



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KILGORIS

CIVIL APPEAL NO. 04 OF 2019

(CORAM: F.M. GIKONYO J.)

(Being an appeal from the judgment /Decree of Hon R.M. Oanda P. M) Delivered on 16th November 2017 in Kilgoris PMCC No. 111 of 2015)

TRANSMARA SUGAR CO. LIMITED.....APPELLANT

VERSUS

DANREE MULTHANDLING SERVICE LTD.....1ST RESPONDENT

JOSEPH TOM OSUO.....2ND RESPONDENT

JUDGMENT

Claim of independent contractor

[1]. The judgment of the principal Magistrate's Court at Kilgoris in Civil Suit No. 111 of 2017 delivered on the 16th November 2017 was: -

a) Apportioned liability; 10:90 in favour of the Plaintiff. Defendants to bear 90% liability jointly and severally.

b) General damages Kshs. 900,000/=

i. Less 10% contribution Kshs. 90,000/=

Kshs. 810,000/=

c) Special damages Kshs. 4,000/=

Grand TOTAL Kshs. 814,000/=

d) plus cost and interest

[2]. Being aggrieved by the said judgment, the appellant filed this appeal vide a memorandum of appeal dated 6th December 2017 in which they cited one (1) ground of appeal which relate to one issue; liability

Appellant's Case

[3]. The Appellant's case was that the 2nd Respondent was not its employee but the employee of the 1st respondent at all material times to the suit. And, therefore, it can neither owe him any duty of care nor be blamed for negligence in common law for want of proximity. They stated this in the defence.

[4]. The 2nd Respondent testified that the employment card shows the employer to be Danree Multi Handling Services Ltd. He further testified that he was paid on monthly basis by one Godfrey who was employed by the 1st Respondent. According to them, it is not contested that the 2nd Respondent was employed by the 1st Respondent; therefore, the trial magistrate erred in fact and law for failing to take into account that the 2nd Respondent was not employed by the Appellant. The Appellant cited Section 107 of the Evidence Act, ***Safari Joseph Ngala & 2 Others V Rapid Kate Services Ltd[2017] eKLR, Kenya Breweries Limited V Meshack Momanyi [2018] eKLR,***

[5]. The appellant further argued that, the principle of causal link applies only to an employment relationship. There was no privity of contract between the 2nd Respondent and Appellant therefore the principle of causal link does not apply in this instant case. The 1st Respondent is liable for its employees. The 2nd Respondent did not prove by way of evidence or in any way that the Appellant was negligent. The Appellant cited the case of **Statpack Industries V James Mbithi Munyao[2005] eKLR, South Nyanza Sugar Co. Ltd. V Caleb Onyambu[2010]eKLR, and Amalgamated Saw Mills Ltd V Tabitha Wanjiku [2006]eKLR.**

[6]. According to the appellant, the courts duty is only limited to the pleadings and evidence tendered before it. The trial magistrate court determined that ‘as an employee temporary or otherwise is owed a duty of care’. The trial magistrate held that the 2nd Respondent was an employee of the Appellant despite evidence tendered in court that the 2nd Respondent was an employee of the 1st Respondent. The appellant has cited the case of **Independent Electoral and Boundaries Commission & another V Stephen Mutinda Mule & 3 Others [2014] eKLR.**

[7]. The Appellant submitted that from the plaint the 2nd Respondent listed his injuries as follows;

- (i) **electrocution on the upper part to the whole body**
- (ii) **Burns on both hand on the palm.**
- (iii) **electrocution burns on the face (has multiple hyperpigmentation)**
- (iv) **electrocution burns to the abdomen down to pubic area**

[8]. Borrowing from an excerpt from the case of **West (H) & Son Ltd V Shepherd (1964) A.C 326** at page 345 on damages available to the plaintiff and **limp oh choo’s case** by Lord Denning M.R. on reasonable awards, the appellant submitted that an award of Kshs. 300,000/= would be reasonable compensation for the 2nd Respondent. The Appellant has relied in the cases of **Edith Alivitsa V Kenya Forest Service & Another [2018] eKLR And Mary Wairimu Njuguna V Kenya Power And Lightning Company Limited [2018] eKLR** where the court awarded Kshs. 800,000 and 500, 000/= respectively which was higher but the appellant pointed out that the injuries in the said cases were grievous.

[9]. The appellant prayed that the lower court judgment be set aside and the suit be dismissed with costs to the appellant.

2nd Respondent’s Case

[10]. The 2nd respondent’s case was that he was employed by the 1st Respondent as contractor and performed his duties on behalf of the appellant at its premises. While carrying out his assigned duties as a loader at the Appellant’s premises, a stack of sugar fell on him and he sustained injuries. The 2nd Respondent then sued the Appellant and the 1st Respondent jointly and severally for breach of statutory duty of care.

[11]. The 2nd respondent submitted that the electrocution was due to the fact that the electrical system of the company was faulty. The appellant did not avail any evidence showing that it was the sole duty of the contractor to ensure that the same was in good condition.

