



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL 101 OF 2005

MEGA SPIN LIMITED.....APPELLANT

VERSUS

GABRIEL OTIENO.....RESPONDENT

JUDGMENT

The respondent, Gabriel Otieno filed suit against the appellant Mega Spin Limited seeking to be paid damages on account of injuries he alleged to have sustained when he was at his place of work at the appellant's premises. The respondent pleaded that he was employed as a general worker by the appellant. He averred that on the 18th February 2003, while he was at his place of employment performing his duties, the ring frame machine which he was operating cut his left middle finger and caused him to sustain severe injuries. The respondent attributed his injury to the negligence of the appellant who allegedly failed to provide him with a safe working environment and further exposed him to risk of injury which the appellant ought to have protected against. The respondent particularised the negligence on the part of the appellant and further particularised the alleged breach of contract of employment. He averred, *inter alia*, that he had been injured because the appellant had failed to provide him with protective clothing.

When the appellant was served, it entered appearance and filed a defence. It denied the respondent was its employee. It further denied that it was negligent or that it had exposed the respondent to unsafe system of work or further that it had failed to provide the respondent with a safe working environment. The appellant averred that if the respondent was injured, then it was due to his own negligence. The appellant particularised the particulars of negligence on the part of the respondent. The appellant averred, *inter alia*, that the respondent was injured due to his own negligence and by failure to follow the laid down procedure of work as instructed by the appellant. The appellant denied that the respondent was injured and put the respondent to strict proof thereof.

The trial magistrate, upon hearing the suit, entered judgment for the respondent against the appellant. He apportioned liability as between the appellant and the respondent at the ratio of 80:20. The appellant was to bear 80% liability whilst the respondent was to bear 20% contributory negligence. She assessed the general damages to be paid to the respondent at Ksh.80,000/=. She awarded special damages of Ksh.2,500/=. The respondent was therefore awarded the sum of Ksh.82,500/= less 20% contribution *i.e.* Ksh.66,500/=, costs and interest.

The appellant was aggrieved by the decision of the trial magistrate and duly appealed to this court. In its Memorandum of Appeal, the appellant raised several grounds of appeal challenging the decision of the trial magistrate in finding in favour of the respondent. It was aggrieved that the trial magistrate had failed

to consider the totality of the evidence adduced and had therefore arrived at an erroneous decision that the respondent had proved his case to the required standard of proof. It was aggrieved that the trial magistrate had failed to consider the evidence that was adduced which had established that the respondent was at his place of work the entire day that he claimed to have been injured. It faulted the trial magistrate for relying on a medical report whose contents had been altered and in the absence of the initial medical treatment papers. It was aggrieved that the trial magistrate had failed to consider the evidence that was adduced by the appellant in its favour and therefore arrived at the said erroneous decision. It faulted the trial magistrate for failing to consider the submission made on behalf of the appellant and further failing to give reasons for her judgment. The appellant was finally aggrieved that the trial magistrate had failed to consider the applicable principles of the law and awarded damages that were excessive in the circumstances.

At the hearing of the appeal, I heard the submissions made by Mr. Murimi on behalf of the appellant and by Mr. Kariuki on behalf of the respondent. Mr. Murimi submitted that the respondent had not established that he was injured while he was working at the premises of the appellant. He submitted that the initial medical treatment papers were marked for identification but were not produced in court. He took issue with the medical report which was produced by Dr. Omuyoma. He submitted that the said medical report was altered and therefore its contents ought not to be relied on by this court. He maintained that the respondent had not established his case to the required standard of proof.

Mr. Murimi noted that on the day the respondent alleged that he was injured, he was on duty the entire day. The respondent made no report that he had been injured while on duty. He urged the court not to rely on the testimony of the respondent that he was injured by a defective machine. He submitted that the respondent had not pleaded the machine that he was assigned to work on was defective. He maintained that the respondent had not established a causative link between the defect in the machine and the injury he sustained. He complained that the trial magistrate had not given reasons for her judgment. He finally submitted that the trial magistrate erred when she made an award of damages that was excessive in the circumstances, taking into account the injuries that the respondent had sustained. He relied on several authorities in support of his submission on this appeal. He urged the court to allow the appeal.

Mr. Kariuki for the respondent opposed the appeal. He submitted that the respondent had adduced sufficient medical evidence which established that he had indeed been injured while on duty at the appellant's premises. He explained that the evidence which was adduced by the appellant's witness, established that the respondent was on duty on the day he was injured. He urged the court not to be influenced by the letter of redundancy to deny the respondent's claim. He submitted that the respondent had established to the required standard of proof that he was injured while he was at his place of work. He maintained that the medical report was corrected by Dr. Omuyoma when he realised that he had made a honest mistake in reference to the place the respondent was treated immediately after he was injured. He urged the court not to be persuaded by the reasons put forward by the appellant in view of the misleading averments that the appellant had made in its defence. He maintained that the appellant had established he was injured due after being exposed to an unsafe system of work. He urged the court to dismiss the appeal with costs.

