REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 79 OF 2011

KOROMOTO GENERAL AGENCIES LIMITED……. APPELLANT

VERSUS

WAFULA IMOLI NYONGESA…….. RESPONDENT

(Being an Appeal from the Judgment of the Senior Principal Magistrate Honourable A. Onginjo in Eldoret Civil Case No. 490 of 2010, dated 18th March, 2011)

JUDGMENT

INTRODUCTION

The appeal arises form the decision of the court in Eldoret CMCC No. 490 of 2010 where the plaintiff filed a claim seeking General Damages, Special Damages, Costs of the suit and interest for injuries sustained in the course of employment in the defendants' premises. He worked for the defendant and his work was to offload crates of beer from the lorry to the store and load empty bottles to the lorry. He slipped and fell down with 2 crates and sustained injuries.

Judgment was delivered in favour of the Plaintiff awarding Kshs. 432,000/- general damages for pain and suffering and Kshs. 1,500/- special damages and the costs of the suit. The Defendant filed the present appeal on 6 grounds which in a nutshell were; that the plaintiff did not prove his case on a balance of probabilities, that the court failed to take into account all material and relevant facts as to the causation of the accident and thus erroneously finding the defendant 100% liable and that the plaintiff did not prove fault on the part of the defendant.

APPELLANT'S CASE

The appellant relied on the case of ***Kisumu HCCA No. 69 of 2012 Mombasa Maize Millers vs Charles Otieno Owino*** where the court was of the opinion that while an employer is under duty of care for the safety of his employees, breach of this duty must be proven by showing the employer was negligent but with regard to the nature of work, the scope of duty cannot be so wide as to encompass situations that cannot be reasonable foreseen or contemplated.

The appellant submitted that the evidence on record proved that what led to the said accident was remains of beer in bottles, that made the floor wet and not the fact that the floor was wet. That the respondent failed to prove negligence or breach of statutory duty and to establish any causation between his injury and the negligence and breach of statutory duty.

The appellant maintained that trial magistrate erred in apportioning 100% liability as the respondent's injuries were not foreseeable and the appellant could not be expected to take reasonable precaution against such risk.

On quantum, the appellant submitted that the court should have awarded Kshs. 70,000/-. The appellant further submitted that the court should set aside the decision by the chief magistrate's court.

RESPONDENTS' CASE

The respondent submitted that the appellant failed to provide safety equipment that would have mitigated exposure to such accidents and further blamed the appellant for not maintaining a safer system of work. He produced exhibits in support of this position on pgs. 54-57 of the record.

The respondents' testimony on how the accident occurred was not challenged and the risk was foreseeable. It was the appellants' duty to provide safety gear like gumboots given the slippery conditions.

On cross examination the respondent stated the appellant never provided a supervisor and consequently failed to provide a proper supervisory system. He relied on ***Nakuru HCCA No. 39 of 2005; Longonot Horticultural Ltd. V Isaac Oluoch Kichama*** where it was held that an employer must put in place a supervisory system that ensures a safe system of work. By failing to provide such a system, the respondent submitted, the appellant predisposed the respondent to an unsafe working environment.

The appellant plead contributory negligence but failed to prove the same or rebut the respondents' claims. The trial court cannot be faulted for holding the appellant 100% liable.

The respondent submitted that the medical record produced in court indicated that he suffered permanent disability which was assessed at 3%. He also suffered swelling on the left forearm and a fracture of the left radius and ulna at the wrist joint. The sum awarded by the court was in tandem with what the court has awarded for injuries of this type before. The sum cannot be said to be inordinately high and the appellant has not managed to demonstrate the same. He relied on the decisions of ***Machakos HCCC No. 28 of 2007 Peris Mwikali Mutua v Peter Munyao Kimaya and Nakuru HCCA No. 118 of 2002; George Kingoina Maranga & Another v Lucy Nyokabi Ndambuki.***

ISSUES FOR DETERMINATION

a) Whether the Appellant was 100% liable

b) Whether the Quantum was excessive

WHETHER THE APPELLANT WAS 100% LIABLE

The legal principles that regulate the relationship between an employer and employee as regards the duty to provide a safe working environment is described in ***Halsbury's Laws of England 4th Edition, Vol.16 par.562***, as follows:

> ***"It is an implied term of the contract of employment at common law, that an employee takes upon himself risks necessarily incidental to his employment. Apart from the employer's duty to take reasonable care; an employee cannot call upon his employer, merely upon the ground of their relation of employer and employee, to compensate him for any injury which he may sustain in the course of his employment in consequences of the dangerous character of the work upon which he is engaged. The employer is not liable to the employee for damage suffered outside the course of his employment. The employer does not warrant the safety of the employee's working condition nor is he an insurer of his employee's safety; the exercise of due care and skill suffices."***

In ***Nkaruarau Lejumurt v Vegpro (K) Limited t/a Kantara Farm [2018] eKLR*** the court cited ***Mumende vs Nyali Golf & Country Club, [1991] KLR at Page 20*** where the Court of Appeal had this to say on this requirement:

> ***"Just because an employee accepts to do a job which happens to be inherently dangerous is, in my judgment, no warrant or excuse for the employer to neglect to carry out his side of the bargain and ensure the existence of minimum reasonable measure of protection".***

This basically means that there needs to be a minimum reasonable measure of protection provided by the Appellant. The Appellant did not provide any safety equipment. Further, it is foreseeable that an employee could slip and fall without protective gumboots whilst carrying out the work. The appellant failed to prove the contrary. I do find that the respondent proved a breach of statutory duty and the appellant could not rebut the same as the respondents' evidence was not controverted there is no proof of contributory negligence. I find that the trial court did not err in apportioning 100% liability on the part of the appellant.

WHETHER THE QUANTUM WAS EXCESSIVE

The test as to when an appellate court may interfere with an award of damages was stated by Law, J.A. in ***Butt vs Khan (1977) 1 KAR 1*** as follows:

> ***"An appellate court will not disturb an award of 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."***

The appellant has merely submitted that the quantum was excessive and has not provided the basis for the proposed quantum or comparable authorities that would show the award is excessive. There is no proof that the magistrate proceeded on wrong principles or misapprehended the evidence in arriving at the figure. I find that the award for damages was not excessive and need not be disturbed.

Given the foregoing, the appeal is in want of merit and is hereby dismissed with costs to the Respondent

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 5th day of April 2019

In the absence of:

The appellant

The Respondent

Mr. Mwelem – Court assistant