent argued to the contrary that the Respondent's counsel suffered serious injuries, and that the amount of damages awarded were too low and warrants disturbance by this court.

The principle of law is that the award of damages is at the discretion of the trial court, and that the appellate court will only interfere with the award where it is shown that the award is inordinately low or high so as to show that the trial court failed to consider or considered the wrong principles for the award of damages.

The Appellants trivialized the injuries suffered by the Respondent. The Respondent suffered serious or severe injuries as both Doctors found. They are -

- (1) *Fractures of the right radius and ulna shafts.*
- (2) *Fracture of the right radius and ulna shafts.*
- (3) *Bilateral dislocation of the inferior radius ulna joints.*
- (4) *Fractures of the radius and ulna have united with mal-union of the right radius.*
- (5) *The Appellant had a temporary disability of ten months and a permanent disability of ten (10%).*

I have no doubt in my mind that the above were serious injuries which trivialized by the Appellant into merely fracture of the radius and ulna. The injuries suffered by the Respondent were much more substantial than the injuries suffered by the Plaintiffs respectively, **David Kamande Mbui vs. Kenya Bus Services Ltd Nairobi HCCC No. 281 of 1995** or **David Kiyalo Muema vs. K. S. Channo (Nairobi HCCC No. 749 of 1994)** where awards of Ksh 100,000/= and Ksh 70,000/= were made to the plaintiffs in those cases. The plaintiffs in these cases did not suffer the type of severe injuries suffered by the Respondent in this case such as multiple fractures. I would therefore agree with the authorities that an appellate court will disturb an award where it is satisfied that the trial court failed to consider the evidence before it and make an award which was too low in the circumstances.

The Respondent's counsel asked for a sum of Kshs 1.0 million in general damages for pain and suffering. Considering the injuries suffered by the Respondent and the authorities of **RAMOGI VS MOKAYA [2004] eKLR, (Kaburu Bauni J.)** substituted the award of Ksh 80,000/= to Ksh 200,000/=. The Court of Appeal did similarly in **KITAVI VS COASTAL BOTTLERS LTD [1985] KLR 473,** from Ksh 250,000/= to Ksh 450,000/= and **TOM MBOYA KOMBO VS NAIROBI FRAME**.

INDUSTRIES [2008] eKLR, where the Court of Appeal found the sum of Ksh 200,000/= awarded to the Plaintiff was too low as to amount to an erroneous estimate and the damages were enhanced from Ksh 200,000/= to Ksh 669,520/= respectively. I would award the Respondent general damages in the sum of Ksh 660,000/= plus special damages of Ksh 1,500/= to make a total of Kshs 661,500/=. I also award the Respondent interest on the said sum together with costs in the Appeal, and Cross-Appeal.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 8th day of June, 2012

M. J. ANYARA EMUKULE
JUDGE