Minuteman Autoworld Limited & 2 others v Makori (Civil Appeal 240 of 2020) [2024] KEHC 2119 (KLR) (Civ) (1 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2119 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 240 OF 2020

AN ONGERI, J

MARCH 1, 2024

BETWEEN

MINUTEMAN AUTOWORLD LIMITED ..... 1ST APPELLANT

CHARLES ODERA LIYAKHA ..... 2ND APPELLANT

ROMENAH MUTAVE KALOKI ..... 3RD APPELLANT

AND

MICHAEL NYAMWEYA MAKORI ..... RESPONDENT

(Being an appeal from the judgment and decree of Hon. Orenge (SRM) in Milimani CMCC No. 6646 of 2015 delivered on 22/05/2020)

JUDGMENT

1. The respondent sued the appellants in Milimani CMCC No. 6646 of 2015 seeking general damages for injuries the respondent sustained on 5/11/2015 while working in the 1st appellant's factory.
2. The trial court found the appellants 100% liable and assessed damages at 950,000/=.
3. The appellants have appealed against the judgment and decree of the trial court on the following grounds;
    i. That the learned Trial Magistrate erred in law and in fact in awarding the Plaintiff Kshs 950,000 together with interest thereon and costs of the suit.
    ii. That the learned Trial Magistrate erred in law and in fact in failing to consider the fact that the Respondent was not an employee of the 1st Appellant.

iii. That the learned Trial Magistrate erred in law and in fact in failing to appreciate and consider the evidence tendered by the Defendants.

iv. That the learned Trial magistrate erred in law and in fact in by failing to appreciate that the burden of proof on the capacity of the Respondent lays squarely on him.

v. That the learned magistrate misdirected himself in finding that there was evidence to establish vicarious liability in the incident and concluded that the 1st and 3rd Respondents were liable.

vi. That the learned magistrate misdirected himself on the assessment of quantum on general damages.

vii. Thatthe learned Trial Magistrate erred in law and in fact in failing to appreciate and consider the evidence tendered by the 1st Appellant.

viii. That the learned Trial Magistrate erred in law and in fact in failing to consider the Defendants written submissions as filed.

ix. That the Learned Trial Magistrate erred in law and in fact in relying on extraneous matters in dismissing the appellants' application.

x. That the learned Trial Magistrate's judgment is flawed by apparent errors on the face of the record and the same is prejudicial to the Appellants.

xi. That the whole judgment Of the Senior Principal Magistrate is against the pleadings, submissions and the law

xii. That the decision of the learned Trial Magistrate occasioned a manifest miscarriage of Justice.

4. The parties filed written submissions as follows; the appellant submitted that on cross-examination the Respondent could not produce a single iota of evidence to confirm his allegation of being an employee. He could not ascertain exactly which piece of land he was laying claim on as the 1st Appellant is a garage cum car wash.

5. Further, that the Appellants provided photographic evidence of the premises and there was no 'shamba" near the premises. On a scale of probability, it is improbable that the 1st Appellant had a garden that needed tending and more plausible that the Respondent was a trespasser. To which end the Appellants in their submissions rightly relied of the doctrine of ex turpi causa non oritur action

6. The appellant submitted that the trial court did not consider either of the parties' evidence, pleadings and or submissions. It did not establish any finding that led to the conclusions made. The appellant was able to prove that the respondent was not an employee and further the photos from the scene clearly indicated that there was a garden in the premises.

7. The respondent was not an employee and was not invited on the appellants premises which by definition made him a trespasser. The respondent referred to a contract of employment which was never produced or proved, his presence in the appellants premise was one intended to cause mischief and create chaos which thus necessitated his removal.

8. On the issue of vicarious liability, the appellant argued that the respondent in his plaint based his claim on section 44 of the *occupational Safety and Health Act* and not the principle of vicarious liability. In law parties are bound by their pleadings thus the trial court erred when it did not restrict itself to the issues pleaded by the respondent.

9. The appellant maintained that they are not in any form liable for the injuries suffered by the respondent as he was a trespasser intended on creating chaos thus the injuries were caused by his own actions. Therefore, no duty of care was owed and no damage of loss was suffered.

10. The respondent submitted that according to the evidence adduced in the lower court it was confirmed that indeed the Respondent was injured due to the actions of the appellants. The appellants called one witness who confirmed that indeed the Respondent was injured hence the Appeal was an afterthought and meant to frustrate the respondent who was injured at his place of work.

11. The respondent contended that in the appellant's submissions, they allege that the respondent was a trespasser who was forcibly removed from the appellants place of business after causing mayhem and threatening employees, there was no evidence that was presented in court to show that the respondent was a trespasser at the appellants premises, hence the burden of prove fails.

12. On the issue of vicarious liability the trial court established that the respondent indeed was injured at the appellants premises in his cause of employment and thus the appellants were therefore liable, hence they were held 100% to blame jointly and severally.

13. On the issue of quantum, the respondent submitted that the evidenced adduced to the lower clearly established that the Respondent was injured as per the medical report of Dr. Okere dated 23/9/2013 and there was a permanent incapacity of 10% that the trial court relied on comparable injuries when awarding general damages.

14. This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced at the trial court and to arrive at its own conclusion whether to support the findings of the trial court. In *Selle v Associated Motor Boat Co*. [1968] EA 123 it was held in the following terms: -

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.
>
> An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.
>
> In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

15. The issues for determination in this appeal are as follows;

    i. Whether the respondent proved his case to the required standard.

    ii. Whether the trial court failed to consider that the respondent was not an employee of the 1st appellant.

    iii. Whether the trial court misdirected himself on the issue of assessment of damages.

    iv. Whether the appeal should be allowed.

v. Who pays the costs of the appeal?

16. On the issue as to whether the respondent proved his case to the required standard, the respondent's evidence was that he was hit by an employee of the 1st respondent with a jembe on 5/11/2012 at around 8.30am.

17. The employee who hit him is the 2nd appellant. The respondent said the 3rd appellant grabbed his hands at the back.

18. The respondent said the 2nd appellant was charged at Makadara court in Cr. Case no. 6080 of 2012 with the offence of causing grievous harm.

19. I find that the respondent proved his case to the required standard in civil suits. The appellant's case was mere denial.

20. On the issue as to whether the trial court ought to have considered whether the respondent was an employee of the 1st appellant, I find that the respondent's claim is based on tort and not on the contract of employment.

21. The respondent does not need to prove that he was an employee of the appellants to be found culpable in the tort of negligence.

22. On the issue as to whether the trial court misdirected itself on the issue of assessment of damages, I find that there is evidence that the respondent sustained serious injuries. The 2nd appellant was charged with the offence of grievous harm.

23. The trial court applied the correct principles. There was undisputed evidence that the respondent sustained 10% permanent incapacity as a result of the injuries which consisted of fracture of the ulna.

24. The trial court relied on the case of Mary Pamela Oyioma v Yess Holdingwhere the plaintiff sustained similar injuries and was awarded ksh.900,000.

25. The trial court also relied on the case of Zachariah Nyabuti Uchiri Vs Tashrif Bus ServicesHCC No. 266 of 1998 at Machakos where the respondent sustained similar injuries with 45% degree of permanent injury and was awarded ksh.1,650,000.

26. I find that there is no reason to interfere with the trial court's assessment of damages.

27. The appellate court can only interfere with an award if the trial court relied on wrong principle or if the award is inordinately high or low as to warrant interference.

28. I find that the trial court did not misdirect itself in the assessment of damages.

29. I find that this appeal lacks in merit and I accordingly dismiss it.

30. The appellants to bear the costs of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 1ST DAY OF MARCH, 2024.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent