Jumbo North (E.A) Limited v Ooko (Civil Appeal 125 of 2018)
[2023] KEHC 20473 (KLR) (17 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20473 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL 125 OF 2018

RN NYAKUNDI, J

JULY 17, 2023

BETWEEN

JUMBO NORTH (E.A) LIMITED ..... APPELLANT

AND

MICHAEL ONYANGO OOKO ..... RESPONDENT

RULING

Coram: Justice R. Nyakundi

Nyairo & Company Advocates

Z.K Yego & Co. Advocates

1. This appeal arises from the judgement and decree of Hon. C Obulutsa in Eldoret CMCC No. 500 of 2017. The respondent instituted a suit vide a plaint dated 11th May 2021 wherein the cause of action arose from injuries sustained by the respondent in the course of working as an employee of the appellant. The respondent sought special damages, general damages against the appellant herein. Upon considering the pleadings, responses and submissions the trial court found in favour of the plaintiff apportioning 100% liability as against the defendant and awarded Kshs. 250,000/- general damages and special damages of Kshs. 8,500/-.

2. Being aggrieved with the judgement and decree, the appellant instituted the present appeal vide a memorandum of appeal dated 8th October 2018 premised on the following grounds;

    1. That the learned trial magistrate erred in law and fact in holding the Appellant herein 100% liable in negligence without considering the evidence on record.

    2. That the learned trial Magistrate erred in law and fact in holding that the Respondent had established a case against the Appellant contrary to the evidence on record.

3. That the learned trial Magistrate erred in law and in fact by failing to make a finding as to whether or not the issue of liability was adequately proved.

4. That the learned trial Magistrate failed to consider the submissions and authorities filed by the Appellant hence an erroneous judgment.

5. That the learned Magistrate erred in law and in fact in failing to hold the Respondent wholly liable for the accident.

6. That the learned trial Magistrate erred in law and in fact in failing to dismiss the Respondent's claim with costs for want of proof.

7. That the learned trial Magistrate erred in fact and law in awarding damages to the Respondent without any basis and which damages were inordinately high as to amount to a gross overstatement of the loss suffered.

8. That the learned trial Magistrate erred in law and in fact in awarding damages to the Respondent without basis and which damages were inordinately high considering the injuries sustained and authorities cited for comparable.

9. That the learned trial Magistrate erred in law and in fact in failing to consider the provisions of Order 21 Rule 4 of the Civil Procedure Rules 2010 and other provisions as required by law.

10. That in the learned trial Magistrate erred in law and in fact in failing to capture and/or record all the evidence and/or testimonies adduced in court thereby omitting important material which were necessary for determination of the issues in question.

3. The parties prosecuted the appeal *vide* written submissions.

Appellant's case

4. Learned counsel for the appellant filed submissions dated 13th January 2023. He submitted that from the onset that the lower court had no jurisdiction to handle this claim the same being a work injury claim neither did this court. He urged that the argument is premised on the provisions of sections 16, 53 and 58 of the *Work Injury Benefits Act*, 2007. He stated that from the reading of the Plaint this is a claim under *Work Injury Benefits Act*, 2007 and therefore the correct forum to ventilate any issues would be before the Director of Occupational Safety and Health Services.

5. The appellant submitted that the suit filed at the lower court was instituted in 2017 during the subsistence of the *Work Injury Benefits Act*, 2007. The suit was filed on 12th May 2017. The *Work Injury Benefits Act* came into force on 22nd October, 2007. It then follows that the suit is squarely governed by the *Work Injury Benefits Act*, 2007 which was in place at the time of its institution.

6. The appellant submitted that on 3rd December 2019, the Supreme Court of Kenya vide Petition No. 4 OF 2019 delivered its ruling upholding the Court of Appeal decision in *Attorney General v. Law Society of Kenya & Another* CA (2017) eKLR (Waki, Makhandia and Ouko JJA), which declared the *Work Injury Benefits Act*, 2007 to be consistent with the Constitution of Kenya, 2010 and thereby nullifying the High Court's decision that purported to declare certain sections of the *Work Injury Benefits Act*, 2007 unconstitutional.

