REPUBLIC OF KENYA

High Court at Nakuru

Civil Appeal 117 of 2007

MENENGAI OIL REFINERIES LTD …..... APPELLANT
VERSUS

JEREMIAH MWAURA WANDETO ..... RESPONDENT

(Being an appeal from the Judgment/Decree of Hon. J. Thuita, Principal Magistrate, Nakuru, delivered on 13/6/2007 in Civil Suit No. 782 of 2003)
JUDGMENT

This is an appeal from the judgment of Hon. J. Thuita, Principal Magistrate, delivered on 13/6/2007 in CMCC No. 782/2003 in which the court found the appellant 100% liable and assessed damages at 72,000/- plus costs and interest. The appellant being aggrieved by the said decision, appealed to this court against both liability and quantum based on the grounds set out in the memorandum of appeal dated 9th July 2007. The said grounds can be condensed into three broad grounds namely:-

1. **Whether the respondent was injured at his work;**

2. **Whether the respondent proved negligence as against the appellant;**

3. **Whether the damages were excessive**.

By a plaint filed in court on 4/4/2003, the respondent, Jeremiah Mwaura Wandeto, stated that he was an employee of the appellant (Menengai Oil Refineries Limited) and on 12/1/2003, while he was lawfully doing his authorized work, he was injured by a falling metal bar. He attributed the injuries to the negligence of the appellant for exposing him to danger, failing to provide a safe working system, failing to provide protective devices or gear while at work. As a result, the respondent suffered injuries for which he sued the appellant and claimed damages.

The appellant filed a defence and denied that it ever employed the respondent, or that he was engaged or was lawfully working for the appellant when he got injured and in the alternative; that if at all the respondent was injured, it was solely caused or substantially contributed to by the respondent's own negligence.

The respondent testified as PW1 in support of his case. He recalled that on 12/1/2003, he was working for the appellant as a casual labourer; packing oil in boxes. As he did that, there was ongoing construction on the roof; a metal bar fell from the roof and injured him on the left forearm, left ankle joint, left shoulder and right hand. He went to Provincial General Hospital, Nakuru for treatment and produced in court the treatment card. He was later examined by Dr. Kiamba who wrote a medical report dated 20/1/2003.

The defence called one witness, Jacob Munala (DW1), assistant operator in the refinery department of the appellant. He agreed that he knew the respondent as a co-worker; he worked at the packing department which was situated on the ground floor. He described the roof as having a gap for communication purposes between the workers and their supervisors. On the material day, there was no construction on the roof, it was complete. They worked the whole day as required and did not see anybody injured.

Mr. Mahida, counsel for the appellant submitted that the respondent failed to prove negligence; his evidence was not corroborated and that the defence was not considered. The respondent did not produce any evidence to prove that the appellant acted negligently neither did he call a witness to support his claim.

It was his submission that liability would only have been proved by considering the evidence in its totality; That the treatment card was never produced by the maker. It was marked for identification as MF1. In support of this line, he annexed authorities of **Eastern Produce (K) Ltd v James Kipketer Ngetich [2005] eKLR** and **Eastern Produce (K) Ltd (Kaitet Estate) v Joseph Lemiso Osuku [2006] eKLR** where the court allowed the appeals due to the failure of the respondents to produce treatment cards and to prove that they were injured on the particular dates. It was held that failure to adduce this evidence was fatal to the plaintiff's case. He also urged the court to find the award in damages were high.

Mr. Matiri in opposing the appeal submitted that it was settled law that an appellate court cannot interfere with judgment of a trial court unless it is shown that the court proceeded on the wrong principles of law. There was no evidence on misapprehension of evidence or acting on wrong principle by the trial court. He relied on the case of **Butt v Khan [1981] KLR** where it was held that the trial court had the advantage of seeing and hearing the parties and the appellate court cannot interfere with the decision unless it is shown that the judge proceeded on the wrong principle and arrived at misconceived estimates.

He further submitted that parties are bound by their pleadings and in support of this, relied on **Eastern Produce (k) Ltd v Christopher Atiado Osiro (civil appeal 43 of 2001).** The counsel stated that the appellant had denied in its pleading that the respondent ever worked for them. DW1 however admitted that the respondent was his co-worker and on duty on the material day. This was a departure from their pleadings. In turn, the appellant owed the respondent a duty to provide safe system of work.

