



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL APPEAL NO. 12 OF 2016

PEMBE FLOUR MILLS LIMITED.....APPELLANT

VERSUS

ALI OMAR SWALEH.....RESPONDENT

(An Appeal from the Judgement of Hon. E.A Mbicha S.P.M in Kajiado SPMCC NO.13 of 2015)

JUDGEMENT

By a Plaint dated and filed on 26th January 2015 in the lower Court, the Respondent sought damages from his employer, the Appellant, for injuries he sustained in the course of work on the Appellant's assignment on the 16th of September 2014.

The Judgement was delivered on the 5th of August, 2016 which apportions liability at a ratio of 80:20% in favor of the Plaintiff (herein the Respondent), general damages for pain, suffering and loss of amenities at Kshs. 350, 000.00/=; special damages at Kshs. 3, 000.00/= and the amount payable to the Respondent is Kshs. 283, 000/=.

The Appellant having been dissatisfied with the Judgement of the Lower Court, filed the instant Appeal dated 18th August, 2016 against the said judgement on account of the following grounds as couched in the memorandum of appeal: -

- a. The Learned magistrate erred in law and in fact by finding that the appellant was 80% liable for the respondent's injuries and yet this was not proved in evidence.
- b. The learned Magistrate erred in law and in fact by attributing the plaintiff's injuries to the negligence by the appellant while no such negligence was established.
- c. The Learned magistrate erred in law and in fact by finding that the respondent was injured while in the course of his employment with the appellant and yet no evidence was tendered in support of that claim.
- d. The Learned magistrate erred in law and in fact in the way he weighed the evidence tendered in Court.
- e. The Learned magistrate erred in law and in fact by awarding damages in a matter where liability was not proved.
- f. The Learned Magistrate awarded an inordinately high figure on quantum.

The Appellant made its submissions in two limbs that is on liability and on quantum of damages. On the issue of liability, the Appellant posed a question as to whether or not the Plaintiff (Respondent) sustained the said injuries while working at his assigned station or when doing his required responsibilities and whether DW1 and the Respondent had express instructions from the Appellant to assist to assist in removing the other motor vehicle registration number KBB O24G that was stuck in a tank.

In that regard there facts which are not disputed from the evidence of both the Respondent and the DW1 the driver of the Appellant. These include the fact that the Respondent was employed by the Appellant as a turn boy, that the Respondent was the turn boy in the Appellant's motor vehicle registration number KBJ 648J. The Respondent was assigned to work with the Appellant's motor vehicle registration number KBJ 648J. DW1 was the driver of the Appellant's motor vehicle registration number KBJ 648J. Along the way to deliver goods to the Appellant's client, they saw one of the Appellant's other motor vehicles registration number KBB 024 which was stuck in a septic tank and they offered assistance out of their own volition as no instructions were received from any of their supervisors back at the Appellant Company.

The Appellant made reference to the testimony of PW2 (the Plaintiff) who testified that on or about 16th September, 2014 he was lawfully

working for the Defendant as a turn boy to deliver animal feeds to Kajiado town. They alluded to the fact that along the way the Respondent endeavored to assist the driver of another lorry owned by the Appellant that had landed in a broken septic tank with its rear wheel and got stuck. The jerk snapped and the Plaintiff sustained injuries. He blamed the Appellant for not providing him with gloves (protective devices).

The Counsel of the Appellant made reference to the Respondents upon cross examination where he testified that Mr. Abdi (his Supervisor) assigned him the duty of delivering goods to Kajiado using motor vehicle registration number KBJ 648J. Further, during evidence in chief of DW1, he testified that they assisted the driver of motor vehicle registration number KBB 024G out of their own volition because they did not have express or implied directions from their supervisor.