7. Counsel for the appellant submitted that sections 22 and 23 of the *Work Injury Benefits Act*, 2007 sets in motion the forum for litigating work injury related claims and states very clearly that such claims ought to be handled by the Director of Occupational Safety and Health Services. Further, that

it can be discerned that work injury related claims are to be referred and/or reported to the Director of Occupational Safety and Health Services within a specific period of time limited by statute. Counsel sought to draw the court's attention to Sections 21, 22 and 26 of the *Work Injury Benefits Act* (WIBA) as to limitation of time. That the Director is the one under *Work Injury Benefits Act*, 2007 clothed with the jurisdiction to handle work injury related claims arising at work place and not the common law courts/system. Therefore, the lower court lacked the necessary jurisdiction to hear and/or determine the suit.

8. Counsel urged the court down its tools at it has no jurisdiction to handle the matter.

Respondent's case

9. The respondent filed submissions dated 23rd November 2022 and supplementary submissions on 31st January 2023. It is the respondent's case that the Appellant was in breach of his statutory duty failed to provide the Respondent with protective gear particularly a pair of toughened industrial gumboots as is required by law being a factory worker, which could have mitigated the injuries sustained by the Respondent. He stated that he sustained his injuries working as a machine operator at the appellant's premises. That on 13th December 2014 while working alongside his colleagues he stepped on the heap of twisted bars his leg sunk and got entangled in between some of the twisted bars in the heap. This caused the rough edges of one of the twisted bars to prick the sole of the Respondent's right leg and another one cut the Respondent on his right ankle. The supervisor was called to where the Respondent was and took the accident report and administered first aid to the Respondent. The Respondent was given permission to go seek treatment due to the persistent bleeding. The Respondent proceeded to Dr. J.C Sokobe's private Clinic at Watergate Plaza in Eldoret town where he was treated as an outpatient and discharged.

10. Counsel submitted that the injuries sustained by the respondent were confirmed and corroborated by the oral of the documentary evidence produced by Dr. J. C. Sokobe (PW1) who upon treating the Respondent issued him with treatment notes which the Respondent produced as Plaintiff Exhibit 1(a) and later on examined him and prepared a Medical Report produced as (Plaintiff Exhibit 2(a)). Dr. J. C. Sokobe confirmed the Respondent's injuries had fully healed. The Respondent blamed the Appellant for the accident for reasons stated in his statement and the particulars of negligence set out in his plaint. He urged that no documentary evidence was adduced in terms of a Labour Sheet, Muster Roll, Accident Register, Work Allocation Sheet, original and signed payment sheets et al to disprove the Respondent's employment with the Appellant as alleged in the Defence. It is vividly clear that the Appellant withheld crucial evidence both oral and documentary in the trial court despite having been served with a Notice to Produce dated 11/5/2017 which the Appellant did not respond to despite admitting service and receipt of the same.

11. Counsel urged that the Respondent's evidence as to causation is uncontroverted. The Appellant's system of work was unsafe and so was his working area. The Respondent's supervisor, Mr. Lawrence Omao, despite his availability since he still works for the Appellant and the fact that he recorded a statement which was filed in court was not called to offer rebuttal evidence that the Respondent was on duty and was injured while on duty and indeed an injury report was made to him and received and recorded by him. That was a fatal omission on the part of the Appellant and further that the Respondent's evidence was unchallenged by the Appellant.

12. The respondent's case is that the Appellant being an Occupier as defined in section 2 of The *Occupational Safety and Health Act*, 2007 was bound by Section 6 to provide safe and healthy environment to its employees which he failed to. The Appellant ought to have ensured that its environment and/ or premises are safe by ensuring that its employees are issued with safety apparel.

The Appellant was in breach of his statutory duty failed to provide the Respondent with protective gear particularly a pair of toughened industrial gumboots as is required by law being a factory worker, which could have mitigated the injuries sustained by the Respondent.

