



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NUMBER 217 OF 2010

BEAUTY LINE LIMITED.....APPELLANT

VERSUS

ANTONY OTIENO MBUNI.....RESPONDENT

JUDGMENT

(An appeal against the judgment delivered by Hon.Njagi at the Principal Magistrate's Court, Naivasha, in Civil Suit PMCC No.403 of 2007 on 20th July, 2010)

FACTS

1. The Respondent was an employee of the Appellant and on the 2nd January, 2007 was assigned the duty of spraying chemicals on flowers on the Appellant's farm. A pipe burst and the chemicals splashed onto the Respondent's eyes as a result of the injuries the he also suffered loss and damage.
2. The Respondent instituted a suit against his employer and after a full trial the trial magistrate entered judgment in favour of the Respondent and held the Appellant liable for the Respondent's injuries to the extent of 90% and awarded general damages in the sum of Kshs.80,000/= together with special damages of Kshs.2,500/= as well as costs and interest thereon.
3. The Appellant being aggrieved with the decision of the Hon. Njagi Principal Magistrate preferred this appeal and listed six (6) grounds of appeal in his Memorandum of Appeal *inter alia*;

i) That the learned trial magistrate erred in law and in fact and misdirected himself in finding the appellants liable notwithstanding the evidence on record to the contrary.

ii) That the learned trial magistrate erred in law and in fact in failing to appreciate the fact that the onus of proof was on the plaintiff and therefore shifted the burden by holding that the plaintiff had proved his case on the requisite standards on the basis of scanty evidence whereas there was overwhelming rebuttal evidence.

iii) That the learned trial magistrate erred in law and in fact by failing to consider the evidence and submissions of the defence and critically analyse the same and accord it due weight to the extent that it was able to prove that the Plaintiff was indeed not injured at work on the material date.

iv) That the learned trial magistrate erred and misdirected himself as to the exact nature of the Respondent's injuries and therefore erred in law in his assessment of damages awardable to the Respondent.

v) That the learned trial magistrate erred in law in failing to appreciate and apply the principles applicable in a claim for negligence.

vi) That the learned trial magistrate erred in law and in fact in finding the appellant liable at all on the face of all available evidence.

ISSUES FOR DETERMINATION

4. The parties opted to argue the appeal by way of written submissions and after reading the respective submissions and the proceedings these are the issues that are found for determination;
 - i. Whether the Respondent proved his case on a balance of probabilities?
 - ii. Liability
 - iii. Quantum of damages

ANALYSIS

5. This being the first appellate court it is incumbent upon the court to re-assess and re-evaluate the evidence on record and arrive at its own independent conclusion. Refer to the case of Sumaria & Another v. Allied Industries Limited (2007) KLR 1
6. It is not disputed that the Respondent was an employee of the Appellant as at the 2nd January, 2007. What is in dispute is whether or not the Respondent was injured at work on that material day.
7. The Appellant's contention is that the Respondent's injury was not reflected in the Appellant's Accident Register for that month of January, 2007. The Human Resource Manager (DW2) in his testimony confirmed that the Respondent was on duty on that material date but testified that the Respondent was not injured as his name was not entered onto the Accident Register. To support his evidence the witness produced a copy of the Muster Roll, Accident Register and an Injury Treatment Register and these were marked as 'DEX.1', 'DEX.2' and 'DEX.4' respectively.
8. A Records Officer (DW1) from Naivasha District Hospital was called to testify on behalf of the Appellant and his evidence was that the Respondent's name did not appear anywhere in the Hospital's records and that the card issued to the Respondent was a forgery and the number given on the card belonged to some other patient who had been treated a day after the Respondent is alleged to have visited the Hospital.
9. The Appellant further contends that notwithstanding the overwhelming rebuttal evidence the trial magistrate failed to consider the evidence and the submissions made in defence and failed to critically analyze the same and accord due weight to this evidence to the extent that the Appellant was able to prove that the Respondent was indeed not injured at work on that material date.
10. On the hand the Respondent testified to having been injured at work on the 2/01/2007 and that he had received first aid at work before going to Naivasha District Hospital and that he had also reported the accident to his Supervisor.
11. A Clinical Officer (PW3) from the above hospital testified and confirmed that the Respondent had been treated thereat for injuries to the eye caused by the spray from the chemicals.
12. After re-assessing the evidence of both parties as to whether the Respondent was injured or not this court's observations are that DW2 was not present at the time the accident occurred. His evidence was that the recordings in the Accident Register were usually filled in by the First Aider and that he (DW2) only countersigned it.
13. The court notes that this First Aider was not called to testify nor was the Supervisor called to testify and they would have offered the best evidence on the happenings of that day and would have clarified on why no entries of the Respondents' accident were made in the Accident Register Card.
14. With regard to the authenticity of the Treatment, it was the evidence of 'DW1' that he only prepared the end month reports and all the entries were done by clinicians and registration clerks. He went further to state that on that material day of the Respondent's accident there was a casual worker who was on duty.
15. Again without sounding too repetitive this casual worker was not called to testify so as to corroborate the evidence of 'DW1' and this court is of the view that this casual worker would have

