Gichuki v Lalji Ramji Filing Station Ltd & another (Employment and Labour Relations Appeal E10 of 2023) [2024] KEELRC 1903 (KLR) (19 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1903 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI

EMPLOYMENT AND LABOUR RELATIONS APPEAL E10 OF 2023

ON MAKAU, J

JULY 19, 2024

BETWEEN

FRANCIS KARIUKI GICHUKI .... APPELLANT

AND

LALJI RAMJI FILING STATION LTD .... 1ST RESPONDENT

MAFUKO INDUSTRIES LIMITED .... 2ND RESPONDENT

(Being an appeal against the Judgment and Decree of Hon. S.K.Nyaga, Resident Magistrate delivered on 19th May, 2020 in Murang'a CMCC No.43 of 2019) (Before Hon.Justice Onesmus Makau on 19th July, 2024)

JUDGMENT

Introduction

1. On 19th July 2016 Motor vehicle KCB XXXX fuel tanker was transporting petroleum products from Nairobi to Meru when it had an accident and burst into flames. Inside were two co-drivers namely the appellant and Charles Mwangi Kariuki. The appellant escaped with serious burns but his colleague perished in the inferno. The two drivers were employees of the respondents, owners of the ill-fated vehicle.

2. After the accident, the appellant sued the respondent blaming the deceased for causing the accident through negligent driving. The trial court (Hon.S.K.Nyaga,RM) heavily relied on the Investigation Report by Bright Loss Assessors (K), a private investigator to hold that the respondents were not liable for the appellant's injuries. Consequently, he dismissed the suit with costs.

3. The appellant was aggrieved and lodged this appeal in the High Court at Murang'a seeking to reverse the said decision on the following grounds: -

a. That the learned Trial Magistrate erred in law and fact by holding that the Respondents were not vicariously liable/to blame for the accident when indeed there was enough evidence to that effect occasioning a miscarriage of justice.

b. That the learned Trial Magistrate erred in law and fact by finding that negligence on the part of the Respondents was not established when indeed the Appellant had proved his case as required in law thereby occasioning a miscarriage of justice.

c. That the learned Trial Magistrate erred in law and fact by not assessing damages payable had the claim succeeded, thereby occasioning a miscarriage of justice.

d. That the learned Trial Magistrate erred in law and fact by applying the wrong principles of law thus erroneously dismissing the Appellant's suit thereby occasioning a miscarriage of justice.

e. That the learned Trial Magistrate erred in law and fact by applying the wrong principles of law on the doctrine of vicarious liability thereby occasioning a miscarriage of justice.

f. That the learned Trial Magistrate failed to address his mind to the pleadings on record and the evidence by the parties, thereby occasioning a miscarriage of justice.

g. That the learned Trial Magistrate erred in law and fact in failing to evaluate the entire evidence as well as submissions as presented by the Appellant, thereby occasioning a miscarriage of justice.

h. That the learned Trial Magistrate erred in law and fact by taking into account extraneous and irrelevant considerations thus arriving at erroneous findings in the Judgment, thereby occasioning a miscarriage of justice.

4. The parties agreed to dispose of the appeal by written submissions. The respondents challenged the jurisdiction of the court in their submissions citing section 16, 23 and 52 of *WIBA*. Wakiaga J rendered himself that the matter relates to Employment and Labour Relations and transferred the file to this court.

5. When the matter reached my desk, I directed that parties to file further submissions on the issue of jurisdiction to enable me determine that matter during the appeal because it was never disputed before the trial court. Both sides complied with my directions.

Appellant's submissions

6. The appellant submitted that the issue of jurisdiction was not raised during trial and that when it was raised in the appeal, Wakiaga J held that the matter arose from employer-employee relationship and therefore the appellate court is this court and not the High Court. The appellant submitted that this court has both unlimited original and appellant jurisdiction by dint of section 12 of the Employment and Labour Relations Court (ELRC) Act.

7. As regards the jurisdiction under *WIBA*, he submitted that by Gazette Notice No.5476 of 28th April 2023 the Chief Justice gave practice directions to the effect that all claims for work related injuries and diseases filed in court after the *WIBA* and before the judgment of the Supreme Court decision in *Law Society of Kenya v Attorney General & another* (2019) eKLR were to proceed until conclusion before the ELRC or the Magistrates Courts. He buttressed the said submissions with the decision of this court in *Zhongmel Engineering Group Ltd v Joshua Ogamba Nyachiro* (2023) KEERLC1165 (KLR) which applied the said practice directions by the Chief Justice.