From the foregoing, the Counsel for the Appellant submitted that the Respondent acted outside his responsibilities of a turn boy by helping another motor vehicle that had stalled and got injured in the process. It was argued that the Respondent's sole responsibilities were only channeled to motor vehicle registration number KBJ 648J as a turn boy and not to other motor vehicles owned by the Appellant. Further that the Respondent acted without the express instructions of the Appellant or his immediate supervisor went to assist the other Appellant's motor vehicle that had stalled and got injured in the process. Therefore, it is the Appellant's view that the Respondent is fully to blame hence the contention that the Learned Magistrate erred in fact and in law in apportioning liability at the ratio of 80:20% in favor of the Respondent as against the Defendant/Appellant. In the premises, the Counsel for the Appellant submitted that the Respondent should be held 100% liable for negligently causing the said injuries upon himself by engaging in an activity that he was not meant to engage in while employed by the Appellant and by willingly and negligently exposing himself to injury.

On the other hand, the Counsel for the alluded to the fact that the Respondent was an employee of the Appellant which is not in dispute as far as this appeal is concerned. (*he referred the court to exhibit 3 (a), (b), (c) contained in the Plaintiff's List of documents dated 21st January, 2015 on page 9 of the Record of Appeal shows the Respondent's pay advice slip for the month of december2014, turn boy Card No.023 and Gate pass dated 29th September, 2014 respectively*). The same was confirmed by DW1. It is also not in dispute that on the material date the Respondent was assigned by his supervisor duties as a turn boy in the Appellant's Lorry together with DW1 to deliver animal feeds to the Appellant's client in Kajiado town. He stated that he was obligated to receive instructions from the driver while in the field as the supervisor would only issue instructions within the company premises.

Counsel affirmed the fact that the Respondent and DW1 when they were on their way to Kajiado Town around 6: pm, the Lorry driver spotted another lorry belonging to the Appellant that had landed in a broken septic tank with its rear wheel stuck therein. The driver who was his senior (DW1) instructed him to assist in retrieving the said lorry and that is where the Respondent met his misfortune. In the same respect, there is no dispute as regards how the injuries were sustained by the Respondent. The question raised by the Counsel for the respondent is whether or not the Respondent was merely assisting in the retrieval of the stuck lorry belonging to the Appellant out of his own volition or was acting within the scope of his employment with the Appellant.

In light of the foregoing, the Counsel for Respondent humbly submitted that the Respondent was acting within the scope of his employment with the Appellant. Counsel based his argument on what he claims to be cross examination evidence of the Appellant's witness by the Respondent's Advocate. According to the Counsel for Respondent, the two Lorries belonged to the Appellant, the goods in the two Lorries belonged to the Appellant, that the delivering of the goods was being done while the Appellant's drivers and the Respondent were in the employment of the Appellant, that the driver was superior to the Plaintiff who was a turnboy, that the supervisor would remain at the other vehicle without assisting it as it would have been a case and the Appellant's management would have taken action against them for not safeguarding the interests of the Appellant and that as the driver he is the one who stopped the lorry he was driving for purposes of retrieving the Appellant's other lorry that had stuck in a broken septic tank.

Counsel for the Respondent also alluded to the fact that after the reporting the incident to the Appellant's Human Resources Manager he was permitted to go to Mama Lucy Kibaki Hospital where he received appropriate treatment and the Appellant catered for his medical bills. Counsel therefore drew an inference that Appellant felt obligated to take care of the Respondent's medication and treatment following his injuries while in the scope of his employment. If indeed the Respondent was engaged in assisting the Appellant's stuck lorry driver on his own volition, then the Appellant would not have spent their money on the Respondent's treatment. Counsel therefore humbly urged the Court to uphold that the Respondent was not acting on his own volition but he was acting under instructions from his in charge, the Appellant's driver during the incident hence the respondent was injured in the course of performing duties for the Appellant.

The Respondent therefore blamed the Appellant for the injuries he sustained pointing out that the Appellant failed to provide protective devices like gloves despite requesting for them. It was argued that if the same had been provided the injuries complained of would not have occurred as the gloves would have protected his hands. Further argument by the Counsel is that the Appellant produced no evidence was produced to show that it provided its employees with any protective devices.