- been better placed to testify on why he issued that type of the Treatment Card that are issued to accident victims as opposed to the regular ones and also to rebut the evidence of the Respondent and his witness. This court is of the view that the card is authentic as there was no evidence tendered by the Appellant to challenge and disprove the card's validity.
16. After re-evaluating the evidence on record this court is satisfied that the trial magistrate did not err in law and in fact in finding that the Respondent had proved to the requisite standard that he had indeed been injured at work on the material date.
 17. The Appellant's grounds of appeal numbers (2) and (3) are found to lack merit and are disallowed.
 18. On the issue of liability, the Respondent blamed the Appellant for failing to provide him with protective goggles or a mask and with a safe working environment. The evidence of DW2 was that the Respondent was provided a mask but this court observes that no evidence was tendered by this witness on the working condition of the chemical sprayer and the conditions put in place by the Appellant to provide a safe working system and a safe working environment for its employees. The burst pipes indicate that the apparatus was unfit and that the working system and the environment were all unsafe.
 19. After re-evaluating the evidence on record on the issue of negligence this court finds that the Appellant was negligent and breached the statutory duty to provide the Respondent with apparatus that were in a fit working condition and failed to provide a safe working environment and a safe working system. This court finds no reason to interfere with the trial magistrate's finding on negligence and apportionment of liability.
 20. The Appellants ground of appeal no. (1) is found lacking in merit and is hereby dismissed.
 21. The last issue relates to quantum of damages. The evidence of Dr. Kiamba (PW2) was that he examined the Respondent and confirmed the injuries sustained. He was awarded Kshs.80,000/= by the trial magistrate. The Appellant submits that the Respondent failed to prove a causal nexus between the Appellant's negligence and the injuries. Further that the trial magistrate erred in his assessment of damages and that the award was not reasonable and was not assessed with moderation.
 22. On the issue of causal nexus, this court is satisfied that the evidence of PW3 established that the injuries to the Respondents eye were caused by the spray from the chemicals. I concur with the trial magistrate's finding that the Appellant did not provide protective gear in the form of goggles to the Respondent which would have protected the Respondent's eyes when the pipes burst. This court is satisfied that the Respondent proved that the Appellant breached its statutory duty of care and established negligence as against the Appellant to the desired threshold.
 23. On the issue of quantum of damages, the test as to when an appellate court can interfere with an award is set down in the Court of Appeal case of *Kemfro Africa Ltd T/A Meru Express Service vs A.M.Lubia & Olive Lubia (1982-1988) 1KAR 727*;

'An appellate court can only interfere with the quantum of damages awarded by a trial Judge, where it is satisfied that the Judge in assessing the damages took into account an irrelevant factor or left out of account a relevant factor, or that the amount awarded is inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage'

24. The court is of the view that the injuries sustained by the Respondent were soft tissue. Comparable awards for soft tissue range from Kshs. 30,000/= to Kshs.150,000/=. The trial court's award of Kshs. 80,000/= is therefore found to be reasonable and not based on wrong principles nor was the award inordinately low or high so as to justify interference.
25. The ground of appeal on quantum is found to be lacking in merit and is disallowed.

FINDINGS

This court finds that the Respondent proved his case to the desired threshold in that he was injured at his workplace.

The court finds no need to interfere with the trial court's findings on apportionment of liability and the award for damages which is found to be reasonable.

DETERMINATION

For the reasons stated above the appeal is found lacking in merit in its entirety and is hereby dismissed.

The Respondent shall have costs.

Dated, Signed and Delivered at Nakuru this 3rd day of September, 2014.

A. MSHILA

JUDGE