Mitchell Cotts v Omar (Civil Appeal 76 of 2017) [2023] KEHC 23424 (KLR) (19 September 2023) (Judgment)

Neutral citation: [2023] KEHC 23424 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 76 OF 2017

DKN MAGARE, J

SEPTEMBER 19, 2023

BETWEEN

MITCHELL COTTS .... APPELLANT

AND

BADI OMAR .... RESPONDENT

JUDGMENT

1. The appeal is an employment related appeal. The suit was filed in 2017 and the Judgment made on 29/3/2017. Given the directions of the court. This is a matter on WIBA appeal and was only to be heard in the court where it is as per the directives given by the chief justice *vide* gazette notice no 5476 of 28/4/2023 to be heard by the court it was filed in.
2. The appellant raised 4 grounds of appeal, in its amended memorandum of appeal dated 15/5/2017 that is: -
    a. The court awarded exorbitant damages
    b. Wrong principles were followed in awarding damages
    c. Disregarding evidence on damages
    d. The court erred in finding the appellant 100% liable for the accident

Duty of the Appellate Court

3. This being a first appeal, this Court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand

4. This was aptly stated in the case of *Peters v Sunday Post Limited* [1958] EA 424 where, the Court of Appeal therein rendered itself as follows: -

> “ It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…”

5. In *Selle & another v Associated Motor Boat Co Ltd & others* [1968] EA 123, this principle was enunciated thus: -

> “ … This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a Trial Court, unlike the Appellate Court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

6. The duty of the first appellate court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus classicus case of *Selle and another v Associated Motor Board Company and others* [1968] EA 123, where the law looks in their usual gusto, held by as follows; -

> “ .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court … is by way of re-trial and the Court of Appeal is not bound to follow the trial court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

7. The court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

8. As regards to damages, the same differ from case to case. In *Nyambati Nyaswabu Erick v Toyota Kenya Ltd & 2 others* (2019) eKLR, Justice D S Majanja held as doth:

> “ General damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same.”

9. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial court.

10. The foregoing was settled in the cases of *Butter v Butter* Civil Appeal no 43 of 1983 (1984) KLR where the Court of Appealed held as follows as paragraph 8: -

> “ In awarding damages, a court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of ……is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local courts.

The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies...should be taken into consideration."

11. In deciding whether to disturb quantum given by the lower court, the court should be aware of its limits. Being exercise of discretion the exercise should be done judiciously conclusively are circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages.

12. The High Court, pronounced itself succinctly on these principles in *Kemfro Africa Ltd v Meru Express Servcie v A.M Lubia & another* 1957 KLR 27 as follows: -

> "The principles to be observed by an Appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the judge in assessing the damages, took into account an irrelevant facts 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 damages.

13. The foregoing statement had been ably elucidated by Sir Kenneth 'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Counsel, that is *Nance v British Columbia Electric Co Ltd*, in the decision of *Henry Hilanga v Manyoka* 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

> "The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

14. Therefore, for me to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

15. So my duty as the appellate court is threefold regarding quantum of damages: -

    a. To ascertain whether the court applied irrelevant factors or left out relevant factors.

    b. To ascertain whether the award is too high as to amount to an erroneously assessment of damages.

    c. The award is simply not justified from evidence.

16. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.

17. Similarly, the duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya v Republic* [1957] EA 336 is as follows:-

> "On a first Appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question

turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a Court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the Appellate Court has not seen.”

18. The foregoing statement had been ably elucidated by Sir Kenneth O’Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is, *Nance v British Columbia Electric Co Ltd*, in the decision of *Henry Hilanga v Manyoka* 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages: -

> “ The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance…”

19. However, when we come to documents, however, the court has the same power as the trial court. This is because documents speak for themselves. There is no extrinsic evidence required to interpret documents. In the case of *Fidelity & Commercial Bank Ltd v Kenya Grange Vehicle Industries Ltd* (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth; -

> “ Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed…”

20. The trial court and this court will construct documents in a similar manner as there are no witnesses required to know the content of a document. Therefore, where the findings of the trial court are consistent with the evidence generally, this court should not interfere with the same.

21. The respondent pleaded to have sustained the following injuries.

a. Severe soft tissue. Injuries of the left knee joint resulting into knee effusion.

22. He also pleaded special damages of Kes 5550/= which are not subject of the appeal.

23. The medical report dated May 13, 2019 written by Dr Wellington Kiamba and produced as exhibit 6, indicated the injuries as pleaded. Dr Kiamba classified the injuries as harm and was of the opinion that it was to take at least 2 months to heal. The respondent must have healed at the time of trial which took place on24/9/2020, long after the 2 months were over.