8. As regards the merits of the appeal, the appellant submitted that this being a first appeal the court has jurisdiction to re-evaluate the evidence on record and come to its own independent conclusion. For emphasis, reliance was placed on the Court of Appeal decision in *Selle v Associated Motor Boat Co.Ltd* (1968) EA 123.

9. He argued ground 1, 2 and 5 of the appeal together to urge that the trial court relied on the wrong principles of law in arriving at the conclusion that respondents were not vicariously liable.

10. He submitted that he proved that the respondents were the registered and beneficial owners of the motor vehicle Number KCB XXXX. He further submitted that he proved by a delivery note that Charles Kariuki (deceased) was the authorised driver on the material day. He further submitted that there was no evidence to prove that he (appellant) was the driver at the time of the accident. He also submitted that no eye witness was called to rebut his evidence and therefore urged that the respondents were vicariously liable for accident.

11. He further submitted that the acts by the deceased driver were being carried out within the scope of employment but the respondent did not avail to the said driver and him a safe system of work when instructing them to transport highly flammable material. He contended that his evidence was consistent throughout the trial that the deceased was the one driving and the appellant was to take over the wheel from Embu to Meru. He maintained that he managed to the escape through the windscreen because he did not have safety belt on. He added that the police Abstract did not indicate who the driver of the vehicle was and the investigation report by DW1 ought not to be taken as the gospel truth since he was doing it for the insurance company.

12. The appellant maintained that the respondents had the burden of proving their allegation that he was the one driving the vehicle at the time of the accident but they failed to adduce any evidence to discharge the said burden except the investigations report. Consequently, the appellant urged that in the absence of any evidence from an eye witness to rebut his evidence, means that the respondents were vicariously liable for actions of their deceased driver.

13. As regards grounds 3, 4 and 6 of the appeal, the appellant submitted that the trial court erred by failing to assess the damages even after the respondent were not liable. He placed reliance on the case of *Frida Agwanda & Ezekiel Onduru Okech v Titus Kagichu Mbugua* (2015) eKLR where the court held that a trial court has a duty of assessing damages even where the suit is dismissed.

14. He then urged this court to award him Kshs.800,000.00 as General damages for the injuries suffered. For emphasis, he relied on *Yunis Noor Mohamed Mangia v The AG* (2004) eKLR, *Lilian Otieno v Joseph K.Kimana* NBI HCCC No.2670 of 1986 (UR) and *Ngala Shedi v Jackson M.Nyambu* MSA HCCC No.152 of 1992 (UR) which involved burns and the court awarded between Kshs.120,000 and Kshs.250,000 compensation. The appellant urged that the cited authorities were 20 years old and therefore considering inflation factor, the sum of Kshs.800,000 is reasonable compensation.

15. As regards ground 7 and 8 of the appeal, the appellant submitted that the trial court did not address her mind on the pleading and the evidence and as a result she erroneously dismissed the suit. He further submitted that the trial court disregarded his evidence and written submissions and dismissed the suit yet there was evidence to support the suit against the respondents. Consequently, he prayed for the appeal to be allowed and the respondent be held vicariously liable for the accident.

Respondents' submissions

16. The respondents submitted that the appellant filed suit before the Magistrate claiming compensation work injury instead of going to the Directorate of Safety and Health under the Work Injury Benefits

Act (*WIBA*). Consequently, they submitted that the court lacks jurisdiction to determine the appeal by dint of section 16, 23 and 52 of the WIBA which provides for an alternative procedure for seeking compensation for work injury claims. For emphasis, they relied on the case of *Law Society of Kenya v The Attorney General & another*, supra and *Joseph Muthee Kamau & another v David Mwangi Gichure & another* (2013) eKLR.

17. As regards the merits of the appeal, they submitted that the appellant laid down a fraudulent claim by purporting to change the circumstances of the accident and the true nature of his work as a driver for their vehicle. They contended that according to the investigations report by DW1, the appellant was the one driving the vehicle and according to the photos taken at the scene, he had the chance to evacuate to safety.

18. They further disputed liability contending that there was nexus shown between the alleged accident, the injuries sustained and negligence on their part. Consequently, they contended that appellant did not discharge the burden of proof of negligence against them as required by section 107, 108 and 109 of the *Evidence Act*. They relied on *Caren Auma Oyugi Okwiri v Emergency Relief Supplies Ltd & another* (2017) eKLR.