It was also argued the Appellant ought to have used break down services to retrieve the lorry instead of instructing the Respondent through its driver to assist manually. Further that the Appellant assigned the Respondent the said duties without due care and attention while exposing him to risk of damage or injury which they knew or ought to have known. Counsel also argued that the Appellant had employed and assigned work to a careless driver who moved the lorry while the Respondent was still raising the jerk without alerting him thereby causing the accident. Further that the Appellant failed to provide a safe system of work and neither did they provide any or adequate supervision of the piece of work assigned to the Respondent and also failure to instruct the Respondent as to the dangers involved in the said work and precautions to be observed. It was therefore argued that for the aforementioned reasons the Appellant's contention must fail.

On the issue of Quantum of damages, the injuries pleaded on the plaint are as provided for under page 5 of the record of appeal. These include:

- a. Fracture of the right ring finger metacarpal bone.
- b. Blunt trauma to the right wrist joint and hand.

c. Deep cut wound to the right middle finger lateral side.

d. Deep cut wound to the right ring finger.

e. Deep cut to the right small finger.

The Appellant stated that it is trite that where liability has not been proven by the Plaintiff against a Defendant, damages cannot be awarded. It was argued that the above mentioned injuries were not sustained by the Respondent outside his scope of employment as he was injured while doing work he was not authorized to do by the Appellant or the Appellant's supervisor. Further that liability having not been proved by the Respondent, damages should not have been awarded by the trial court. Counsel argued that the trial magistrate erred in fact and in law by awarding Kshs.350, 000 as general damages for pain and suffering and loss of amenities. Further that the award is inordinately high in comparison to the nature of the injuries in the authorities quoted in the Respondent's written submissions.

The Appellant therefore submitted that if this court is inclined to award general damages, Kshs. 80, 000 would be sufficient to compensate the Respondent fully.

On the other hand, Counsel for the Respondent stated that the Respondent sustained severe injuries to his right hand which he showed the trial court being blunt trauma to the right wrist joint and hand, deep cut wounds on his right ring finger, small and middle (lateral side) fingers. Counsel also referred to Dr. Mwaura who opined that in his medical report that the injuries would leave multiple permanent scars with a possibility of future osteoarthritis of the fractured bone. The Respondent's testimony in the trial court is that he experiences recurrent pain and could not perform duties with his preferred right hand as a result. The Respondents humbly submitted that the trial court's award of Kshs. 350,000/=before contribution is therefore not manifestly excessive given the amount awarded for similar injuries in the comparable authorities hereinabove as well as inflation. It was also mentioned that it is trite that an appellate court will only interfere with an award of damages by the subordinate court only if the same is manifestly high or low. They humbly submitted that the 5th and 6th grounds of this Appeal must therefore fail.

Discussion and Decision

I have carefully considered this appeal and submissions tendered by both parties in support and in rebuttal of issues herein as well as the judicial precedence and the law. I take the following view of the matter.

It is important to begin with stating the principles that govern an appellate Court in considering a request to review an award of general damages. : The celebrated words Law J.A. in the case of **Butt v Khan (1977) KAR 1**: stated that:-

“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 as either inordinately high or low.”

See also Kemfro Africa Ltd and Another -vs- A.M. Lubia & Another (1982-1988)

I now endeavor to determine the foregoing accounts of the parties herein. It is not in dispute that the Respondent was the employee of the respondent and he was injured while working for interest of the Appellant. What is in dispute is whether the Respondent was injured while in the course of his duties as employee of the Appellant and whether the incident is attributed to negligence of the Appellant. The relevant Act in this case being the **Occupational Safety and Health Act Cap 514 and the Factories Act**. In **M (A Minor) v Amullenga & Another [2001] KLR** the court held thus:

“In order to succeed in an action for negligence the plaintiff must prove:

(a) That the defendant owes the plaintiff a legal duty.

(b) That the defendant was in breach of that duty.

