Bahchu Industries Limited v Katuva (Civil Appeal 7 of 2018) [2023] KEHC 19865 (KLR) (Civ) (6 July 2023) (Judgment)

Neutral citation: [2023] KEHC 19865 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 7 OF 2018

AN ONGERI, J

JULY 6, 2023

BETWEEN

BAHCHU INDUSTRIES LIMITED .... APPELLANT

AND

PATRICK KATUVA .... RESPONDENT

(Being an appeal from the judgment and decree of Hon. D. E. MBURU (PM) in Milimani CMCC No. 4963 of 2016 delivered on 24/11/2017)

JUDGMENT

1. The appellant herein Bahchu Industries Limited (hereafter referred to as the appellant only) was the defendant in Milimani CMCC No. 4963 of 2016 and the respondent Patrick Katuva (hereafter referred to as the respondent) was the plaintiff.
2. The respondent filed a plaint dated 11/7/2016 seeking general damages for injuries the respondent allegedly sustained when he was working for the appellant which injuries were occasioned by the negligence of the appellant.
3. The appellant filed a statement of defence dated 7/9/2016 denying the respondent's claim.
4. The respondent's case in summary was that he was employed as a welder by the appellant from the year 2007 to 2014 when he started experiencing persistent coughs and shortness of breath caused by inhalation of smoke at his place of work.
5. The respondent blamed the appellant for failure to provide him with protective clothing while working for the appellant as a welder.

6. The trial court found that the appellant failed to avail records showing issuance of the relevant protective gears.

7. The trial court relied on Section 10(1) of the *Occupational Safety and Health Act* (OSHA) no. 15 of 2007 which places a duty upon the employer to provide protective clothing and appliances to employees.

8. The trial court held the appellant 100% liable for the injuries the respondent sustained and awarded him damages as follows;

   i. General damages ksh.800,000

   ii. Special damages ksh. 3,000

   Total ksh.803,000

9. The appellant who was aggrieved with the judgment and decree of the trial court has appealed to this court on the following grounds;

   a. The learned trial magistrate erred in law and in fact in disregarding the medical evidence tendered by the appellant's witness at the trial and holding the appellant culpable on the basis of inconclusive medical opinion by persons who were not called upon to tender evidence and in the absence of an evidence of independent investigation to ascertain any causal link between the respondent's medical condition and his work environment.

   b. The learned trial magistrate erred in law and in fact in holding the respondent liable for the plaintiff's medical condition by relying on hearsay evidence.

   c. The learned trial magistrate erred in law and in fact in holding that the plaintiff/respondent had discharged the burden of proof.

   d. The learned trial magistrate erred in law and fact in holding that the plaintiff/respondent had discharged the burden of proof.

   e. The learned trial magistrate erred in law and fact in awarding the sum of Kshs. 750,000(803,000) which figure is so inordinately high as to amount to an erroneous estimate and an error of principle taking into account the available medical evidence especially the unchallenged evidence of Dr. Ashwin Madhiwalla which was to the effect that chest examination revealed no abnormality and air entry on both sides of the chest was normal

   f. The learned trial magistrate erred in law and in fact in disregarding the submissions tendered on behalf as well as legal authority in case High Court Civil Appeal No. 148 of 2005 *Pollen Limited v. Ursula Ikasilon Opuko*.

   g. The learned trial magistrate erred in law and fact in arriving at a decision that is wholly against the weight of the evidence and the law

10. The parties filed written submissions as follows; the appellant in its submission argued that the burden of proof lied on the defendant to prove that the bilateral Pneumonitis was a result of his occupation which he did not. That the treatment notes presented by the respondent were based on information given to the doctor by the patient with no further testing to ascertain that indeed the root cause of the said health condition was as a result of his occupation. That further the treatment notes from Mama Lucy Kibaki Hospital made by doctor Ummuku Ithum were inconclusive and ambiguous as it did

not clearly state the cause of Pneumonitis that ailed the respondent and with this it was clear that the respondent did not fully discharge his burden of proof on a balance of probability.

11. The appellant further argued that disallowing the maker of the medical report to be called during the trial to back his evidence and considering the evidence that was relied upon by the respondent was inconclusive and disputed by the medical report presented by the appellant.

