



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 14 OF 2012

KIPKEBE LIMITED.....APPELLANT

VERSUS

KEACHA OMWANDO ONDARI.....RESPONDENT

(Being an appeal from the judgment and Decree of Hon. J. Were (SRM) dated 13th day of January, 2012,

in the original Keroka SRMCC NO. 130 of 2009)

JUDGMENT

1. The Respondent- Keancha Omwando Ondari- filed a civil suit No. 130 of 2009 against Kipkebe Limited, he sought compensation in terms of general damages and special damages for injuries he allegedly sustained on 16th February, 2005 within the course of his employment with the appellant.
2. In his claim the Respondent did state that the appellant breached his statutory duty of care to the respondent and was also negligent resulting in the injury to himself.
3. The appellant filed a defence denying that it was liable to the respondent for injuries that he sustained. The appellant further stated that such injuries if at all were sustained elsewhere and the same is unknown to the appellant.
4. After hearing the case, the trial magistrate found the appellant to have been 50% liable for the injuries that the respondent sustained. He awarded the respondent kshs. 80,000 in general damages, kshs. 6500 n special damages and costs of the suit. The appellant being aggrieved by this decision has now appealed the said decision of the trial magistrate to this court.
5. In its memorandum of appeal the appellant has raised seven (7) ground of appeal challenging the decision of the trial magistrate. These grounds of appeal may be summarized as follows:-

The appellant was aggrieved that the trial magistrate had found it liable for the said injuries sustained by the respondent whereas no evidence was adduced to support the respondent's claim. Further the trial magistrate held the appellant liable at 50% whereas the evidence on record did not disclose any negligence or breach of any duty of care on the part of he appellant. Further the trial magistrate in awarding the sum of kshs. 80,000 in general damages and kshs. 6,500 in special damages, this was excessive in the circumstances.

6. This being a first appeal, this court is mandated in law to hear the appeal herein by way of rehearing the case. This court is required to consider the facts and the law as regards the appeal before it. This court is further required to reconsider and re-evaluate the evidence adduced before the trial magistrate court so as to reach its own independent decision. In reaching its decision this

court required to put in mind the fact that it neither saw nor heard the witnesses who testified before the trial magistrate's court, see **Selle –vs- Associated Motor Boat Co. Ltd (1968) E.A. 123.**

7. In the instant appeal, the issues for determination by this court are as follows:

- i. *Whether the respondent was on duty on 16th day of February, 2005 and whether he sustained the alleged injuries;*
- ii. *Whether the appellant was negligent and/or in breach of its duty;*
- iii. *Whether the award in general damages was excessive and/or inordinately as to warrant interference by this Honourable court.*

8. I have read the submissions of both counsels in this appeal. As expected, the respondent's submission Mr. T.O. Nyangosi, advocate, asserts that this appeal has no merit and should therefore be dismissed. On the other hand the appellant's submissions Mr. O.M. Otieno, advocate, vehemently argues that this appeal has merit on both the issues of both liability and quantum.

9. Before addressing the issue raised in this appeal, I will briefly set out the facts on this case. The respondent testified that he was working at Kipkebe Factory. He produced his work identity card, having been issued on 21st July, 1998, as PExhibit.4. He testified that although his work usually involved putting tea leaves in bags ready for grinding/crushing, on 16th February, 2006, he was asked to firm the fence, a cypress fence, using a panga, a small panga, and old, and blunt one. He had no gumboots. He had only slippers on. His supervisor was called Orare Nyamora. He testified that he was cutting a stick when the stick injured his right leg. He testified that if he had gumboots, he would not have injured himself. He had asked for them but the boots were not provided. In cross-examinations, the respondent said he was injured severally and filed several suits.

10. When he was injured, he went to the factory clinic, of Kipkebe for treatment. He was seen by Dr. Rop PW3- Peter Nyandega Mokaya, a nurse testified that he attended to the respondent at the company clinic where Dr. Rop was a Doctor. The respondent subsequently saw Dr. P.M. Ajuoga. He examined the respondent on 23rd March, 2009. Medical report and receipt thereof were produced as exhibit P.Exh.1 and 2 respectively.