13. In his supplementary submissions, counsel for the respondent the trial court had jurisdiction to entertain the suit. He cited *Public Service Commission & 4 others v Cheruiyot & 20 others* (Civil Appeal 119 & 139 of 2017 (Consolidated) [2022] KECA 15 (KLR) in support of this submission. He distinguished the authority cited by the appellant, being *Law Society of Kenya vs Attorney General & Another* (2019) eKLR by stating that the case before the trial court on 12th May 2017 whereas the supreme court judgement was delivered on 3rd December 2019. Further, that the prevailing authority at the time of the filing of the case was Petition No. 185 of 2008 – *Law Society of Kenya vs Attorney General & Another* (2009) eKLR which declared section 4,7(1)&(2),10(4

14. The respondent urged the court to dismiss the appeal with costs for lack of merit.

Analysis & Determination

15. This being an appellate court, it is imperative to state the role and duty of the court as was held in *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, where the court stated as follows-

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

16. The principles guiding an appellate court in determining whether to interfere with an award for damages were set out in the celebrated case of *Butt v Khan* {1981} KLR 470 where the court pronounced itself 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".

17. Upon considering the memorandum of appeal and the submissions of the parties, the following issues arise for determination;

    1. Whether the trial court had jurisdiction to entertain the suit
    2. Whether the trial court erred in its apportionment of liability
    3. Whether the trial court erred in its award of damages
    4. Whether the trial court had jurisdiction to entertain the suit

18. Without jurisdiction a court cannot entertain a suit. It is trite law that a suit devoid of jurisdiction is dead on arrival. In *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd*. (1989) the court held as follows:

> Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment

> it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."

19. The claim at the Chief Magistrate's court was instituted on 11th May 2017. In its defence, the appellant herein admitted the jurisdiction of the trial court. The prevailing authority on jurisdiction at that time was the finding of the court in *Law Society of Kenya v The Attorney General & Another* [2009] eKLR where the court of appeal vide its judgement delivered on 17th November 2017 directed that;

> The legislative practice where a new judicial forum is created to replace an existing system is to finalize all proceedings pending in the previous system before that forum where they were commenced. For instance, upon the establishment of the Employment and Labour Relations Court, section 33 of the *Employment and Labour Relations Act* provided for what would happen to pending claims as follows;
>
> All proceedings pending before the Industrial Court shall continue to be heard and shall be determined by that court until the Court established under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar of the Judiciary."

20. Whereas the Court of Appeal proceeded to set aside the decision of Hon Justice J.B Ojwang in High Court Petition No. 185 of 2008 - *Law Society of Kenya v The Attorney General & Another* [2009] eKLR, it directed that matters that were pending before the Industrial Court were to continue to be heard. The matter in the trial court having been instituted before the Court of Appeal decision, was therefore heard by a court that had jurisdiction. Therefore, on the ground of jurisdiction, the appeal fails.

Whether the trial court erred in its apportionment of liability

21. The law permits the judge seating as a fact finder to find that causation in fact they exist even when this existence is uncertain as long as it is proved by a preponderance of the evidence. For example if the evidence that the plaintiff shows and 80% chance that the defendants negligent act caused the plaintiff's harm the law permits the session judge as a fact finder to infer possession even though there is a 20% chance that the defendant negligence did not cause the plaintiff's harm. The authority of *Rahman v Arearose Ltd* (2001) QB 351 on apportioning liability is instructive where it was stated that: " the real question is what is the damage for which the defendant under consideration should be held responsible. The nature of his duty (here, the common law duty of case) is relevant causation, certainty will be relevant – but it will fall to be viewed, and in truth can only be understood. In light of the answer to the question: from what kind of harm was it in the defendants duty to guard the claimant.? .

22. It is the law in Kenya through well-established case law that in a claim grounded in the tort of negligence or breach of statutory duty the burden of proof is on the plaintiff to lead evidence to show that a duty of care is owed by the defendant and it is that breach of that duty damage sustained is compensable. In the case of the general duty of an employer the circumstances giving rise to the inference of negligence or that breach of duty of care is assessed within the scope of providing adequate equipments, system of working, with effect supervision and a safe place to work with minimum risk of personal injury. In this class of cases the defendant can only escape liability if he is able to show that there was a probable cause in the full extent of the damage that does not connote breach of duty of care or negligence.