[12]. The 1st Respondent never entered appearance and interlocutory judgment was entered against it. The Appellant on the other hand filed a defence and stated that the 2nd Respondent was employed by the 1st Respondent who was an independent contractor and the Appellant is thus not liable.

[13]. Apart from the appellant producing a contract agreement which even did not have the seal of the company to prove its authenticity, it never stated any attempts made to ensure the working environment was safe. He has relied on the case of **Efil Enterprises Ltd Vs Dickson Mathambo Kilonzo (2018) eKLR.**

[14]. The Appellant has a duty under the Occupiers Liability Act to ensure safety of the persons who comes into its premises. The Appellant allowed the 1st Respondent to source employees who then their presence in the company’s premises was with the authority of the Appellant. The Appellant thus owed the 2nd Respondent duty of care to ensure the 2nd Respondent’s safety while within its premises. He cited the case of **Soma Properties Ltd Vs HAYM (2015) eKLR Ouko JA**

[15]. They argued further that, in its defence, the Appellant did not state any measures that it had put in place to ensure safety of the 2nd Respondent and thus cannot escape liability.

[16]. The 2nd Respondent concluded that the Appellant has not satisfied the threshold for interfering with the trial court’s finding both on liability and quantum and therefore urged the court to dismiss the same with costs.

[17].

ANALYSIS AND DETERMINATION

Duty of court

[18]. As the first appellate court, this court should evaluate the evidence on the record and make its own determination except having in mind that it did not have the advantage of hearing witnesses. See: *Selle & Another vs. Associated Motor Board Company Ltd [1968] EA 123.*

Issues

[19]. Arising from the pleadings, evidence and submissions of parties are the following issues for determination:

a) Liability; who is to blame for the accident? Is this a case of contributory negligence?

b) Damages: Whether the trial court adopted wrong principles in assessment of damages.

Liability

[20]. Liability for tortious acts or breach of statutory duty is determined on the basis of evidence and facts of the case, and the applicable law. The burden of proof on balance of probabilities, falls on the person alleging; in this case, it is the 2nd Respondent who is alleging negligence or breach of statutory duty on the part of the Appellant. See **Section 107 and 108 of the Evidence Act.**

[21]. What evidence was adduced? And does it prove to the required standard that the appellant is liable for the injuries sustained by the 2nd respondent?

[22]. According to the 2nd respondent, on or about 7th day of October 2014, while he was carrying out his assigned duty as a packager at the Appellant's premises and while placing sugar on, the conveyor belt suddenly pulled him and he was electrocuted as a result of which he sustained electric shock and bodily injuries.

[23]. The Appellant called one witness DW1 who confirmed that there was a contract between the 1st respondent and the appellant. The 1st respondent was contracted to offer cleaning services. The 1st respondent was employing cleaning services to the appellant.

In the course of employment

[24]. The 2nd Respondent alleged that he got injured while working at the Appellant's premises. He produced his staff ID as proof of employment (**P Exh. No.1**). His employment card showed that he was employed by Dandree Multi Services Ltd. The evidence available was that the 2nd respondent was an employee of the 1st Respondent. But he was working within the Appellant's premises. Although there was absolutely no evidence to show that the 2nd respondent was an employee of the Appellant at the material or any other time relevant to this incident, the trial magistrate did find that the 2nd Respondent was an employee of the Appellant. On the same breath. The trial magistrate found and held that the 1st Respondent and the Appellant had a duty to ensure that any person working within the appellant's premises is given a proper working environment as to ensure that none is endangered. Thus, they owed the 2nd Respondent jointly and severally a duty of care. Is there any basis for this finding in law?

Independent contractor

[25]. The appellant claims that the 1st respondent was an independent contractor for whose tortious acts it is not liable. This may be so. The general rule is that the hiring person is not liable for tortious acts of the independent contractor. Nonetheless, the dynamic nature of law has impelled growth of the law of tort to cover emerging or situations not foreseen; and common law as well as statute law have enacted new obligations which provide exceptions to this general rule. For instance, if the occupier/employer is negligent in selecting, instructing, or supervising the independent contractor, they may be liable for torts committed by the independent contractor. Similarly, where the occupier/employer has a non-delegable duty, arising out of some statutory or common law obligation to the public. And, finally, if the work being done by the contractor entails inherently dangerous activity.

Negligence and or breach of statutory duty

[26]. Emphasis in this case is that the workplace is the Appellant's premises and the machinery that the 2nd respondent was working upon also belongs to the appellant. The facts and circumstances of this case fall in the exception and brings into play the Occupiers Liability Act and the Occupational Safety and Health Act. These statutes embody "the common duty of care" and create "statutory obligations" on the occupier/employer to take such care as in all the circumstances of the case is reasonable to see that the visitor or licensee or contractor or employee will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.

[27]. Of relevance in this case, is that the 2nd Respondent was injured while working at the Appellant's premises and machinery on 7/10/14. In his statement he stated that he was employed by the 1st Respondent. And, that he was injured while in the course of placing sugar on the conveyor belt at the appellant's premises. He blamed the Appellant and the 1st respondent for injuries sustained because they breached their statutory duty of care and or negligence towards him.