He further stated that the evidence adduced by PW1 did not require corroboration; All potential witnesses were employees of the appellant and therefore difficult to get them to testify; As a factory is required to keep a record of injured employees the appellant should have produced it in court to counter the claim; DW1 testimony is not evidence that the respondent was not injured.

As the 1st appellate court, I am required to re-evaluate the evidence afresh and arrive at my own findings and conclusions, bearing in mind that this court did not have a chance to see the witness and assess their demeanor. The appellant contends that the trial magistrate did not give concise statement of facts, point of determination and reasons for the judgment but this will be cured by this court re-evaluating evidence and arriving at its own determination.

It was pleaded that the respondent was not an employee of the appellant but DW1 confirmed that the respondent was an employee and was on duty that day (12/1/2003). The appellant's pleadings were at variance with DW1's evidence. It is trite law that a party is bound by its own pleadings.

As to whether the respondent was injured at work or not, he testified that he was treated at Provinical General Hospital, Nakuru, and was issued with a treatment card which was marked as MF1. For some reason, the said card was never produced as an exhibit. However, Dr. Patel who was instructed by the appellant referred to the treatment notes of Provincial General Hospital, Nakuru. For unknown reasons the appellant failed to call the witnesses such as Mr. Pitoria who were present when the respondent was injured. These were the company employees over whom the company had control. Instead DW1 who was not present at the scene was called. Although DW1 had denied that the respondent was injured, in cross examination he did admit that construction was ongoing using iron pipes. The appellant had the duty to ensure safety of its employees who were in the premises. It is evident that the respondent was exposed to

in breach of the said duty. On the other hand, the respondent had a duty of care owed to himself. He did not tell the court what he did to avert injury to himself having known that construction was ongoing above him. In the result I will apportion liability between the respondent and the applicant bearing 10% liability.

It is trite law that the appellate court will not interfere or disturb an award by the trial court unless it is satisfied that the trial court in assessing damages, took into account an irrelevant factor or left out of account a relevant one or that the amount awarded is so inordinately low or so inordinately high that it will be a wholly erroneous estimate of the damages (see **Kemfro Africa Ltd v AM Lubia and Olive Lubia (1982-88)2 KAR 727).** This is because an award of damages is an exercise of the court's discretion and the appellate court will be slow to interfere. In this case, Dr. Kiamba who saw the respondent 8 days after the accident found that the respondent had few minor scars on the left forearm and right hand and that he suffers from residue pain in the left shoulder joint. He classified the injury as harm and temporary disability of one week. In my view, the respondent sustained minor soft tissue injuries. The respondent was also examined by Dr. Patel who was instructed by the appellant. He confirmed that the respondent suffered injury at his place of work and found that the respondent only sustained injuries to the left ankle joint. The treatment notes did not refer to any other injury.

In the trial court, the appellant had submitted that an award of 25,000/- be made and relied on **Elias Munioki vs Aid Juma & Another (HCCC 53 of 1990),** where court awarded Kshs. 15,000/-. The injuries sustained in that case included multiple soft tissues injuries to the neck, face, left arm and shoulder but the award was made over 20 years ago.

The respondent on the other hand submitted an award of Kshs. 120,000/- and relied on the decision in **Flora E. Wamula v Kanyingi Kiguta (HCC NO 385 of 1991)** where the plaintiff was awarded Kshs. 120,000 for lacerated wound on the front part of the head, left knee,right side of the pelvis, several other abrasions. She was hospitalised for one week. In **Daniel L. Nkurne v Constatino Thomas & Another (HCC No. 4084 of 1983)** the court awarded Kshs. 100,000/- for injuries to the head, chest and right knee, bruises and cuts. The injuries healed leaving multiple keloid scars over the chest. The injuries in the above cases were more serious that the instant case. After considering the two medical reports on the injuries with other comparable cases, and taking into account the rate of inflation, I am of the view that an award of Kshs. 60,000/- is reasonable and fair compensation. He is also entitled to Kshs. 2,000/- as special damages.

In the end, this appeal on liability is dismissed. The appeal on quantum succeeds in part and the respondent will have judgment for Kshs.55,800/- after apportionment. The respondent will also have costs of this appeal and in the lower court. It is so ordered.

DATED and DELIVERED this 12th day of October, 2012.

R.P.V. WENDOH
JUDGE

PRESENT:

Mr. Muchele holding brief for Mr. Matiri for the respondent

Mr. Njoroge holding brief for Mr. Mahida for the applicant

kennedy – Court Clerk