Bake 'N' Bite (Nrb) Limited v Mwalonzi (Civil Appeal 411 of 2014)
[2023] KEHC 21701 (KLR) (Civ) (6 April 2023) (Judgment)

Neutral citation: [2023] KEHC 21701 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 411 OF 2014

AA VISRAM, J

APRIL 6, 2023

BETWEEN

BAKE 'N' BITE (NRB) LIMITED ..... APPELLANT

AND

DANIEL MUTISYA MWALONZI ..... RESPONDENT

(Being an appeal from the Judgment of the Honorable Magistrate Mrs. Oganyo dated 29th August, 2014)

JUDGMENT

Introduction

1. The respondent (Plaintiff in the lower court) filed this suit in the lower court vide a plaint dated March 26, 2013. He alleged that he was employed by the appellant (Defendant in the lower court).

2. On or about May 10, 2012, during the course of his employment at the appellant company, the respondent alleged that he was hit by a sharp iron sheet of a trolley that he was pulling, injuring his hand. In particular, he claimed that he suffered a deep cut to his left middle finger and laceration on the back of his hand. He stated that the appellant had failed to take reasonable precautions to ensure his safety; to provide safe systems at work; and had exposed him to risk of injury. Accordingly, he sought general damages; special damages of Kshs 3,000/-; interest; and costs of the suit in the lower court.

3. The appellant opposed the suit in the lower court vide its Defence dated May 8, 2013, in which it admitted that the Plaintiff was its employee, but denied all the other said allegations.

4. The matter went for a full trial and on August 28, 2014, the lower court entered judgment in favour of the respondent. The lower court found the appellant 100% liable and ordered it to pay general damages

of Kshs 60,000/-; special damages in the sum of Kshs 3,000/- plus costs of the doctor at Kshs 5,000/- ; costs of the suit; and interest at court rates.

5. Aggrieved by the above judgment, the appellant has filed this appeal dated September 3, 2014 on the following grounds:

    1. That the Learned Magistrate erred in law and in fact in failing to find that the Plaintiff failed to prove his case for want of compliance with the provisions of sections 35 of the *Evidence Act* Cap 80.

    2. That the Learned Magistrate erred in law and in fact in awarding General Damages of Kshs 60,000/- and Kshs 3,000/- and special (damages) which awards were unwarranted in light of the evidence adduced.

    3. That the Learned Magistrate erred in law in fact in not taking into account entirely the submissions of the appellant.

    4. That the Learned Magistrate's finding and decision on General Damages of Kshs 60,000/- and special damages of Kshs 3,000/- were against the weight of the evidence adduced.

    5. That the Learned Magistrate erred in law and in fact in awarding Doctor's charges of Kshs 5,000/- which award was unwarranted in light of the evidence adduced.

6. The parties agreed that this appeal be disposed of by way of written submissions. The appellant filed its submissions dated November 3, 2022. The respondent did not file any submissions.

Appellant's Submissions

7. In relation to the first ground, the appellant submitted that the respondent had never been injured in the first place, and that no accident had been reported on the day of the alleged injury.

8. The appellant noted that based on the record in the lower court, it was evident that the respondent had contradicted himself by testifying that he had been injured while carrying bags of wheat flour rather than by the iron sheets and trolley as stated in his plaint.

9. Further, that the appellant's Head of Safety and Security has testified that the accident never occurred. It had never been reported; and it had not been recorded in the injury book, which had been produced by the appellant in the lower court.

10. The appellant submitted that the inconsistencies on the part of the respondent's testimony, in general, had failed to muster the test required by section 107(1) of the *Evidence Act*. As such, the respondent had failed to prove its case against the appellant on a balance of probability.

11. In relation to the remaining grounds, the appellant contended that the award of Kshs 60,000/- as general damages was excessive and not commensurate to the injury suffered by the respondent. Counsel relied on the High Court decision in HCC No 742 of 2003, *Socfinaf Company Limited v Joshua Ngugi Mwaura* [2005] eKLR where Visram, J (as he then was) awarded the sum of Kshs 20,000/- for a soft tissue injury on the basis that there was no fracture nor hospitalization involved.

12. Counsel cited the Court of Appeal decision in *Kemfro Africa Limited t/a Meru Express Services (1976) & another v Lubia & another* (No 2.) [1985], in support of its argument that the trial court failed to consider its submissions and authorities in arriving at its judgment.

> 'The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a Trial Judge were held by the former Court

of Appeal of Eastern Africa, to be 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 damage. (See Ilanga v Manyoka, [1961] EA 705, 709, 713 (CA-T); Lukenya Ranching and Farming Co-operative Society Ltd v Kavoloto, [1979] EA 414, 418, 419 (CA-K).'

13. Finally, counsel stated that special damages must be specifically pleaded and strictly proved by way of production of receipts, which had not been done by the respondent in the lower court. Accordingly, the award for special damages ought to be reversed.