This being a first appeal, this court is aware of its duty as the first appellate court. As was held by the court of appeal **in Bidco Refineries Ltd vs Rosslyn Developments Ltd C.A Civil Appeal No.227 of 2007 (Nrb) (unreported)** at page 8;

“The principles upon which an appellate court would interfere with the decision of a court of first instance are now well settled and have been restated many times by this court. A court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did. An appellate court also has jurisdiction to review the evidence in order to determine whether the conclusion reached upon the evidence should stand, but this is a jurisdiction which should be exercised with caution – see Makube – vs Nyamira [1983] KLR 403 and Kiruga vs Kiruga & Anor. [1988] KLR 3483.”

In the present appeal, the issues for determination are two fold; whether the respondent established that he was injured while he was at his place of work. The second issue of determination is whether the quantum of damages assessed by the trial magistrate was appropriate in the circumstances of this case. On the first issue, the respondent adduced evidence which established that he was at his place of work on the day that he claimed he was injured. The witness of the appellant, DW1 Naftali Charles Asiago confirmed that the respondent was at his place of employment on the day that he claimed he was injured. DW1 however testified that the records of the appellant did not indicate or show that the respondent was injured or that he was forced to leave work to enable him to be medically attended on account of the injuries that he alleged to have sustained. On his part, the respondent testified that he was injured when the ring frame machine that he was working on developed a mechanical problem and cut his middle finger. He did not plead in his plaint that he was injured on account of a defect in a machine. He however pleaded that the appellant had exposed him to an unsafe system of work thereby resulting in the injury that he had sustained.

The respondent testified that the appellant failed to provide him with protective clothing, including gloves that would have prevented him from sustaining the said injury. DW1 confirmed in his testimony before court that the appellant did not issue its employees with gloves. The respondent testified that after he was injured, he went to Mwamu Medical Clinic where he was treated and discharged. The medical treatment chit from Mwamu Medical Clinic was marked for identification but was not produced in evidence. PW2 Dr. Omuyoma testified that he examined the respondent and confirmed that he had been injured. He relied on the medical treatment chit which was issued by Mwamu Medical Clinic.

On re-evaluation of the evidence adduced, it was clear that the respondent established that he was injured while he was at his place of work. It is trite law that where an employee is injured by a machine which has a moving part which is exposed and is not well secured, the employer shall be held strictly liable (*See Section 23(1) of the Factories Act*). Although the respondent did not plead that he was injured by the defective machine, it is the view of this court that the aspect of the defective machinery was covered by the averment made by the respondent that he had been exposed to an unsafe system of work. The evidence adduced by both the appellant and the respondent established that the respondent was injured due to the negligence of the appellant in failing to provide the respondent with safety equipment *i.e.* gloves. If the respondent wore gloves at the time of the industrial accident, most probably, he would not have been injured.

The appellant relied on self generated documents in support of its assertion that the respondent was not injured on the day he alleged to have been injured. In the present case, it was clear that the appellant had denied in its defence that the respondent was its employee. It can therefore be reasonably inferred that the appellant generated the said documents so as to support its case that the appellant worked the entire day without reporting the injury that he had sustained. Taking into consideration the totality of the evidence adduced before the trial magistrate, I hold that the respondent proved, to the required standard of proof on a balance of probabilities, that he was injured while he was on duty and further that he was injured due to the negligence of the appellant. If the respondent had cross-appealed on liability, this court would have found the appellant solely liable in negligence for the injuries that the respondent sustained. As it were, the appeal against liability is hereby dismissed. The liability apportioned by the trial magistrate is hereby upheld.

On quantum, the appellant is on firmer ground. According to Dr. Obed Omuyoma, the respondent sustained a deep cut wound on the left middle finger that resulted in severe soft tissue injuries to the left middle finger. At the time of examination, the said injury had healed with no permanent disability. The said injury had however left a permanent scar on the left middle finger. It was clear that the respondent sustained only soft tissue injuries. The award of Ksh.80,000/= was excessive in the circumstances. The injuries sustained by the respondent are similar to the injuries the plaintiff sustained in **Nakuru Timber Cases vs Kephagh Siminwi Njomo Nku HCCA No.28 of 2001 (unreported)** and in **Socfinaf Company Ltd vs Joshua Ngugi Mwaura Nbi HCCA No.742 of 2003 (unreported)**.

The principles upon which this court can interfere with an award of a trial court are well settled. This court will interfere with an assessment of damages made if it was established that the trial magistrate

acted on wrong principles or alternatively that he took into account irrelevant considerations in assessing the said damages. This court will also interfere with the said assessment of damages if it was established that the said award was either inordinately high or inordinately low as to constitute an erroneous assessment of the general damages to be paid to the claimant. (See **Lukenya Ranching and farming Co-operative Society Ltd vs Kavoloto [1970] E.A 414**).

In the present appeal, it was clear that the assessment of general damages by the trial magistrate was inordinately high as to constitute an erroneous assessment of damages payable to the respondent. I will set aside the said assessment of general damages and substitute it with an appropriate assessment of this court. I assess the general damages to be paid to the respondent for pain, suffering and loss of amenities on account of the injuries that he sustained at Ksh.30,000/=. There was no dispute as to the special damages of Ksh.2,500/= awarded. The respondent is thus awarded the sum of Ksh.32,500/= less 20% contributory negligence *i.e.* Ksh.26,000/=. The respondent shall have the costs of the suit in the subordinate court. Since the appellant was partially successful on this appeal, it shall have half (1/2) of the costs on this appeal.

It is so ordered.

DATED at NAKURU this 18th day of December 2007

L. KIMARU

JUDGE