24. The injuries were not contested since on cross examination of the respondent was asked whether he suffered a fracture, which he answered in the negative.

25. In its Judgment given February 15, 2021 the court awarded a sum of Kes 200,000/= for general damages, for pain suffering and loss and amenities. He indicated to have considered the rival submissions, although I cannot see the consideration on the record. This is not a proper way of reviewing evidence and submissions. The court needs to indicate the actual review of evidence and submissions, albeit in a summary manner on record.

26. The duty of the appellate court as regards damages is that of discretion. The Court of Appeal for East Africa in *Shah v Mbogo & another Version Shah* (1968) EA 93, held as doth;-

> "The (appellate court) .. should not interfere with the exercise of discretion of a (trial court)..unless satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifested from the cause as a whole that the Judge was clearly wrong in the exercise of this discretion and that as a result these has been an injustice."

Liability

27. Liability is seen from two aspects.

    a. That the respondent was not on duty on the material day, and

    b. That the accident occurred without negligence.

28. Unfortunately, the matter proceeded on a wrong premise. Records related to employment are never kept by the employee. They are in exclusive control of the employer. The employee needs only to raise reasonable grounds that he was on duty. It is the duty of the Appellant as the employer to disprove that he was not on duty. This is premised on section 112 of the *Evidence Act*, which provides as follows: -

> " 112. Proof of special knowledge in civil proceedings In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

29. The *Employment Act* equally places the duty to maintain the records on the Employer. Pray, how will the individual employee access work records? Therefore, the employer has a duty to bring complete records.

30. The records are common sense. No employee is a slave. They get paid. They have to be paid for days worked. If injured a record of incidents including assaults between employees has to be recorded. The record on how they are paid is to be maintained.

Respondent's submissions

31. The Respondent went through a lot of pain explaining why possibly the appellant was not at work. He referred to various records. He submitted that the list of employees brought was incomplete and difference. The Respondent, Defence witness DW2 is said to stated that the Respondent left earlier.

32. Section 3 of the *Occupation Safety and Health Act* is relied on. On negligence the Respondent relied on the case of *Nickson Muthoka Mutavi v Kenya Agricultural Research Institute* [2016] eKLR, where the court stated as doth: -

    It is also evident from the provisions of section 6 (1) and (2) of the *Occupational Safety and Health Act* that an employer's duty of providing a safe working environment is not restricted only to it areas of control. The said provisions are as follows:

    "(1) Every occupier shall ensure the safety, health and welfare at work of all persons working in his workplace.

    (2) Without prejudice to the generality of an occupier's duty under subsection (1), the duty of the occupier includes—

(a) the provision and maintenance of plant and systems and procedures of work that are safe and without risks to health;

(b) arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;

(c) the provision of such information, instruction, training and supervision as is necessary to ensure the safety and health at work of every person employed;

(d) the maintenance of any workplace under the occupier's control, in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks to health;

(e) the provision and maintenance of a working environment for every person employed that is, safe, without risks to health, and adequate as regards facilities and arrangements for the employees welfare at work;

(f) informing all persons employed of—

(i) any risks from new technologies; and

(ii) imminent danger; and

(g) ensuring that every person employed participates in the application and review of safety and health measures."

On Quantum

33. To the effect that the court either took into account of an irrelevant factor or left out a relevant factors and as a result the damages were to high or too low as to amount to an erroneous estimate of damages.

34. The plaintiff is stated to have suffered hairline fracture of the right femur. The court awarded 280,000/ =. The respondent's submissions are not signed for the Respondent.

Appellant's submissions

35. The appellant filed submissions dated 9/6/20123. They are incomplete. They dispute the Respondent's evidence. The defence called 3 witnesses who were supervisors. They rely of the decision of *Statpack Industries v James Mbithi Munyao* [2005] eKLR where the court stated.