[28]. The 2nd respondent pleaded particulars of breach of statutory duty and or negligence on the part of the appellant and 1st respondent. The testimony and evidence of the 2nd Respondent point to the fact that the 2nd Respondent was injured in the premises of the Appellant while in employment with the 1st Respondent.

[29]. In matters of safety at workplace or premises, the Appellant and the 1st Respondent owed the 2nd respondent a statutory duty of ensuring his safety in the workplace. Section 6 and 13 of the Occupational Safety and Health Act sets out the employer's as well as employee's obligations. These two sections were considered by the Court of Appeal sitting in Nyeri in the case of Purity Wambui Murithii v Highlands Mineral Water Co. Ltd, [2015] eKLR where it stated as follows:

“Section 6(1) of the Occupational Safety and Health Act provides:-

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

It, therefore, follows that as a general rule the employer is liable for any injury or loss that occurs to his employees while at the workplace as a result of the employer's failure to ensure their safety. Does this mean that the employer would always be liable in all circumstances regardless of what caused the accident in question? We do not think so. We say so because where an accident happens due to the employees own negligence it would be unfair to hold the employer liable. Further Section 13(1) (a) of the Occupational Safety and Health Act provides:-

“13(1) every employee shall, while at the workplace –

(a) Ensure his own safety and health and that of other persons who may be affected by his acts or omissions at the workplace.

Therefore, the employee is also required to take reasonable precaution to ensure his/her safety at the workplace while performing his/her duties.”

[30]. PW1 told the court that, electric shock caused the conveyor belt to suddenly pull him and he was electrocuted, and thus, suffering injuries. An electric conveyor belt is a moving part of machinery which ought to have secure safeguards and operations. The obligation to ensure the such machinery with dangerous moving parts or belts is secure so as to prevent injury to persons attending the machinery does not leave the backyard of the appellant-the owner of the premises and the machinery. There is also no mention of provision of safety gears by the 1st respondent as required in law. Similarly, the claim by the 2nd respondent that electric system was faulty such that it caused the conveyor belt to suddenly pull him was not controverted. Accordingly, the Appellant and the 1st Respondent breached their duty of care towards the 2nd respondent.

Duty of employee

[31]. But, under the Occupational Safety and Health Act, the employee also bears the duty of care to himself; to take safety precaution while working. The 2nd respondent did not state the reasonable precaution he took whilst working on a dangerous moving conveyor belt. In all fairness, the circumstances of this case demand contributory liability. Thus, this is perfect case for contributory negligence. But in what proportion?

Apportionment of liability

[32]. I have stated that the 2nd Respondent ought also to have taken precaution. He bears some proportion of liability. Nevertheless, in the circumstances of the case, the Appellant and 1st Respondent bear substantial contributory negligence jointly and severally. Accordingly, the overall impression of the evidence supports the apportionment of liability amongst the parties in the proportion apportioned by trial court. In the upshot, I find that the trial magistrate did not err when he apportioned liability at 90:10 in favour of the 2nd Respondent. The appeal on liability fails.

Quantum of damages

[33]. On quantum; the appellate court ought not to interfere with the assessment of damages by the trial court except where the trial magistrate acted on wrong principles of law or the award is so high or so low as to be an erroneous estimate of the damages to which the plaintiff is entitled. This general principle was articulated in the case of Butt v Khan [1981] KLR 349 where it was held per Law, JA as follows:

“An appellate court will not disturb an award of damages unless it is so 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.”

[34]. The 2nd Respondent pleaded that he suffered electrocution on the upper part to the whole body, burns on both hand on the palm, electrocution burns on the face (has multiple hyperpigmentation), and electrocution burns to the abdomen down to pubic area. The medical report confirmed this and concluded that the 2nd Respondent sustained very severe multiple injuries which are in the process of healing well.

[35]. The appellant suggested a sum of Kshs. 300,000 would be adequate compensation. They cited ample judicial decisions in support thereof. I note that the cases cited by the appellants, to wit, Edith Alivista vs. KFS & Another [2018] eKLR and Mary Wairimu Njuguna vs. KP&LC & Another [2018] eKLR relate to almost similar injuries and offer proper guide in assessment of damages in the present case. The trial court simply made an award of Kshs. 900,000 without citing any grounding, thus, falling in error. I therefore, set aside the award of Kshs. 900,00 and substitute thereof an award of Kshs. 500,000 as general damages. Subject, however, to the contributory negligence of 10% leaving a balance of Kshs. 450,000.

[36]. Special damages were not challenged and remains as awarded by the trial court.

[37]. I also award costs and interest on the award.

[38]. Given the result of this appeal, I order each party to bear own costs of the appeal. It is so ordered.

[39]. Therefore, this appeal succeeds to the extent only on reduced quantum of damages.

DATED, SIGNED AND DELIVERED AT KILGORIS THROUGH MICROSOFT TEAMS ONLINE APPLICATION, THIS 7TH DAY OF OCTOBER, 2021

F. GIKONYO M.

JUDGE

In the presence of: -

1. MR. KARANJA FOR APPELLANT

2. M/S KUSA FOR THE RESPONDENT

3. KASASO C/A