



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 118 OF 2002

(An appeal from the judgment of S. Wamwayi (CM) in Eld CMCC No. 1004 of 2003

delivered on 11/02/2002)

PAN AFRICA PAPER MILLS LIMITED.....APPELLANT

-VS-

SYLVESTER NYARANGO OBWOCHA.....RESPONDENT

JUDGMENT

1. The Respondent (**SILVERSTER NYARANGO OBWOCHA**) had sued the Appellant (**PAN AFRICA PAPER MILLS LIMITED**) in the lower court where he sought general damages for loss of earnings and earning capacity, special damages in the sum of Kshs. 3000/-, costs and interest. The trial court entered judgement against the appellant on liability at 80% and awarded the respondent damages in the sum of Kshs 400,000/-. The appellant being aggrieved with the decision appealed on the following grounds:-

The learned trial magistrate erred in law and in fact in using the wrong principles in the assessment of damages such that the amount awarded was excessive and does not reflect the extent of the injuries sustained.

- i) The trial magistrate erred in finding the appellant liable against the weight of the evidence adduced.
- ii) The trial magistrate erred in failing to note that the accident was an Act of God and the Defendant was not to blame in any way.
- iii) The trial magistrate failed to consider submissions of the Defendant.
- iv) The trial magistrate ought to have dismissed the Respondent's claim with costs.

2. As a first appellate court, the court is duty bound to reconsider the evidence on

record afresh and come to its own conclusions and inferences as cited in the case of **SELLE -VS- ASSOCIATED MOTOR BOAT CO. LTD. [1968] 1968 EA 123**.

3. PW 1 (the respondent) testified before the trial court that he was on duty on 3rd December 1999 when he was assigned a task to trim down tree branches. In the course of trimming a tree another tree that had been partially cut fell on his back. He was rushed to Moi Teaching & Referral Hospital where he was admitted between 3.12.99 and 28.12.99.

4. He produced a photocopy of his treatment documents (Ex.1) and testified that he had given the original to his employer who was the appellant. He also produced a letter from the appellant referring him to **DR LODHIA** (Ex 2), his medical certificate (Ex.3) and his medical report from **DR. LODHIA** (Ex 4).

5. The respondent blamed the appellant company for allowing him to trim trees while felling was still going on. He stated that he was not warned that the tree was about to fall and he had no control over when the power saw operator would begin to fell trees; he happened to be 15 meters away. However, he also stated that he did not know whether the tree that fell on him from behind had been half felled or was blown by the wind.

6. As a result, he suffered a fracture of thoracic vertebrae and cannot perform heavy duties as he was still experiencing the effects of the

injury

7. The respondent maintained that the tree had been cut partly and this is why it fell on him. Upon re-examination he confirmed that the fractures had healed albeit with residual deformity.

8. **PW2 (CHRISTOPHER KIPLAGAT KOSKEY)** who was felling trees alongside the respondent testified that the respondent was an axe trimmer and on the material date, there was a tree lying on the tree he was cutting and snapped and hit him.

9. Upon cross-examination PW2 stated that he did not see any hazard in the form of a tree lying on another and. He stated that the tree that had already been uprooted from the ground. He stated that the clerk or forest manager is in charge of axe trimmers while they are in the forest.

He detailed that the work of the axe trimmers was to trim the trees after they had been cut by the tree fellers. He states that on that particular day, there was a little wind and the ground was wet.

10. In defence, **DW2 (JOSEPH OKUMU)** told the court that he was a tree feller who has worked for the appellant company for the last 8 years. That on the material date, he was felling trees and made sure that all of them had fallen to the ground and the plaintiff/respondent began to trim the trees.

11. He saw the tree that fell on the respondent, saying it was a Cypress tree that fell due to the wind when its roots came off. He was emphatic that no other tree was leaning on that tree when it fell and that it fell purely because of the wind. He disputed the claim that tree fellers normally fell one tree and then allow it to fall on other half cut trees.

12. DW2 states that he had told the plaintiff to move away as there was a tree falling but he did not hear. He stated also that the plaintiff did not have any protective gear like helmet and boots because trimmers are not provided with these. DW2 reiterated this testimony in re-examination.

13. The learned trial magistrate found that the plaintiff was 20% liable and ought to pay 32,000/-. He awarded the plaintiff Ksh. 400,000/-. He found that special damages had not been proven but awarded costs and interests to the plaintiff/ respondent.

