



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 105 OF 2011

TURBO FEEDS LIMITED.....APPELLANT

VERSUS

PAUL OFIDI OMENDA.....RESPONDENT

(Appeal against the judgment and decree by Hon. I. Maisiba (RM) in Eldoret CMCC No. 749 of 2010 on 4th May, 2011)

JUDGEMENT

1. The appellant filed this appeal on grounds that:

- i. The trial magistrate erred in law and in fact in holding the appellant 100% liable for the accident despite the weight of the evidence on record.***
- ii. That the learned magistrate erred in not taking into account the appellant's evidence.***
- iii. That learned magistrate erred in law and in fact in failing to find that no accident occurred as alleged.***
- iv. That the learned magistrate erred in law and fact in awarding general damages to the plaintiff when such injuries were not occasioned in the course of employment.***
- v. That the learned magistrate erred in law and in fact in failing to consider the appellant's submissions and authorities and more so that the respondent was not within the premises of the appellant at the material time of the alleged injuries.***

2. The respondent sued the appellant for recovery of damages arising from an accident alleged to have occurred on or about 1st September, 2010. It was alleged that the respondent who was employed by the appellant as a casual labourer was on the material day undertaking his assigned duties when due to breach of contract of employment by the appellant he was seriously injured when he was hit by a moving roller/mixer in the mixer machine. That as a result his left ring finger was swollen and tender with a lacerated wound and he suffered severe pains during and after the injury. He further pleaded special injuries to the tune of KShs. 1,500/- for medical report. It was his testimony that he was on the material day assigned the duty of operating a mixer by the Supervisor Mr. Aswani since whoever does that work was not present at the time. He stated that he had not worked there before since he was a loader. That he was hit by a roster of a mixer while removing the cattle feed from the machine which was not switched off. He reported to Mr. Ali who was the Operator Supervisor but he did not assist him. He was treated at Huruma Sub-District Hospital and later examined by Dr. Aluda. He laid blame on the appellant for instructing him to operate a machine he had never operated before without training. Dr. Aluda (PW2) stated that he examined the respondent on 13th September, 2010 and that his left ring finger was swollen and tender with a lacerated wound and stated that he suffered soft tissue injuries. He produced the medical report and a receipt thereof as P. Exhibit 3 (a) and (b).

3. The appellant denied the said claim in its statement of defence. Hussein Khalif Maalim (DW1) who works at the appellant's administrative department and who deals with welfare of workers stated that he did not know the respondent. He denied that an accident occurred on the material day and stated that the respondent's name does not appear on the register (D. Exhibit 2). Davis Mukabane Chibule (DW2) who works at the store control department stated that the respondent had worked at the stores before as a casual for a week and was on duty on 30th August, 2010 but went away. That the respondent was not at work on the material day. That he issued workers with protective gears but the respondent's name was not on the list. He produced records to that effect as D. Exhibit 3 and receipts for protective gear as D. Exhibit 4 (a) –(i). On cross-examination, DW2 admitted that D. Exhibit 3 reveal that the respondent was on duty on 30th August, 2010 and does not show that the workers were given protective gear. That D. Exhibit 3 has no official stamp of the appellant and that his name is not in D. Exhibit 3. Augustine Aswani (DW3) who is a supervisor in the protective department stated that he knew the respondent who was a casual worker for the appellant. That the company keeps the register of workers but that the respondent's name does not appear on the register for 1st September, 2011. He produced an attendance register as D. Exhibit 7. The trial court after hearing the case found the appellant 100 % liable and awarded the respondent general damages of KShs. 70,000/- and special damages of KShs. 1,500/-.

4. The parties herein adopted the submissions tendered before the trial court. For the appellant it was submitted that the appellant's witnesses produced records to show that the respondent was not at work on the material day thereby the appellant is absolved of any duty of care to a person who is not within its premises. On quantum, the appellant cited **Nairobi HCCA No. 742 of 2002., Socfinaf Company Ltd v. Joshua Nguni Mwaura** and stated submitted that an award of KShs. 20,000/- was sufficient to compensate the respondent. The respondent on the other hand submitted that the defence evidence was manufactured and dubious since the documents produced had no logo and official stamp. On quantum, the respondent cited **Catherine Wanjiru King'ori & 3 others v. Gibson Theuri Gichubi., Nyeri HCCC No. 320 of 1998** and submitted that an award of KShs. 300,000/- was reasonable.

5. This is a first appeal and therefore this court is under duty to re-evaluate the evidence adduced in the subordinate court both on points of law and facts and come up with its findings and conclusions. See: **Selle v. Associated Motor Boat Co. Limited [1968] EA, 123**. The issues for determination in this appeal are:

a) Whether or not the magistrate erred in apportioning liability at 100% on the appellant and enter judgment in favour of the respondent.

b) Whether or not the magistrate erred in awarding the respondent damages.

6. The appellant tendered documentary evidence to demonstrate that the respondent was not on duty on the material day and could not have been injured at the appellant's premises. It is noteworthy however that documents produced were not authentic for having no company seals. Having so said, I further find that the appellant did not controvert the respondent's allegation that he was not issued with protective garment particularly gloves. The appellant herein did not adduce any evidence to controvert the respondent's case. The consequence of such failure has been vastly discussed for instance in **Karuru Munyoro v. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988** Makhandia J held:

"The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon."

It follows therefore that the appellant was in breach of duty and therefore liable. In **Winfield and Jolowicz on Tort by WVH Rogers 14th Edition, London Sweet and Maxwell at page 213** it is stated that:

"If a worker is injured just because no one has taken the trouble to provide him an obviously necessary safety device, it is sufficient and in general satisfactory to say that the employer has not fulfilled its duty."

7. The position was affirmed in **Mumende -v- Nyalii Golf & County Club (1991) KLR 13** where the court was of the opinion that it is the employer's responsibility to ensure a safe working place. However, in measuring the duty care, one must balance the risk against the measures necessary to eliminate the risks. The respondent ought to have been keen while working having known that he was handling the roller mixer. In the circumstances, I find that the trial court erred in apportioning liability wholly on the appellant. Liability is hereby apportioned at the ratio of 80:20 between the Appellant and Respondent.

8. The principles to be applied by an appellate court to determine whether or not to interfere with a trial court's finding on quantum was discussed in **Loice Wanjiku Kagunda -vs- Julius Gachau Mwangi C A No. 142 of 2003 (UR)** where the Court held:

"We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence, an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (See Mariga -vs- Musila (1984) KLR 257.)"

9. In awarding the said damages, the trial court bore in mind the extent of the injury suffered and authorities relevant thereto. In the circumstances, I am unable to find that the trial court erred in awarding the damages as done.

10. In the end, the trial court's finding on liability is set aside and is substituted with an apportionment of 80:20 between the appellant and respondent to which the award of damages will be subjected. The appellant is awarded half costs of the appeal while the Respondent will have full costs in the lower court.

Orders accordingly.

D. K. KEMEI

JUDGE

Delivered at Eldoret this 22ND day of November, 2018.

HELLEN OMONDI

JUDGE