23. The proper approach to be taken by the 1st appeals court is the guideline given in the case of *Sokoro Saw Mills Limited v Grace Nduta Ndungu*, Nakuru High Court Civil Appeal Number 99 of 2003 (Kimaru, J on 24 March 2006

a. In the first appeal the court is mandated to reconsider and-revaluate the evidence adduced by the witness before the trial magistrate's court so as to arrive at an independent decision whether or not to uphold the decision of the trial magistrate. (See *Jahane vs Olenja*) (1986) KLR 661

24. Perhaps the single most important factor in this appeal is the limit in which an appellate court can interfere to the discretion of the trial court in the findings made on the pleaded issue of liability or quantum to set aside the judgement. The manner in which the grounds of Appeal are traditionally framed in the language of the learned trial magistrate erred in law or facts in finding for the respondents or the trial magistrate failed to consider that having found for the respondents on the facts that the plaintiffs case being unproven or to properly have been dismissed or there was a complete lack of evidence from either side on the contested issues, there was no basis for the judgement of the court. In my judgement such submissions or arguments import the principles in *price and another v Hilder* (1986) KLR 95 (Hancox JA Chesoni and Nyarangi, IJA on 15 June 1984)

a. In considering the exercise of judicial discretion as to whether or not to set aside judgment the court considers whether in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgement, if necessary upon terms to be imposed. The court will not interfere with the exercise of its discretion by an inferior unless it is satisfied tht its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have taken into consideration and in doing so arrived at a wring decision. See *Mbogo v Sha* (1968) EA 95.

25. The difficult in defining the degrees of negligence in percentage model and applying the definitions to practical situations sometimes poses a definitive legal deference. Why do I say so? For a trial court to determine with some precision the legal difference between negligence and gross negligence which apparently mean the same thing with the addition of vituperative epithet to answer the question in any specific case whether there was culpable negligence to apportion liability may sometimes give rise to unfair results. Furthermore, the onus of showing that the plaintiff was guilty of negligence rests with the defendant. As noted from the evidence apportionment of liability gives a very wide discretion based on what one considers just and equitable in the circumstances of the probative evidence and materials admissible in the case by the plaintiff. It is important to note I find no new compelling evidence or error in appreciating the significance of the evidence by the trial court and liability to dissuade me to interfere with the findings in the judgement.

26. It is not in dispute that the respondent worked on the appellant's premises on the material date he was injured. He produced evidence that he was on duty on 13th December 2014 and further, the medical report produced by Dr. Sokobe confirmed the injuries sustained. The appellant did not controvert the evidence of the respondent and further, was unable to prove that the respondent was provided with adequate safety gear that would have protected the respondent in his duties. The appellant did not provide the muster roll or any documentary evidence that would have controverted the evidence that the appellant was at work on the said date.

27. In light of the above analysis of the evidence that was adduced before the trial court, I am inclined to agree with the learned trial magistrate that the respondent proved his case on a balance of probabilities. The apportionment of liability that was arrived at by the trial court was not shown to have been unreasonable or unwarranted in the circumstances of the case. I would therefore not disturb the same.

Whether the trial court erred in its apportionment of damages

28. Matters relating to compensation in tortuous claims primarily are meant to restore the victim as far as money can do to as nearly the same position he was before the negligent act intervened and occasioned physical injuries. The decision of *Jobling v Associated Diaries Ltd* (1982) AC 794 (HL) provides intelligible principles which can be applied as a yardstick to the facts of this appeal " The assessment of damage for personal injuries involves a process of restitution in integrum. The objects is to place the injured plaintiff in a good a position as he would have been in but for the accident. He is not to be placed in a better potion. The process involves a comparison between the plaintiff's circumstances as regards capacity to enjoy the amenities of life and to earn a living as they would have been if the accident had no occurred and his actual circumstances in those respect following the accident. In considering how matter might have been expected to turn out if there had been no accident, the "vicissitudes" principles says that it is right to take into account events such as illness, which not uncommonly occur in the account, the damages may be greater than are required to compensate the plaintiff for the effects of the accident, and that result would be unfair to the defendant."

