



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 205 OF 2002

LAKE QUARY LIMITED APPELLANT

-VERSUS-

SIMON ANANGWE RESPONDENT

JUDGMENT

This is an appeal from the judgment of the Resident Magistrate's Court in Winam, Civil Case Number 60 of 2002 that was delivered on the 26th of August, 2002. The appellant had been sued by the respondent who filed a plaint dated 15th of February, 2002 alleging that on or about the 31st of July, 1998 in the course of his employment with the appellant he was involved in an accident as a result of which he sustained injuries. He alleged breach of statutory duty by the appellant. He sought for general damages, costs of the suit and interest.

The appellant in a statement of defence dated 5th April, 2002 denied the accident and particulars of statutory breach as alleged. The appellant equally denied the injuries alleged to have been sustained by the respondent. It sought for dismissal of the plaint. In her judgment the learned trial Magistrate found the respondent to have contributed to the accident. She apportioned liability at 40:60. She awarded 90,000/= as general damages to be apportioned in line with her apportionment on liability.

The appellant being dissatisfied with the judgment preferred this appeal on the grounds that:-

1. The learned trial magistrate erred in law and fact in failing to determine the issue of contributory negligence.
2. The learned trial magistrate grossly misdirected herself in treating the evidence on liability and submission on quantum before her very superficially and consequently came to the wrong conclusion on liability and quantum.
3. The learned trial magistrate misdirected herself in not taking into consideration or proper consideration the plaintiff/respondent's injuries at the time of assessing damages.

4. The learned trial magistrate erred in awarding a sum in respect of damages which was inordinately high that it represented an entirely erroneous award vis a vis the injuries of the respondent and consequences arising therefrom.
5. The learned trial magistrate proceeded on wrong principles when assessing the damages to be awarded.
6. The learned trial magistrate erred in law in the making an award which was with the limits of decided cover of a similar nature.

The appellant sought the appeal allowed with costs. The respondent opposed the appeal.

At the hearing of the appeal the appellant's counsel submitted that; there was no evidence in support of the claim that the appellant was in breach of a statutory duty; the appellant provided protective gear; the apportionment of liability at 40:60 was too high. The sum awarded was also manifestly high. In opposing the appeal the respondent's counsel submitted that the respondent was not provided with protective gear; that there was no proof from the appellant that any protective gear was supplied; the machine was faulty and the respondent had reported to his supervisor, the quantum awarded was reasonable.

This is the first appellate court charged with the duty of re-considering, analyzing and evaluating evidence on record afresh, and arriving at an independent conclusion. See *Sella & Another versus Associated Motor Boat Company Limited and Another* (1968)E. A at 122.

Having considered the record and the submissions by learned Counsel, I find that for determination by the court are the following issues:-

1. Whether or not the respondent was injured.
2. If so was the appellant negligent of any statutory duty or any at all?
3. Did the respondent contribute to the accident? To what extent was the respondent negligent.
4. What were the injuries sustained.
5. What is the quantum of damages and
6. Who bears the costs.

It was not in dispute that the respondent worked for the appellant as a machine operator. The respondent (PW1) in his evidence stated that:-

- He was injured on 31/7/98.
- That he was injured while repairing the machine that was faulty.
- He was treated.....
- Dr. Nyamogo prepared a P3.

DW1 Romanus Okeno, the proprietor of the defendant company admitted that the respondent was injured while operating the machine.

As regards the claim of negligence, the respondent alleged that the appellant failed in his statutory duty. In the plaint the respondent claimed that the appellant failed in his duty by;-

- Providing poor working condition and facilities.
- Failing to provide any protective gears at all i.e gloves.
- Exposing the plaintiff to a risk he knew or ought to have known.
- Providing a defective machine.

In his evidence the respondent stated that the machine was faulty; it poured sand blast and in his attempt to rectify the same he got injured; he did not have gloves and his hand was trapped in the machine. He blamed the appellant for the faulty machine. He further stated that he had informed his boss about the condition of the machine.

On his part the appellant's witness stated that the machine was not faulty; he provided the respondent with protection gear; that the respondent ought to have switched off the machine before removing stone.

It is trite law that an employer owes a duty of care to his employee, to give him a safe working environment and protective gear where it is necessary. The respondent gave evidence stating that he had not been provided with protective gear. The appellant insisted that he did provide the same. However the appellant's witness stated that the machine was good and if it had jammed the respondent ought to have switched it off, clearly indicates that all was not well with the machine. A well serviced machine is expected to function without any jam. I find the evidence of the respondent to have been truthful as opposed to that of the appellant's witness.

Common law imposes a duty of care on the employer to take fitting care to see that an employee carrying on his work or industry does not suffer injury either in consequence of his personal negligence or through his failure to superintend or control the undertaking (See Halsbury's Laws of England, 4th Edition Vol. 16 at Paragraph 15) closer home, the Factories Act Chapter 514 of the Laws of Kenya Section 53 provides:-

“ Where in any factory workers are employed in any process involving exposure to met or to any injurious or offensive substance, suitable protective clothing and appliances, including where necessary, suitable gloves, footwear, goggles and head covering, shall be provided and maintained for the use of such workers.”

From the foregoing it is obvious that the appellant had both a common law and a statutory duty towards the respondent. Is it enough that he provided the protective gear. The appellant purports to have done so even if this was true (which I have discounted) however the expectation of law upon him is higher than simply to supply. He had to ensure that his employee indeed used the gloves (See Halsbury’s Laws of England, (supra. In Mghosi versus Gaytwi Engineering works (1981) KLR at 163 Kneller J held inter alia:-

1. It is not enough for an employer to provide a safe system or appliance, he must also ensure that the system is followed and the appliance used.

2. ----

3. The employer having failed to ensure and to see as far as it is reasonably possible that the system worked was in breach of the statutory duty under the Act. Plaintiff has further proved beyond the balance of probabilities that the defendant was guilty.”

Was the respondent guilty of contributory negligence? In his own words he stated:-

“ I was injured I was repairing machine, the machine was faulty, it was not working.”

He further said;

“The machine uses electricity. My hand was trapped in the machine and the machine stopped.”

The respondent was a machine operator yet he chose without wearing gloves to repair the machine. He does not say that the machine was off. I concur with the trial courts finding that he indeed contributed to the injuries he sustained.

Can this court interfere with the assessment of contributory negligence and assessment of damages?

The trial court assessed contributory negligence at 40:60.

An appellate court will only interfere if the trial court came to a manifestly wrong decision and based on wrong Principle. See Vyas Industries vs Diocese of Meru (1982) KLR at 114. I do not find the apportionment manifestly wrong neither that the magistrate erred as such. I therefore decline to interfere with the apportionment.

Again an appellate court will only interfere with assessment of damages if the same is inordinately high or manifestly low.

The injuries sustained was to left thumb and nail (came off). The thumb was stitched.

I agree with the appellant's counsel's submission that Kshs 90,000/= was excessively high for the injury sustained. I reduce the same to Kshs 50,000/=.

This appeal therefore succeeds only to the extent that the sum awarded as general is reduced from Kshs 90,000/= to Kshs 50,000/=. The same to be apportioned at the ratio of 40:60. For avoidance of doubt the appellant will take the large share of responsibility.

Costs to the respondent in any event.

Dated and delivered in Kisumu on 29.03.2011.

**ALI-ARONI
JUDGE**

In the presence of:

..... present for Appellant

.....present for Respondent