14. In their submissions, the appellants maintain that the tree that fell on the respondent was the result of the wind blowing and therefore an Act of God. Additionally, the appellant states that the respondent never specified what a safe work environment is and how the appellant failed to provide it.

15. Counsel submitted that the trial magistrate erred in not giving sufficient reasons for finding the appellant liable. Further that the award of Ksh. 400,000/- was too high and was erroneous because the appellant's liability has not been proved.

16. The respondent submits that it was proved that at all material times to the suit he was indeed employed by the Appellant which evidence was corroborated by DW1 during the trial.

17. The respondent states that having suffered severe injuries the court ought to acknowledge the same in view of the evidence adduced.

The Respondent maintains that the tree in question had not been cut down fully and that this meant that the accident in question occurred during the course of the Respondent's employment as per the supervisor's instructions. He states that the accident was foreseeable hence preventable and not an act of God as alleged by the Appellant.

18. He adds that no whistles were blown in the event of such accident and as such the appellant failed to provide a safe environment for the employees. He maintains that the Appellant was negligent and breached the duty of safety or care owed to its employees.

19. The respondent states that trimming could only take place upon the authorization of the supervisor and said that though the appellants claim that the tree fell as a result of being uprooted by the wind, no photos were produced in court to prove this. There was therefore no evidence produced contrary to the evidence produced by the Respondent.

20. The Respondents states that there wasn't enough evidence adduced to show that the accident was an act of God. It is his contention that the damages awarded by the trial court were commensurate to the injuries suffered by the Respondent. He states that they had proven their case on a balance of probability and hence the appeal should be dismissed.

21. The court in **MBOGO & ANOTHER V SHAH, (1968) EA 93** gave the foundational and guiding principles in determining a case brought before a court on appeal;

“An appellate court will not ordinarily interfere with the exercise of discretion by the trial judge unless it is shown that the trial judge misdirected himself in some matter and as a result arrived at a wrong decision, or it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion, thereby occasioning an injustice.”

22. The crux of the matter before the court is to answer the question of whether or not the accident that the respondent suffered fell within the employer's scope of duty of care owed to the respondent or whether it was merely an act of God that could have taken place anytime and at any place.

23. From the testimonies adduced by both parties, it is clear that the exercise the workers were involved in at the time when the plaintiff was injured was a hazardous exercise for anyone involved or on site at the time.

This would mean that the appellant had a duty to ensure that every person on site had the kind of gear that ensured that they were well taken care of in the course of handling their work and also that incase an alarm needed to be sounded, it would be done easily and efficiently. Unfortunately, this was not the case.

24. Moreover, it is a requirement in the law that the one who alleges must prove. The appellants have maintained that the incident happened as a result of an Act of God but has done nothing to prove the same – including providing pictures as was cited by the respondent.

25. I hold and find that the trial court adequately considered the prevailing circumstances in concluding that the appellant bore the greater burden of proof to the extent that although the respondent evasive action, the exercise of trimming the trees was so hazardous as to require the appellant to provide a warning system as a precautionary measure for any eventualities. I do not find any error in fact or law as regards the finding on liability.

26. As regards general damages for the injuries suffered, the medical report by **DR. LELEI** dated 27/08/2001 indicated that the respondent soft tissue injury of the lower thoracic region and a compression fracture of the 11th thoracic vertebrae but there was no neurological deficit. The prognosis was that the fracture had healed but with residual deformity and he would have frequent backache due to mechanical de-arrangement of the back. He would also not be able to perform any strenuous work especially carrying heavy loads.

27. Another medical report by **DR LODHIA** dated 15th May 2002 confirmed that the respondent sustained a back injury and the x-ray showed compressed fracture of T12 and at the time of examination he complained of back-ache, which was confirmed on examination. The movements of the spine were slightly restricted and he was awarded 10% permanent disability.

28. The appellant's counsel argued that the sum awarded was inordinately high and suggested a scaling down to between Kshs. 100,000/- to 150,000/-.

I take note of the past decisions cited by the appellant are more than 10 years old, and taking into account the nature of the injury especially the permanent residual effects and the current economic trends with the dwindling value of the Kenyan shilling, I do not consider it just to interfere with the general damages awarded.

In my view, the sum awarded is commensurate to the injuries sustained.

Consequently, I uphold the trial court's findings and find that the appeal lacks merit. The appeal is thus dismissed with costs to the respondent.

DELIVERED AND DATED THIS 2ND DAY OF MAY 2019 AT ELDORET.

H. A. OMONDI

JUDGE