19. As regards the reliefs sought, the respondents submitted that the appellant sustained 2nd degree burns to the scalp, face and dorsal region and therefore an award of Kshs.200,000 is sufficient. For emphasis, they relied on *James Nyaboga Masogo v Kipkebe Ltd* (2007) eKLR and *Crown Foods Ltd v Emily Wangui* (2011) eKLR where the court held that award of damages is not meant to punish the defendant but to compensate for the injuries. They further urged the court to be guided by the case of *Smokies Bar & Restaurant & another v Reuben Kieti* (2015) eKLR and *Eldoret Steel Mills Ltd v George Ochieng Owino* (2011) eKLR where the court awarded between Kshs.200,000 and Kshs.250,000 for comparable injuries.

20. As regards special damages, the respondent submitted that the appellant pleaded Kshs.530 only and that is the much this court can award since parties are bound by their pleadings.

Issues for determination

21. This being a first appeal, I agree with the appellant that my mandate is to re-evaluate the evidence and arrive at my own independent conclusions. In *Selle v Associated Motor Boat Company Ltd* (1968) EA 123 the Court of Appeal held that: -

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must consider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate he evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

22. Having been guided by the above precedent, I proceed to address myself to the following issues which fall from the pleadings, evidence and submissions on record: -

    a. Whether or not this court has jurisdiction to determine this appeal.

b. Whether or not the appellant was the one driving the motor vehicle KCB XXXX during the material accident.

c. Whether the respondents are vicariously liable for the negligence of the driver in this case.

d. Whether the appellant is entitled to General as well as special damages in this case.

e. Who should pay the costs of the Appeal.

Jurisdiction

23. The Work Injury Benefits Act was passed in 2007 and came into force on 2nd June 2008. Section 16 of the Act provides that: -

> " No action shall lie by an employee or any dependent of an employee for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death."

24. It is clear from the above provision that effective 2nd June 2008 a claim for compensation for injuries or death arising from work related injury were to be resolved in the procedure set out under the *WIBA* and not in court. However, the Act was challenged in the High Court in the case of *Law Society of Kenya v The Attorney General* and on 4th March 2009 several sections of the Act including section 16 were declared null and void.

25. The Attorney General appealed to the Court of Appeal but in the meanwhile litigants continued to file suits because the decision of the High Court was never stayed. On 17th November 2017, the Court of Appeal allowed the appeal by the Attorney General and reinstated section 16 of the *WIBA*. But Law Society appealed to the Supreme Court. Again, no order was given to stay the judgment of the Court of Appeal but litigants like the appellant continued to file suits in court. On 3rd December 2019, the Supreme Court upheld the decision of the Court of Appeal and dismissed the appeal by the Law Society of Kenya.

26. The Court of Appeal, and Supreme Court decisions led to confusion and outcry on the part of the litigants who had filed suits during the pendency of the appeals. As a result, the Chief Justice published practice directions vide Gazette Notice No.5476 on 24th April 2023 with the aim of unlocking the stalemate relating to work injury claims filed prior to 2017 and that had been pending in courts.

27. Direction number 3 is relevant to this suit: -

> " 3. All claims with respect to compensation for work related injuries and diseases filed, after commencement of *WIBA* and before the Supreme Court decision, at the Employment and Labour Relations Courts or the Magistrate's Courts shall proceed until conclusion before the said courts."

28. Radido J upheld the said practice directions in *Zhongmel Engineering Group Ltd v Joshua Ogamba Nyachiro*, *supra* when he held that: -

> 22. The respondent approached the Principal Magistrate's court on 21st February 2017.
>
> 23. The state of the law as of 21st February 2017 was that section 16 of the Work Injury Benefit Act was invalid (Judge made law).

24. The court also note that the Chief Justice has issued Practice Directions relating to pending court claims regarding compensation for work related injuries and instituted prior to the Supreme Court decision in *Law Society of Kenya v The Attorney General & anther* Petition No.4 of 2019 (2019) eKLR through Gazette Notice No.4576 of 28th April 2023.

25. The directions underscore the jurisdiction of the courts in claims filed with the courts prior to the Supreme Court decision.

26. In light of the above, this court finds that the Principal Magistrate's Court had the requisite jurisdiction at the material time to entertain the claim advanced by the respondent."

29. Whereas I agree with Radido J that suits filed after declaration of invalidity of section 16 of *WIBA* and the restoration of the same by the Court of Appeal were properly before the court, I doubt whether the practice Directions by the Chief Justice issued on 28th April 2023 were capable of overturning the decision of the Court of Appeal and the Supreme Court. My considered view is that the said practice directions should only apply to claims filed before the 17th November 2017 when the Court of Appeal restored section 16 and 52 of the *WIBA*.