> " Coming now to the more important issue of "causation", it is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone's negligence and his injury. The plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily a result of someone's negligence. An injury per se is not sufficient to hold someone liable for the same.
>
> Here, in this case, the Respondent did not lead any evidence to connect his injuries or accident to an act or omission on the part of the Appellant. The real cause of the accident was not established. The learned Magistrate ought to have asked herself, as I have repeatedly tried to ask myself, "so what exactly did the employer do or did not do that caused this accident?" And I cannot find the answer in the testimony adduced before the lower Court.
>
> In *Wilsher v Essex Area Health Authority* (1988) 2 WLR 557 the House of Lords held that where a Plaintiff's injury could have been caused by six possible factors of which the

defendant's negligence was only one, the onus was on the Plaintiff to establish "causation", and that, in that case he had failed to establish that the defendant's negligence was the cause of the accident. It is instructive to note that in the Wilsher case, the House of Lords noted that at least one of the factors of negligence could be attributed to the defendant. Here in this case before me, not a single element of negligence has been pleaded or proved against the appellant, who took all reasonable steps to provide protective clothing, and to instruct employees on safety issues.

36. The appellant relied on the case of *South Nyanza Sugar Co Ltd v Daniel Odek Matoka* [2011] eKLR, where the Court, Justice Asike Makhandi

stated as doth:-

> " In my judgment, the Respondent failed miserably to prove that he was an employee of the appellant as a cane cutter. No documentary evidence or otherwise was produced to prove such employment since the appellant had denied the same in its defence. The Respondent too did not even call any of his co-workers to buttress his claim to employment. Ordinarily such an accident would have attracted a claim under the then Workmen's Compensation Act. If indeed the Respondent's claim was genuine, how come he never lodged such a claim under the said Act with the appellant?
>
> In abid to prove that he was indeed an employee of the appellant, the Respondent tendered in evidence a delivery note issued by the appellant. As I have had occasion to state in the past, a delivery note perse is not evidence of employment. That delivery note is in respect of cane delivered from a particular cane farmer to the factory."

Respondent – case

37. The appellant did not address the other limbs of liability, that is negligence. It takes it that the same was abandoned. The only issue available is whether or not the respondent was on duty on the material day.

Procedure

38. The Respondents called Dr Ajoni Adede who testified and produced medical Report, receipt and attendance receipt. The injury was said to have occurred at work. There is a statement that the employer did not recommend. It is however incomplete.

39. PW2 was the respondent who narrated how he was injured. He joined shift at work. A 60 bags stake fell, spilled fertilizer. He stated on cross examination that they sign a gang list. He had worked since 2004. He stated that he was paid cash for the 2 shift. He was paid till the bandage was removed.

40. DW1 – He stated that he worked for the appellant from 1988. He produced a gang list. There were 90 people but the list had 88 people.

41. DW2 – Charles Awiti is said to be charge of casual. They had 50 workers in gang 2. On cross-examination the witnesses state that Juma did not sign as he had left earlier.

42. He did not address one specific issue. The respondent was categorical that the witness took him to Bangladesh clinic. DW2 – (correctly DW3) Ernest Khapenesu Aluo was the head of loading and unloading. He did not see the Appellant. He also got into the night shift.

Analysis

43. The defence evidence was unhelpful since it did not answer the respondents case. The time Court found as a fact the appellant's supervisors Charles Oduor and Agoti were in court. The list produced was for casuals. The Respondent indicated he had been on duty since 2004. He is not a definition of a casual. The company needed to have the complete list. I am also disturbed that only one list was used for 24 hour work.

44. There are those who moved from day to night shift. They include the supervisors. They were not re-entered into the register again. The payroll o payment roaster was not produced to show that the Respondent was not paid of the work done.

45. I find that there is no merit in the Appeal as liability. The court below was correct in its determination. The issues raised touch on the court's discretion and finding of fact. In the case of *Mbogo and another v Shah* [1968] EA 93 where the Court stated:

> " ...that this court will not interfere with the exercise of judicial discretion by an inferior Court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

46. On quantum a sum of Kes 280,000/= was awarded for a hairline fracture of the femur (neck). The same took years to heal. The award was low but there was no appeal by the respondent. It is definitely not inordinately high. In the case of *Simon Mungai Kariuki v Fatma Hassan* [2017] eKLR, decided around the same period, this matter was decided the court awarded 230,000/= for a hairline fracture. A sum of 280,000/- is not far from the norm.

47. In the circumstances, the appeal on quantum is misplaced. The court therefore finds the entire Appeal lacking in merit and consequently dismissing the same with costs.

Determination

48. The upshot of the foregoing is that the appeal lacks merit and is consequently dismissed with costs of Kes 85,000/= to the respondent.

49. File is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 19TH DAY OF SEPTEMBER, 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Miller & Company Advocates for the Appellant

Egunza for Osino for the Respondent

Court Assistant - Brian