11. The appellant called two witnesses:

The testimony of DW1- George Moraa Nyabuga for Kipkebe Ltd- a keeper of records of work attendance. He testified that on 16th February, 2005 there was no records of the respondent- the checkroll book, does not have the respondent's name on 16th February, 2005. On cross-examination, it reveals that although he himself was on duty, his own name is not in the checkroll, indicating that the roll is not accurate and does not capture all the workers sometimes or other times

12. DW2- for the appellant, worked at the dispensary. He testified that on 16th February, 2015 he treated 25 patients but the respondent was not one of them. On cross-examination; it transpired he was not on duty on 16th February, 2005. It also transpired that there are two factory clinic sites.

13. The court will proceed to determine the three issues above raised:

Whether the respondent was on duty on 16th day of February, 2005 and whether he sustained the alleged injuries. The court makes a finding that the respondent was on duty on 16th February, 2005 upon the testimony PW3- Peter Nyandega Mokaya corroborating the testimony of PW2. The second limb i.e. Whether the respondent sustained the alleged injuries the court accepts that the respondent sustained.

Whether the appellant was negligent and/or in reach of its duty;

The appellant had a duty to provide the plaintiff with relevant protective gear. There is no evidence that the appellant did so despite the respondent asking for the same. And yet, the respondent would not reject his boss' directive to trim a fence albeit with defective implement and without protective gear. If he did, he would do it at his own risk of being fired instantly, even when he knew, doing

that task would expose him to physical injuries. It is in evidence that he was injured severally and had several acclams against the appellant in respect of these tasks. Under the Bill of rights in the Constitution article 4 1(2)(b): these conditions include, inter alia, provision for rights gears in performance of certain tasks without which the worker is exposed to physical injuries. Legal authority of Civil Appeal No. 15 of 2003 which I have read, is herby distinguished. The Bill of rights thus supersedes the principles laid down in this authority. Therefore the court finds that the appellant was negligent and in breach of statutory duty.

14.The two issues as determine confirm the liability for the appellant to the respondent on quantum, that is, on issue (iii) whether the award in general damages was excessive and/or inordinately as to warrant interference by this Honourable court. The principles governing his court in deciding whether or not to interfere with the award made by the trial magistrate we set out in the case of Kemfro Africa Limited & Another –vs- Lubia & Another (No.2)[1987] KLR 30

“where it was held that an appellant court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge must be satisfied that either the judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that short of this, the amount is so inordinately low or so inordinately high, that it must be a wholly erroneous estimate of damages”

15.In this appeal, the respondent sustained cut on the right leg. The Dr. said, PExh.1, the respondent suffered STI(Soft Tissue Injuries) that had healed well(with) no disability.

16.Therefore on re-evaluation o the evidence, it is my opinion that the award of kshs. 80,000 as general damages was inordinately too high. In the circumstances the court will interfere and reduce the figure to kshs. 50,000 subject to 50%, it works out as kshs. 25,000.

17.In the premises, therefore the appeal herein is allowed as hereunder:

i. ***Appeal on liability is dismissed.***

ii. ***Appeal on quantum is allowed, General damages to reduce to kshs. 50,000 subject to 50% to kshs. 25,000. Special damages of kshs. 6,500 subject to 50%, reduces to kshs. 3,250.***

iii. ***The appellant is awarded half the costs, as the appeal partially succeeded.***

iv. ***Interest on general damages shall be paid for the date judgment of the trial magistrate.***

Dated and delivered at Kisii this 6th day of March, 2015.

C.B. NAGILLAH,

JUDGE.

In the presence of:-

Mainga holding brief for O.M. Otieno for the appellant.

Nyangosi for the respondent

Edwin Mongare Court Clerk.