



No. 401/14

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 1 OF 2009

DWA ESTATE LIMITED.....APPELLANT

VERSUS

JOSEPH KALAMBA NTHUKU.....RESPONDENT

(Being an appeal from the judgment of Makindu Principal Magistrate's Court PMCC No. 204 of 2006 by Hon. B Ochieng, P.M on 4/12/08)

JUDGMENT

1. The respondent, **Joseph Kalamba Nthuku** filed a suit against, **DWA Estate Limited**, the appellant seeking general damages and special damages in the sum of **Kshs. 2000/=**. He pleaded that he was an employee of the appellant and per the term of his contract, the appellant was required to take precaution to ensure his safety while in the course of employment.
2. On the **19th April, 2002** or thereabout, the appellant breached its contract of employment/statutory duty due to negligence whereby the respondent who was engaged in duties of cutting sisal was hit by a sisal leaf that snapped. As a result he sustained serious injuries.
3. The appellant denied having been negligent and attributed negligence to the respondent.
4. The trial court analysed evidence adduced and reached a finding that the appellant was liable in negligence to the extent of 80% against the respondent 20%. It awarded general damages in the sum of Kshs. 150,000/= subject to contribution.
5. Being aggrieved by the decision of the trial magistrate, the appellant appealed on grounds that:-
 - The magistrate erred in law by reaching a finding that the appellant was liable in negligence to the extent of 80% as against the respondent 20% and damages assessed were inordinately high considering the injuries sustained which were minor soft tissue injuries.
6. The appellant prayed for setting aside of the judgment; in the alternative a finding be made on liability and quantum of damages payable.
7. This being the first appellate court, I do bear in mind its duty to re-consider evidence adduced at the trial court, evaluate it and draw conclusions on that basis; bearing in mind the fact of having neither seen or heard witnesses testify. (*See Selle versus Associated Motor Boat Co. Ltd [1968] E.A. 123, 126*).
8. A re-evaluation of evidence adduced clearly show that it is not in dispute that the respondent was an employee of the appellant. The appellant however, refutes the assertion that the respondent was on duty and was injured while in the course of employment. It is stated that the respondent

- was on leave as from the **13th April, 2002** therefore it is not possible for him to have been injured on the **19th April, 2002** while on duty as alleged.
9. In his evidence PW1, the respondent stated that he was on duty on the **19th April, 2002**, cutting sisal when the sisal snapped and its edge hit him on the left eye causing the injury he sustained. He produced evidence of treatment notes from the **DWA Estate Ltd Clinic**. He was indeed treated on the **19th April, 2002**. The medical practitioner who later examined him considered it as first aid. Drugs were prescribed.
 10. The appellant argued that the respondent could not have sustained injuries while in the course of his duty because he was on leave. A leave application form was produced in evidence to prove the allegation. They also produced a purported filed register to buttress their argument. The learned trial magistrate in evaluating the documents stated thus:-

“I have perused the two documents and find the same sketchy and bereft of official authority with no name or position of the person approving the leave indicated nor any official stamp appended thereto giving the impression that the remarks that leave was approved was made after filing of this suit to build up a defence against the plaintiff’s claim. Indeed there is nothing documentary or otherwise; to show that the leave application “approval” was communicated to the plaintiff and was duly informed when it will start and when he is expected back on duty. I therefore find the defence a sham and dismiss same as an afterthought.”

11. The trial magistrate rightly observed that the leave application form was not handled by the respondent. **DW3, Mary Atieno** was the supervisor of cutters who worked at the cutting section. It was her evidence that a worker applies for leave when it is due. He could however not tell if the respondent applied for leave personally although the document she produced in evidence had his name and personal number. The application form was introduced in evidence at the defence stage. The respondent on testifying, in cross-examination was not shown the document to respond to it. It was not even suggested that he was on leave on the alleged date. This was a document to be disregarded and the learned trial magistrate rightly did so.
12. Another document dismissed by the learned trial magistrate was a page plucked from a book. He argued that the whole book should have been produced in evidence for the court to tell whether or not the incident was recorded. A paper indicated as page 32 was produced in evidence. Its content is a write-up made in hand, the subject being “injury report week ending 21/4/02”. The author Mutunga addressed it to Ass. Production Manager and it is copied to ‘Admin Manager’. The name of the respondent does not feature as one of the persons who were injured.
13. The court could not tell its origin and when the document was made. The magistrate rightly disregarded it.
14. The appellant as the employer of the respondent was required to take reasonable steps to ensure the respondent was safe while working. The appellant was required to provide adequate safety to the respondent. It is pleaded that the appellant failed to provide the respondent with protective gadgets/devices and also failed to ensure that all the paths were clear of any impediments.
15. The appellant on the other hand pleaded that the respondent ignored to heed to safety regulations; he worked recklessly and dangerously without caring for his safety and that he failed to wear protective gear provided.
16. In his evidence PW1, stated that the appellant failed to provide him with protective eyewear (goggles) that would cover his eyes hence prevent him from being injured. The appellant did not rebut the averments. Indeed the sisal plant did snap. He was injured. If he had goggles, the injury would have been averted. As a worker he should have also exercised diligence to avoid a situation whereby he would be injured in the circumstances. The learned trial magistrate was justified in reaching a finding that he contributed to the accident. I therefore have no reason to fault the learned trial magistrate in his apportionment of blame.
17. The second and last ground of appeal is in respect to damages awarded. It is stated that the damages were inordinately high. The respondent’s left eye was pricked. At the outset he was treated with eyedrops (*antibiotics and steroids*) and analgesics, anti-tetanus and steroids) subsequently he developed complications. According to **Dr. Kyalo** the injury healed with scarring of the cornea causing him to have recurrent irritation and poor vision. He assessed the permanent

functional disability at 20%. **Dr. Adala** on the other hand opined that the poor vision was unrelated to the injury since it was in both eyes. The respondent however had limbal growth that could have been accelerated by the injury.

18. It is argued by counsel for the appellant that an award of Kshs. **100,000/=** for the injury sustained would have sufficed. It is trite law that an appellate court should not interfere with exercise of discretion of the trial court unless in acts on the working principle of law.

19. Various authorities were cited in the lower court. In the case of **Joseph Oreso Ager versus Manji Kesiira Contactors** Kshs. 80,000/= was awarded to a plaintiff who suffered penetrating injuries to his right eye. Pieces of metal were removed from the cornea. This award was made in 1997. The respondent was injured in the year 2002. The trial magistrate having considered time that had lapsed would award Kshs. 150,000/= in the instant case. I therefore interfere with the award in as far as the sum is concerned and reduce the amount to Kshs. 120,000/= less contribution the appellant shall be entitled to Kshs 96,000/= with costs and interest in the Lower Court.

20. The costs of the appeal shall be borne by each party.

DATED, SIGNED and DELIVERED at MACHAKOS this 9TH day of OCTOBER, 2014.

L.N. MUTENDE

JUDGE