12. The appellant submitted that it was clear that the respondent contracted Bilateral Pneumonitis as a result of an infection and not as a result of his work. That the report by Dr. Ashwin Madhiwala and his examination in chief revealed that Bilateral Pneumonitis can be caused by a number of factors including bacterial infection and that to ascertain the cause a blood test had to be done. It was clear from the medical reports that no such test was done.

13. The appellant submitted that the learned trial magistrate relied on inconclusive reports whose makers were never called to produce the said reports in court and out rightly ignored the precedent of *Pollen Limited v. Ursuls Ikasilon Opuko* [2008] eKLR Civil Appeal No. 148 of 2005 where the High Court at Nairobi dismissed the respondent's suit stating that there was no co-relation between the respondent's illness and her employment and that her evidence was insufficient to prove her claims of negligence as pleaded on a balance of probabilities.

14. On the award for general damages the appellant submitted that Kshs 800,000 for pain and suffering was inordinately high. This was due to the evidence by Dr. Ashwin that indicated that the respondent had healed without any incapacities.

15. The respondent submitted that he discharged the burden of proof to warrant the finding that the bilateral pneumonitis was caused by work related duties. That he produced medical report form and x-rays from Mama Lucy Kibaki Hospital and medical report from Dr. G. K Mwaura in support of his case. Based on the period of time worked for by the respondent and the nature of his work, it was clear that the said condition was caused by the said work.

16. On the award of general damages, the respondent argued that in the case of *Juma Lukale Olutali v. Everady Batteries (k) Ltd* [2017] eKLR awarded the plaintiff who was suffering from chronic rhinitis and sinusitis, obstructive lung disease and asthma general damages of Kshs. 1,000,000

    1. This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence of the trial court and to arrive at its own conclusion whether to support the findings of the trial court while bearing in mind that the trial court had the opportunity to see the witnesses. In *Selle v Associated Motor Boat Co.* [1968] EA 123 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 demeanor of a witness is inconsistent with the evidence generally.
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> 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."

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

    i. Whether the appellant was liable for the injuries sustained by the respondent.

    ii. Whether the trial curt disregarded the medial evidence adduced by the appellant.

    iii. Whether the award of general damages was inordinately high.

18. On the issue as to whether the appellant was liable for the injuries sustained by the respondent, the appellant submitted that the respondents condition, bilateral pneumonitis could be caused by various factors and not necessarily related and further that there was no evidence that the injuries were work related.

19. I find that the trial court found that the appellant failed to show that the respondent was supplied with protective gear as required by Section 15 of the *OSHA Act*.

20. I find that the trial court was right in holding the appellant 100% liable.

21. On the issue as to whether the trial court disregarded the medical evidence by the appellant, I find that the trial court at page 2 para 3 referred to the report by Dr. Madhiwala and noted that the evidence of Dr. Madhiwala did not overturn the evidence of the medical officer who treated the respondent severally.

22. I therefore find that it is not true that the trial court disregarded the evidence adduced by the appellant.

23. On the issue as to whether the award of general damages was excessive, the trial court relied on the authorities submitted by the respondent as follows;

    i. *Rose Nduku Kno'oo v Cirio Delmonte (K) LTD* Nyeri HCCC No. 62 of 2002 where 1,900,00 was awarded for inhalation of toxic gases that had caused injury to the plaintiff's respiratory system.

    ii. *Joyce Mwikali Metho v Cirio Delmonte (k) LTD* Nyeri HCCC no. 63of 2002 where 1,743,600 was awarded for abdominal injuries lung injury and painful menstrual periods for inhalation of toxic gases.

    iii. *Paul Gakuru Mwinga v Nakuru Industries Ltd* Nakuru HCCC No. 670 of 1994 where kshs.750,0000 was awarded for chest complications as a result of inhalation of dust.

24. The trial court noted that the appellant proposed general damages of ksh.40,000 but did not rely on any authority.

25. I find that the trial court was guided by relevant considerations in awarding ksh.800,000.

26. The appellant had the opportunity to submit their authorities but hey failed to do so.

    1. I find that the only time when an appellate court will interfere with the award of damages is where the trial court has relied on the wrong principles and arrived at an erroneous award or when the award is too low to too high. In the case of *Butt v. Khan* (1977) 1 KAR, the court set the test 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."

27. I find that this appeal lacks in merit and I dismiss it with costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 6TH DAY OF JULY, 2023.

A. N. ONGERI

JUDGE

In the presence of:

.... for the Appellant

.... for the Respondent