(c) That as a result of the breach of that duty the plaintiff suffered damage.”

In **Halsbury's, Laws of England, 4th Edition** it is stated at paragraph 662 (p. 476) as follows: -

“The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal connection must be established.”

In **Clerk and Lindsell on Torts 18th Edition pg 600** paragraph 4 the legal scholarly works outlined the essentials on an action for breach of statutory duty as:

“(1) The claimant must show that the damage he suffered falls within the ambit of the statute mainly that it was of the type that the legislation was intended to prevent and that the claimant belonged to the category of persons that the statute was intended to protect. It is not sufficiently simply that the loss could not have occurred if the defendant had complied

with the terms of the statute.

This rule performs a function similar to that remoteness of damages.

(2) It must be proved that the statutory duty was breached. The standard of liability varies considerably with the wording of the statute, ranging from liability in negligence to strict liability.

(3) As with other torts, the claimant must prove that the breach of statutory duty caused his loss, which he will fail to do if the damage caused would have occurred in any event.

(4) *Finally there is the question whether there are any defences available to the action.*”

In *Boniface Muthama Kavita V Carton Manufacturers Limited Civil Appeal No. 670 Of 2003[2015] eKLR Onyancha J* observed that:

“The relationship between the Appellant and the Respondent as employer and employee creates a duty of care. The employer is required to take all reasonable precautions for the safety of the employee, to provide an appropriate and safe system of work which does not to expose the employee to an unreasonable risk.

Going by the writings of *Winfield and Jolowicz on Tort 13th Edn.p.203 ...Employers liability is defined: -*

“At common law the employers’ duty is a duty of care, and it follows that the burden of proving negligence rests with the plaintiff workman throughout the case. It has even been said that if he alleges failure to provide a reasonable safe system of working the plaintiff must plead, and therefore prove what the proper system was and in what relevant respect it was not observed.”

The same was addressed in the case of *Van Daventer v Workmen’s Compensation Commissioner [1962] 4 SA G Boshof J* held as follows:

“An employer owes a common law duty to a workman to take reasonable care for his safety. The question arises in each particular case as to what reasonable care is required. This is a question of fact and depends upon the circumstances in each particular case. A master is in the first place under a duty to see that his servants do not suffer through his personal negligence, such as failure to provide a proper and safe system of working and a failure to provide proper and suitable plant.

If he knows or ought to have known of such failure, he is not bound to give personal superintendence to the conduct of his workings and there are so many in which it is in the interest of the workman that the employer should not personally undertake such superintendence. He may for instance be not sufficiently qualified to do so. In that event the master would be liable for the negligence of persons so acting on his behalf. If a servant is employed on work of a dangerous character, the employer is bound to take all reasonable precautions for the workman’s safety. This may entail provision of a proper and safe system of work.....”

In light of the above laid down principles, it is trite that for the applicant to succeed in his claim, he had to prove, among others, that he was injured while engaging on duties that he was assigned or expected to perform in the course of his employment with the Appellant.

It seems that the Appellant attributes the Respondent’s misfortune to the concept of *volenti non fit injuria* which basically exonerates or absolves Employers from liability. It must be noted that our Courts have moved in the direction of carefully considering apportionment of liability, by examining the mutuality of obligations in an employment relationship.

In the case of *Rashid Ali Faki v A.O. Said Transporters [2016] eKLR*, it was stated that: -

“There is a significant difference between an Employee who causes an accident and injury to self or to others, through “a frolic of his own” and an Employee who does so through “a detour.” The first relates to an Employee who acts completely in his own capacity, rather than following the instructions of the Employer. The Employee takes a major departure from the instructions given by the Employer. He takes such departure for his own benefit. If there occurs an accident and injuries ensue to the Employee or 3rd Parties during such a frolic, the Employer cannot be held liable.

This is not so in cases of detour. This involves minor departures by the Employee from the instructions of the Employer. In detouring, the Employee’s conduct must remain within the scope of employment. This means the Employee’s conduct must be of a kind the Employee was hired to perform; occurs substantively within the prescribed time and space; and at least in part conduct purposed on serving the Employer.

