



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Coram : F. Azangalala J.

HCCA NO. 24 OF 2005

BETWEEN

REGISTERED TRUSTEES

NANDI BEAR'S CLUB:.....APPLICANT

AND

HENRY SIKUKU KHATUNJI:.....RESPONDENT

[Being an appeal from the Judgment of Mr. S.M. SHITUBI (Senior Resident Magistrate) dated 18th January, 2005 at the Principal Magistrate's Court at Kapsabet in PMCC NO. 154 OF 2003]

JUDGMENT

Henry Shikuku Khatunji (hereinafter "**the respondent**") was employed by the appellant as a grass mower at its **Nandi Beers Club**. On 25th April, 2001, he was on duty when he tried to physically lift the mower and got a back dislocation. He was treated at Nandi Hills District Hospital where he said he was put on physiotherapy. A medical report prepared by **Dr. Okubasu** indicated that the respondent suffered soft tissue injuries having strained his back muscles/ligaments which led to chronic lumbago. He then filed Kapsabet Principal Magistrate's Court Civil Suit No. 154 of 2003 against the Registered Trustees of Nandi Bears Club, (hereinafter "**the appellants**") alleging that the latter were negligent and in breach of their duty of care and or breach of contract of employment in that they, *inter alia*, failed to take any or adequate precaution for the respondent's safety and further that they exposed the respondent to a risk of injury.

The appellant denied the respondent's claim and more particularly that the respondent was injured in the course of his employment or that they were negligent or in breach of contract. In the alternative and without prejudice, the appellants pleaded that the alleged accident was solely or substantially caused by the negligence or breach of duty on the part of the respondent.

By consent, the Plaint in Kapsabet Principal Magistrate's Court Civil Case No. 152 of 2003, was produced as DEX.1. In that case, the parties were the same and the respondent claimed damages for injuries sustained on 22nd October, 1999 when a latrine he was using collapsed and he fell into the pit thereby sustaining severe bodily injuries including a blunt injury to the back.

Upon hearing the suit, the learned Senior Resident Magistrate found that the appellant had a duty to

provide the respondent with a helper to assist in lifting the grass mower. In the opinion of the learned Senior Resident Magistrate, the failure to provide the respondent with a helper constituted negligence. She concluded that the appellant was 100% to blame and awarded the respondent Kshs 100,000/= general damages for pain, suffering and loss of amenities. A further sum of Kshs 3,000/= was awarded as special damages. The total award being Kshs 103,000/= with costs and interest.

The appellant was dissatisfied with the said decision and so preferred this appeal on some 14 grounds. The substance of the grounds is that the trial magistrate's finding on liability was not based on the evidence adduced before her and that she applied wrong principles in arriving at the award of damages which award was exaggerated.

When the appeal came up before me for hearing on 26th July, 2011, counsel agreed to file written submissions which they duly filed by 11th October, 2011. The submissions were a rehash of the submissions made at the trial.

I have considered the pleadings, the evidence adduced before the learned Senior Resident Magistrate and the grounds of Appeal. I have also given due consideration to the submissions made to me. Having done so, I take the following view of the matter. The respondent's evidence at the trial was basically that on the material date, as he attempted to lift a grass mower, he got a dislocation of the back and could not stand. He however, walked slowly with a stick to Nandi Hills District Hospital where he was treated and placed on physiotherapy. The appellant then filled a workman compensation form for him. Later, **Dr. Okubasu** prepared a medical report of his injuries which report was produced as Ex. 6.

The respondent was extensively cross examined by counsel for the appellant. Initially he denied that he had ever had a back injury. This position changed with further cross-examination. In his own words:-

“I got a back dislocation for lifting the machine. I had healed in the first fall. Yes, I was not injured but my previous injuries appeared revived. The machine did not injure me anywhere. I always lifted the mower since employment. I used to work with 2 others. On the field, it is only me who usually worked on the mower since 1996. It is the work I used to do. I used to use the same mower. I continued using it after discharge from hospital. I had to do the work though I had not healed from the first injuries because of my needs. Yes, I never got fresh injuries in but I just revived the old. It is them who filled the workmen compensation. I could not have come to court had they not filled the compensation form. ----- Yes, I suffered strain back, muscle and chronic Lumbago. The injuries have been there since 1999. ----- Yes, I had pain though I can't tell what had happened. ...”

Given the respondent's own testimony, it is rather difficult to appreciate the conclusions of the learned Senior Resident Magistrate that the appellant was required to provide the respondent with a turn boy – because he had to lift a 50 kgm grass mower and that the appellant was therefore liable to the respondent on a 100% basis. The respondent himself had testified that he worked alone before and after the alleged accident. He had also categorically testified that he had had a strained back muscle and chronic lumbago since the year 1999. That was long before the 25th April, 2001 when the respondent alleged the accident, which gave rise to this appeal, occurred. He expressly testified that he had pain but could not tell what had happened.

In those premises, the respondent failed to demonstrate on a balance of probabilities that the appellants were guilty of the negligence he had alleged against them. Consequently, the aforesaid conclusions of the learned Senior Resident Magistrate were unsupportable. She clearly erred. I have come to that conclusion fully cognizant of the decision of the Court of Appeal in **Peter vrs= Sunday Post Ltd [1958] E.A. 424** that:

“ It is a strong thing for an appellate court to differ from the finding, on question of fact of the Judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. But the jurisdiction (to review the evidence) should be exercised with caution: It is not enough that

the appellate Court might itself have come to a different conclusion”.

But this Court is entitled to interfere when the finding of fact by the trial court was based on no evidence, or on a misapprehension of the evidence or the trial court acted on wrong principles in reaching that finding or that it was plainly wrong. **(See Ephantus Mwangi & Anther =vrs= Wambugu (1983/84) 2 KCA 100 at page 118 and Shah –vrs- Mbogoh [1968] EA 93 at P. 94.)**

In the case before me, having found that the learned Senior Resident Magistrate was plainly wrong on her finding on negligence, this appeal is for allowing.

If this appeal turned on quantum, I would not have disturbed the award of Kshs 100,000/= awarded to the respondent as general damages as the award in my view is not inordinately high as to represent an entirely erroneous estimate or that the award was based on wrong principles of law or against the weight of evidence, (See **Butt –vrs- Khan [1982 – 88]/KAR 1**) regard to Kshs 3,000/= awarded as special damages, the same in view were specifically pleaded and strictly proved.

However, as I have found for the appellant on negligence, the appeal is allowed. The entire award to the respondent is hereby set aside and in substitution thereto, the respondent’s suit is dismissed.

With regard to costs, the record shows that the respondent had been the appellant’s employee for some time and may have lost his employment when he suffered injuries after falling in a pit latrine in 1999 which led to chronic lumbago. In the premises, the order which commends itself to me is that each party bears its own costs both in this appeal and the lower court.

It is so ordered.

**DATED AND DELIVERED AT ELDORET THIS
15TH DAY OF NOVEMBER, 2011**

**F. AZANGALALA
JUDGE**

Read in the absence of parties and their advocates the, the date having been given in court.

**F. AZANGALALA
JUDGE**

15TH NOVEMBER, 2011