29. On quantum of damages, an appellate court cannot interfere with an award of damages by a trial court unless it has been shown that the trial court, in assessing the damages, took into account an irrelevant factor or left out of account a relevant factor or that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage, see *KEMFRO Africa LTD t/a Meru Express Services (1976) and Another vs Lubia and Another (No.2)* [1987] KLR 30.

30. The respondent sustained the following injuries;Deep prick on the right footCut wound on the posterior right ankle.

31. The trial court awarded him Kshs. 250,000/- as special damages. It is trite law that in awarding damages courts must be guided by comparable awards for similar injuries. In the case of *Kenya Power & Lighting Co. Limited –vs- Mary Akinyi* Civil Appeal No. 72 of 2007 (unreported)the court upheld an award of Kshs. 350,000/= for multiple soft tissue injuries in the case where the plaintiff also had permanent disability of 20%. In *Veronicah Mkanjala Mnyapara v Charles Kinanga Babu* [2020] eKLR the court upheld an award of Kshs. 300,000/= for a plaintiff who had sustained a deep cut wound on the forehead, chest contusion, bruises on the face, bruises on both hands, dislocation of the left wrist joint, bruises on both ankle joints and dislocation of the left ankle joint.

32. If I were to reverse the decision by the trial court as submitted by the appellant the criterion used on assessment of damages has to be found to be in contravention of the approach outlined in the case of *Mohammed Mahmoud Jabnane v Highstone Butty Tongoi Olenja*, civil appeal number 2 of 1986 (1986) KLR.

    a. Each case depends on its own facts

    b. Award should not be excessive for the sale for those who have to pay premiums medical fees o taxes (the body politic)

    c. Comparable injuries should attract comparable award

    d. Inflation should be taken into account: and

    e. Unless the award is based on the application of a wrong principle or misunderstanding of relevant evidence or so inordinately high or low as to be an entirely erroneous estimate for an appropriate award, leave it alone it.

33. How does the trial court determine which items of loss to give a high weight is by applying customary rules and past awards to align the measure of damages to the facts of the case at hand. It is also true that the specific combination of facts in each case is unique. The fact of the physical disability itself together with the resulting inconvenience to the plaintiff plus pain and suffering though a basis for evaluating the damages awarded little information or data is available on how similar or identical that harm can be from one case to another. In considering general damages there is no formula which the trial court can use to present the matter of pain and suffering from one case to another save for the presumed applicable principles that need not be necessary just to the harm to that particular plaintiff. It is instructive also there is even some difference of opinion by the medical doctors as to what kind of pain can be considered by a trial court to award a fair and proportionate damages for the physical injury. Therefore a satisfaction analysis of this appeal leaves this court to make a finding towards the better assessment of pain and suffering to the realm of discretion by the trial court which had the advantage to hear and assess the evidence on pain, suffering, anxiety, emotional strain, physical and psychological health and loss of enjoyment of life as an aftermath of the accident. In my view I find no error that the award of damages for pain and suffering did not correspond to the harm incurred by the respondent.

34. For purpose of the present appeal I dare mention that assessment of damages in the tort of negligence is often a principle issue in litigation within the hierarchy of our courts because the primary objective of the plaintiff is usually to collect as much as possible of the quantum and that of the defendant is to pay as little as possible. There is so much time wasted for litigants taking every opportunity and effort to establish a fair and proportionate level of harm and the underlying damages. First as a cautionary statement assessment of harm capable of setting the fundamentals of justice model on damages to incentives the parties from further litigation is in the realm of unknown. I consider this to be the nature of our adversarial system where errors in the computation system have to be tested in some cases where there is no injustice to the plaintiff but in which the defendant envisages that a court likely to make an unjust award renders it a subject of appeal. The catastrophe is given the complexity of the precise nature of judicial discretion a party is either compensated or is under-compensated.

35. Finally, in matters of this appeal having considered it extensively, I find no merit on any of the grounds canvassed by the Appellant and I am of the persuasion that the appeal is lost with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 17TH DAY OF JULY 2023

.....

R. NYAKUNDI

JUDGE