



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KITALE

CIVIL APPEAL NO. 15 OF 2007

**KRISHNA BAKERY
LIMITED.....APPELLANT**
VERSUS
PETER SHATTY
WAFULA.....RESPONDENT

JUDGEMENT

1. The appellant was sued before the Chief Magistrate’s Court for general and special damages arising out of an accident that occurred while the respondent was working as an employee of the appellant on 4th March, 2003. The respondent was awarded general damages of Ksh. 160,000/= less 25% contribution and special damages of Ksh. 1,500/=. Being aggrieved by that decree, the appellant has appealed and in the memorandum of appeal, the following grounds are raised:-

1. **THAT the learned trial Magistrate erred in law and infact in awarding the plaintiff damages which was quite high in the circumstances of the case.**
2. **THAT the learned trial magistrate erred in law and infact in disregarding the defendant’s submissions and the authorities in support thereof without any reasonable cause to do so.**
3. **THAT the learned trial magistrate erred in law and infact by acting on wrong principles on reaching his findings.**
4. **THAT the learned trial magistrate erred in law and infact in evaluation of evidence on record regarding injuries by the plaintiff.**
5. **THAT the learned trial magistrate erred in law and in fact if failing to give reasons for apportioning 75% as against the Appellant.**

2. In further arguments, counsel for the appellant submitted that the trial magistrate erred in law by finding the appellant 75% liable for the accident. There was no justification for such a finding as the respondent was the author of his own accident. The respondent was injured while removing bread from the oven; he was in control of the oven and bread and therefore should have been more careful. This evidence was supported by PW 2 who confirmed that the respondent was in charge of the bread trolleys.

3. Moreover, the appellant provided a safe working environment and there was no reason for apportioning only 25 % liability. Finally, counsel submitted that the award of Ksh. 160,000/= was excessive considering that the responded suffered soft tissue injuries. He recommended an award of Ksh. 70,000/= which is in line with awards given in similar cases that were cited before the learned trial

magistrate in the appellant's written submissions.

4. This appeal was opposed the respondent also filed a cross appeal on the following two grounds:-

(a) THAT the learned magistrate erred in law and in fact in making a finding that, the plaintiff/cross appellant be held contributory negligent when sufficient evidence on record had proved on a balance of probability that, the defendant ought to be held 100% liable.

(b) THAT the learned trial magistrate erred in law and infact, in awarding the plaintiff Ksh. 160,000/- (read one hundred and sixty thousand only) while from the injuries proved, the learned magistrate ought to have awarder the plaintiff Ksh. 800,000 (read eight hundred thousand only) as prayed I the plaintiff's submissions dated 20th December, 2006.

5. In further arguments, counsel for the respondent submitted that the award of ksh. 160,000/= was on the lower side considering the respondent suffered serious injuries he should have been awarded Ksh. 800,000/=. Secondly, the appellant contested the issue of employment DW 1 who testified on behalf of the appellant, categorically denied that the respondent was an employee. The court analysed the evidence, and on a balance of probability found that the respondent had proved his case that he was employed and he had suffered the injuries in the cause of employment. There was no justification for apportioning liability. The appellant should bear the entire 100% liability. Moreover, the respondent sustained electric burns and even if he was wearing gloves the injuries would still have occurred. The authorities cited by the appellant were old and the issue of inflation should be factored in.

6. This being a first appeal this court is mandated to re- evaluate the evidence before the trial court and arrive at its independent decision. The court must bear in mind that it never heard or saw the witness testify and give due allowance for that. The principles to be followed by the first appellate court have been set out in several decisions by the Court of Appeal and one such leading authority is a case of **PETER VS SUNDY (1958) E.A. PAGE 429**

“It is a strong thing for an appellant court to defer from the finding on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellant court has, indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with the caution: It is not enough that the appellant court might itself have come to a different conclusion.”

7. Both the appeal and cross appeal are on the issue of quantum, the appellant is contesting the award of Ksh. 160,000/= for general damages and contribution of 25%. The respondent on the other hand is contesting the award of Ksh. 160,000/= which he contends is low and the apportionment was erroneous as the appellant denied liability in total and there was no evidence to show contribution. According to the evidence on record, the respondent testified how he was injured while employed by the appellant to work in the bakery section. According to the medical report by **Dr. Aluda**, who examined the respondent, the respondent suffered severe burns on the right shoulder classified as 1st – 4th degree burns, burns on the anterior chest of 3rd – 4th degree burns and severe burns on the left fore arm of 1st – 4th degree burns. His prognosis was that the respondent sustained severe injuries which were continuing to heal but the scars and the skin pigmentation will be a permanent feature.

8. The respondent was also seen by **Dr. Gaya** whose prognosis was that the burns suffered by the respondent left permanent scars, the fore arm scar is hyper pigmented at centre and hypertrophied. The appellants denied that the respondent was an employee. The trial magistrate found that on a balance of probabilities the respondent was working for the appellant. He was injured in the cause of employment. Going by the evidence on record, do not see the reasoning behind the apportionment of liability because the court held that the accident was contributed by a possible defect in the oven trolley.

9. The learned trial magistrate further made a finding that it was the duty of the defendant to ensure a safe working area. The court having dismissed the defence, I do not see the basis upon which there was a

finding of contributory negligence. It is always the duty of the employer to take reasonable care and provide the employees with necessary equipment, and in the absence of a safe working environment; the employer is liable for the injuries.

10. On the issue of the assessment of damages, I have considered the medical reports by the two doctors, and the injuries suffered by the respondent which resulted into permanent scars but with no permanent disability. The authorities cited for similar injuries are within the range, although each party tended to exaggerate their case with the respondent citing authorities where higher awards were made for more serious injuries resulting into unsightly scars. The injuries in this case did not result in unsightly scars and there was no permanent disability noted. Also the authorities cited by the appellant although they dwelt with similar injuries did not take into account the inflation.

11. It is trite that when awarding damages for personal injury the court should consider the need for consistency while making awards which should be within the limits of decided cases. It is the trial Magistrate who heard the evidence and saw the witnesses, thus on the issue of the assessment of damages, it is undesirable for this court to interfere with the trial court's decision on damages unless it can be proved that the court proceeded on the wrong principle. Taking into consideration the totality of the evidence, am not satisfied that the trial court assessment of general damages at Ksh. 160,000/= erred.

12. However, on apportionment as held above, there was no reason for the apportionment of liability. Accordingly I allow the cross appeal as regards to apportionment of 25% and substitute the judgment of the trial court with the order that general damages shall be awarded to the respondent at Ksh. 160,000/=. Consequently, the appeal is dismissed and the cross appeal is allowed on the ground of apportionment. The respondent shall have the costs of the appeal.

Judgment read and signed this 19th day of November, 2010

MARTHA KOOME

JUDGE