Analysis and determination

14. I have read the record in its entirety and considered the grounds of appeal raised by the appellant. The issues that arise for determination are essentially two:

    a. Was the lower court correct in its finding on liability?

    b. Was the lower court correct in its award of damages?

Was the lower court correct in its finding of liability?

15. As this is a first appeal, I have a further duty to re-evaluate the evidence before me. This principle as set out in the Court of Appeal decision of *Selle and Another Versus Associated Motor Boat Company Ltd & Others* [1968] EA 123, where the court stated that:

> " 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 conclusion. 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 in some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence on the case generally."

16. Looking at the record before me, I see that the lower court based its decision on liability on two primary factors: first, it found that an accident had occurred while the respondent was at work; and secondly, it found, that on a balance, the employer was more than less likely to blame for the accident and the resultant injuries occasioned to the respondent.

17. Based on the evidence in the record, I am of the view that the lower court reached a reasonable conclusion. I see that the respondent's version of events is corroborated by the evidence that he produced in the lower court. In particular, he produced a sick sheet dated May 10, 2012; a receipt from Kingstone Community Clinic, Makadara dated May 10, 2012; and a medical report of Dr Cyprianus Okoth Okere dated March 11, 2013, all of which were consistent with his testimony concerning the date and nature of the injuries he sustained.

18. Reading of the judgment, I see that the Magistrate considered the fact that the appellant had not subjected the respondent to any further medical examination by a doctor of its own to disprove the nature of the respondent's injures. Accordingly, the Magistrate found that the medical report was uncontroverted.

19. The Magistrate further appreciated the fact that the appellant had not produced any evidence to show that the appellant did in fact issue the respondent with protective gear on the date of the accident. Accordingly, based on these and other reasons, the Magistrate found that the appellant was to blame for the respondent's injury on that day. To my mind, this conclusion falls within the range of reasonableness. I see no reason to interfere with the finding of the lower court on the issue of liability.

20. For the sake of completeness, I would add that the lower court was entitled to reach its conclusions based on its assessment of the evidence rather than the submissions by the appellant. In *Japhet Nkubitu & Another Vs Regina Thirindi* [1998] eKLR the Court of Appeal stated the following, which is self-explanatory, in relation to the question of whether or not submissions are binding upon a court of law:

> " Submissions are not evidence and cannot take the place of evidence. We are told this practice is rampant at Meru but that is no excuse for a practice which is clearly illegal and contrary to law."

Was the lower court correct in its award of damages?

21. The guiding principle in the assessment of damages is that an award must reflect the trend of previous, recent, and comparable awards. This position finds support in the case of *Stanley Maore v Geoffrey Mwenda* NYR Civil Appeal No 147 of 2020 [2004] eKLR where the Court of Appeal held:

> " Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."

22. Further to the above, in the Court of Appeal decision of *Butt vs. Khan* (1977) 1 KAR the court stated that the test on whether or not to interfere with an award of damages, is as follows:

> " An Appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so, arrived at a figure which was either inordinately high or low."

23. With regard to the award of special damages, looking at the record, it is clear to me that the respondent pleaded and proved his claim in relation to his cost incurred for a medical report at Kshs 3,000/-. The said amount was specifically pleaded in his plaint; and he produced a receipt for the same. I do not find any reason to interfere with this award.

24. As regards the award of general damages, counsel for the appellant cited the authority of the High Court in HCC No. 742 of 2003, *Socfinaf Company Limited v Joshua Ngugi Mwaura* [2005] eKLR, in support of his submission that damages for an injury of this nature ought not to exceed Kshs 20,000/-. Counsel stated that this was a similar case because the respondent had suffered only soft tissue injury; there was no fracture to the bone; and the respondent had not been hospitalized.

25. Based on the authority above, I am persuaded the award of Kshs 60,000/- was excessive. I do however note that the above decision was made in the year 2005. Since then the value of money has depreciated considerably and the cost of living has risen substantially. I am therefore of the view that this figure may be adjusted for inflation to Kshs 40,000/ -.

26. As regards the award of Kshs 5,000/- as part of the respondent's costs; looking at the record, I am satisfied that the respondent did not specifically plead and prove the same.

27. Based on the reasons above, the upshot is that the appeal is successful in part. I make no orders as to costs as the respondent did not participate in the appeal and the appellant was only partly successful.

28. The orders of the court are as follows:

    a. The award of general damages in the lower court in the sum of Kshs 60,000/- is substituted with and replaced by an award for general damages in the sum of Kshs 40,000/ -.

    b. The award of Kshs 5,000/- as part of the respondent's costs in the lower court is disallowed and set aside.

    c. No order as to costs.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 6TH DAY OF APRIL 2023

ALEEM VISRAM

JUDGE

In the presence of;

..... for the Appellant

.....for the Respondent