



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 883 of 2006

KARUNGURU ESTATE LIMITED.....APPELLANT

VERSUS

JEREMIAH NANDWA

MUSTA.....RESPONDENT

J U D G M E N T

1. This appeal arises from a suit which was filed in the Resident Magistrate's Court at Kandara, by Jeremiah Nandwa Musta (hereinafter referred to as the respondent), against Karunguru Estate Limited, (hereinafter referred to as the appellant). In his suit the respondent sought general and special damages from the appellant arising from injuries suffered by him in an accident whilst working for the appellant. The respondent maintained that the accident was caused by the negligence and/or breach of common law or statutory duty on the part of the appellant or its agents or servants.
2. The appellant filed a defence to the respondent's suit, in which it denied that the respondent was injured during the course of his employment, or that the injuries arose because of the appellant's negligence, breach of duty or breach of contractual obligation. The appellant maintained that if the respondent suffered any injuries, he did so because of his own negligence.
3. During the trial the respondent testified that at the material time, he was working for the appellant as a watchman but could also be assigned other duties. On the particular day, he was assigned to weed flowers. While the respondent was in the process of weeding the flowers using a panga, the panga was deflected after hitting a stone as a result of which it cut the respondent's left toe. The respondent reported the accident to the appellant's manager and also to the manager's clerk. He was referred to Kimunyu Medical Center where he was treated and discharged.
4. The respondent was later examined by Dr. Kiama Wangai who prepared a medical report showing that the respondent suffered a cut wound, blood loss and soft tissue injuries from which he had fully recovered. The respondent blamed the appellant for the accident contending that his injuries were aggravated because he was not provided with proper gumboots.
5. The appellant testified through two witnesses, these were Teresio Nyaga, the appellant's assistant manager and Peter Murage Gatima, an accountant with the appellant. Their evidence was that the respondent was employed by the appellant as a security officer. On the 9th and 10th he was on sick off. The witness maintained that there was no record of the respondent having been injured whilst on duty. It was denied that the respondent was weeding flowers.

6. In his judgment, the trial magistrate found that the respondent was employed by the appellant. She noted that although the respondent was employed as a watchman he was sometimes assigned other duties. The trial magistrate further found that the respondent was injured whilst on duty weeding flowers using a panga, a duty that had been assigned to him. The trial magistrate also found that the respondent was not provided with any gumboots which could have prevented the injury that the respondent suffered. Consequently, the trial magistrate found the appellant liable to the respondent, and awarded the respondent general damages of Kshs.60,000/= and special damages of Kshs.9,000/=.

7. In its memorandum of appeal, the appellant has raised 6 grounds as follows:

(i) That the learned trial magistrate erred in fact in finding that the respondent was injured and sustained injuries on 9th June, 2003 whilst in the course of employment.

(ii) That the learned trial magistrate erred in law and fact by awarding damages when it was clear that the respondent operation of the panga was within his power and control.

(iii) That the learned trial magistrate erred in law and fact in finding the appellant wholly liable to the injuries whereas the respondent entirely contributed to blame.

(iv) That the learned trial magistrate erred in law and fact in making an award which was excessive and not commensurate with the nature of injuries by the plaintiff.

(v) That the learned trial magistrate misdirected herself on all points of law.

(vi) That the learned trial magistrate erred in law by ignoring the submissions of the defendant and the evidence placed before her by the defence.

8. During the hearing of the appeal, the 1st and 6th grounds were abandoned. It was submitted that the respondent was involved in a simple operation of cutting grass and was in full command and control of the tool which he was using. It was maintained that the respondent's injury was self inflicted and the respondent cannot therefore blame the appellant. Further it was submitted that the incident was too remote and unforeseeable. On the quantum, it was maintained that the respondent having sustained only a cut wound, the general damages of Kshs.60,000/= awarded to the respondent were excessive.

9. For the respondent, it was submitted that as an employer the appellant was under a duty not to expose the respondent to unnecessary risk. It was maintained that the respondent was using a panga which was a dangerous object and therefore the appellant ought to have provided protective clothing such as gumboots. It was contended that the panga having been deflected by a stone which was hidden by grass, there was no negligence on the part of the respondent. In this regard *Gatundu Coffee Growers Cooperative Society Ltd vs Njoki Njoroge Civil Appeal No.12 of 1989* was relied upon, as well as a passage from *Winfield and Jolowic on Tort (Thirteenth Edition at page 189 to 190)*.

10. On the issue of quantum, it was submitted that the amount awarded was within the range of awards for the kind of injury suffered by the respondent. It was submitted that the trial magistrate neither misdirected himself nor gave an extraordinary award such as would justify interference.

11. I have carefully reconsidered and evaluated the evidence which was adduced before the trial Magistrate. I have also considered the submissions made before me. It was not disputed that the respondent was an employee of the appellant. What was in issue was whether the respondent was injured during the course of his employment, and if so whether the appellant was negligent or in breach of its common law duty of care or contractual duty, and whether there was any causal connection between the appellant's alleged negligence or breach, and the respondent's injuries.

12. In his evidence the respondent explained that although he was employed as a watchman, he would sometimes be assigned to weed flowers by the manager one Mr. Nyakundi. Although the appellant's witness Teresio Nyaga (Nyaga) maintained that the respondent has never weeded flowers because he

was in the security section. He conceded that both Mr. Nyakundi and himself distributed work to staff. Under cross examination, the witness conceded further that the respondent could do any work allocated to him. Indeed the Muster Roll which was produced by the appellant in evidence reflected that the respondent had previously done other work such as picking coffee. This was inconsistent with Nyagah's assertion that the respondent could not do weeding because he was in the security section.

13. Further the respondent explained that he was injured on the 9th June, 2003 at around 7.00 a.m. He stated that the incident happened before the supervisor arrived, and therefore he reported the incident to Mr. Nyakundi and the clerk, one Maria before he proceeded to hospital at Kimuyu Medical Centre where he was treated and given off duty. The respondent produced treatment notes which corroborated his evidence, but again neither Mr. Nyakundi nor the clerk were called to testify to negate the respondent's allegation. Although it was conceded that both were in the appellant's employment, the trial Magistrate, who saw and assessed the demeanour of the witnesses rejected the evidence for the appellant and believed and accepted the evidence of the respondent that he was injured whilst on duty. In the light of the evidence which was before the trial Magistrate, I have no reason to fault the finding of the Magistrate in that regard.

14. I find that the respondent was injured when a panga which he was using to weed flowers was deflected by a stone and the panga cut his toe. The pertinent issue is whether the appellant was negligent or in breach of any duty towards the respondent. As an employer the appellant was under a duty to the respondent to provide reasonable care against risk of injury caused by events reasonably foreseeable or which would be prevented by taking reasonable precaution. *Mwanyule vs. Said t/a Jomvu Total Service Station [2004] 1 KLR 47*) refers. The respondent blamed the appellant for failing to provide him with a pair of gumboots.

15. In its statement of defence the appellant denied all the particulars of negligence attributed to it, including failure to supply the respondent with gumboots. However, there was no evidence adduced by the appellant's witnesses challenging the respondent's evidence that he was not supplied with gumboots or confirming that gumboots were supplied to the respondent. Nor was any evidence adduced to show any protection that was given to the respondent in order to substantiate the particulars of negligence alleged against the respondent.

16. The respondent was engaged in the exercise of weeding flowers using a panga. The possibility of being injured by a sharp object or a deflected stone, was not unforeseeable and therefore the appellant ought to have taken reasonable precaution by supplying the respondent with a pair of gumboots. Thus the appellant failed in its duty to provide reasonable care to the respondent. On the other hand, there was no evidence that the respondent deliberately hit the stone or otherwise performed his work in a reckless manner or contrary to instructions given to him. No negligence or contributory negligence was therefore established against him.

17. The next issue for consideration is whether there was any causal connection between the appellant's breach of duty and the respondent's injuries. In my view the appellant's failure to provide the respondent with the gumboots substantially contributed to the injury to the respondent as the respondent's feet were exposed. Had the appellant supplied the respondent with the gumboots, the risk of injury would have been greatly minimized. For the above reasons I find the appellant liable to the respondent.

18. As regards quantum the principle to be observed by an appellate Court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge is that it must be satisfied that either the Judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages. (*Kemfro Africa Ltd t/a Meru Express Service & Another vs. A.M. Lubia vs. Olive Lubia*). In this case the respondent suffered a cut wound on the big toe which had to be stitched and which resulted in his toe nail coming off. The injury healed leaving a scar. In my considered view the award of Kshs.60,000/= made by the trial Magistrate was not based on wrong principles nor is it so inordinately high as to justify the intervention of this Court.

19. The upshot of the above is that I find no merit in this appeal and do therefore dismiss it with costs.

Orders accordingly.

Dated and delivered this 18th day of September, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Kisya for the appellant

Advocate for the respondent served, absent