There is no doubt that the respondent was an employee of the Appellant. There is no doubt also that he sustained the said injuries while assisting in the repair of the Appellant’s other stuck motor vehicle. There is no doubt that the Respondent was working towards advancing the interests of his employer, the Appellant. The testimony of DW1 affirms that position. He testified that he had more leverage with the Respondent which goes to show that it was as per his instructions to the plaintiff that they assist the other lorry driver to preserve the company’s products. The Respondent and DW1 were under instruction to deliver the Appellant’s goods in Ngong town. They did not stick to the said instructions, when they saw one of their company’s motor vehicle stuck on a septic tank. That is when they *detoured*, the driver drove towards the said motor vehicle and parked. They began to assist the driver of the said stuck vehicle to retrieve it. Unfortunately, the stone they had used to assist in holding the jerk slipped thereby hitting and injuring the plaintiff’s right hand. The decision to assist the said

stuck motor vehicle was clearly outside the Appellant’s instructions and policy, but certainly not a prolific of their own, so as to consider the Appellant completely discharged from liability. The distinction between the concept of a “prolific” and a “detour” is important to this matter. It is merely co-incident in time, where Employee frolics. It is in the course of business, where the Employee detours. (see *Rashid Ali Faki (supra)*).

Looking at meaning of the term turn boy, (at <https://en.wiktionary.org/wiki/turnboy>) defines it as follows: *turnboy (plural turn boys)(East Africa) An assistant to the driver of public transport or a truck.*

In light of the above, the court does hold the view that the role of the Appellant (*a turnboy*) could be mere loading and offloading or just watching over the lorry, where only an overall and gloves were required for discharge of his role. The appellant was tasked with loading and offloading cereals. That would require an overall and gloves, but from the Respondent’s testimony, the same was not provided. As a turn boy, it was reasonably expected that in case the truck was to encounter a break down, the Respondent would assist the driver to resuscitate the motor vehicle as his job was to assist the Driver. It is for that reason that I find no ground to depart from the Learned Magistrate’s findings on liability.

On quantum of damages, the injuries pleaded on the plaint are as follows:

- a. Fracture of the right finger metacarpal bone
- b. Blunt trauma to the right wrist joint and hand
- c. Deep cut would to the right middle finger lateral side.
- d. Deep cut would to the right ring finger
- e. Deep cut to the right small finger.

The Appellant’s contention in that regard is that the injuries sustained by the Respondent were occasioned outside scope of employment. Further that he was injured doing work he was not authorized to do by the Appellant or the Appellant’s Supervisor. He is of the view that the Learned trial magistrate in this case erred in fact and in law by awarding Kshs. 350, 000/= as general damages for pain and suffering and loss of amenities. Further that the award is inordinately high and that Kshs. 80, 000/= would be enough to compensate him fully. The above contention was opposed by the Counsel of the Respondent who believes that the award is not manifestly excessive. I’m in agreement with the award of damages as founded by the learned magistrate. It is important to recall that I can only interfere with an award of damages if the aggrieved party satisfies one of two conditions:

- i. That the trial Court took into account irrelevant factors or left out relevant factors when assessing damages; or*
- ii. The amount of damages is so inordinately high or low that the quantum awarded must be a wholly erroneous estimate of damages.*

In the premises, I find that no sufficient reasons have been advanced for interfering with these awards, which I am satisfied are reasonable in the circumstances.

For the above reasons the applicant’s appeal on both liability and quantum is hereby dismissed with costs to the Appellant. The Decretal amount deposited as security for due performance of the decree be released by the Deputy Registrar to the Respondents forthwith.

It is so ordered.

Dated signed and delivered in open Court at Kajiado this 1st day of March 2019.

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R. NYAKUNDI

JUDGE

Representation

Mr. Momanyi for the Respondent – present

Mr. Mbigi for the Appellant - present