30. I say so because the said decision was not stayed pending the Supreme Court decision on 3rd December 2019. However, since the respondent did not challenge the said Practice Directions by the chief justice which I believe are intended to serve the interest of administration of justice, I proceed to uphold the same and find that the court has authority to determine this Appeal.

31. Besides, under section 12 (1) of the *ELRC* Act, this court is clothed with unlimited original and appellate jurisdiction to hear and determine all disputes related to Employment and Labour Relations. Further, the respondents admitted in their defences that the trial court had jurisdiction to determine the suit and therefore any decision from the trial court was appealable to this court by dint of section 12 of the *ELRC Act*.

Driver of the vehicle

32. The Appellant's case is that his co-driver Mr.Charles Kariuki (deceased) was the one driving the vehicle at the time of the accident; that the delivery note issued from the fuel depot indicated the deceased as the driver of the vehicle; that the deceased was to handover the vehicle at Embu but on reaching Makuyu area the accident occurred; and that since he had not worn safety belt he quickly escaped through the front windscreen but the deceased perished in the cabin after the tank bursted into flames.

33. DW1 who testified for the respondents was the private investigator appointed by the respondents' insurer. He basically gave and produced photographs, which were taken by another person who was never called to testify during the trial. He also relied on a statement he allegedly recorded from the appellant, admitting that he was the one driving the vehicle when the accident occurred.

34. The appellant disowned the said statement and averred that he never recorded any statement with DW1 but at the police station three weeks after the accident. He maintained that the deceased was the one driving the ill-fated vehicle. No eye witness was called to rebut the evidence by the appellant that the deceased was the driver.

35. Without any eye witness evidence or other form of evidence to rebut the appellant's evidence, I find that the appellant had proved, on a balance of probability, that the deceased, Charles Kariuki was the person driving the respondent's vehicle at the time of the accident. This conclusion is fortified by the invoice and Delivery Note produced by DW1 as part of the Investigation Report (Exh.D.1) which clearly indicated the driver of the ill-fated vehicle as Charles Mwangi and not the appellant.

36. Besides, I have noted that the Police Abstract did not indicate who was the driver and the Investigation police officer was never called to rebut the appellant's evidence. Logically if the police had information that the appellant was the one who was driving the ill-fated vehicle, they would have charged him with causing death of his co-driver Mr.Charles Mwangi Kariuki. Having considered the evidence on record, I reiterate that Charles Kariuki (deceased) was the one driving the respondents' vehicle when the accident occurred while the appellant was the loader/co-driver waiting to take over the wheel from Embu town.

Vicarious liability

37. I have already made a finding of fact that the deceased was in control of the respondents' vehicle when the accident occurred. There is evidence that the respondents were the registered or beneficial owner of the said vehicle and that the deceased was their authorised driver. It is also evident that the deceased was acting in the course of his employment by the respondents when the accident occurred. It follows that the respondent's were vicariously liable for deceased's negligence.

38. I seek guidance from the case of t*he Commissioner of Transport v T.R Gohil* (1959) EA 936 cited by the Appellant where it was held: -

> " It is sufficient to plead that the driver was a servant of the defendant. The presumption then arises that the defendant is responsible for any negligence on the part of his servant. If the servant was not driving in the course of his employment, this would absolve the defendant from liability …"

39. The question that ought to be answered is whether the deceased driver caused the accident through negligence. In the case of *Jamal Ramadhan Yusuf & Another v Ruth Achieng Onditi & Another*, (2010) eKLR where the court held that:

> " It is trite law that the mere fact than an accident occurs does not follow that a particular person has driven negligently and or negligence ipso facto must be inferred. So that it is always absolutely necessary and vital that a party who sues for damages on the basis of negligence must prove such negligence with cogent and credible evidence as he who asserts must prove."

39. In this case, I have to consider the scene of the accident and the totality of the circumstances of the accident. To start with, there is evidence that the road was under construction and that there were stones and boulders on the road shoulders. The foregoing fact was enough to warn the drivers to be careful while driving along that section of road section.

40. The second consideration is the undisputed evidence by the appellant that when the vehicle reached the scene of the accident, it hit a stone and rolled 4 times and burst into flames. The only reasonable inference to draw from the said evidence is that, for a tanker carrying 10,000 litres of fuel to roll severally, it must have been going at a high speed. Driving the vehicle at high speed on a road under construction which had stones and boulders along the road shoulders amounted to negligence. Consequently, I find that the deceased driver was negligent and therefore the respondents were vicariously negligent for the acts of the deceased driver.

Damages to the Appellant

41. There is no dispute that the appellant was lawfully travelling in the respondents' motor vehicle on the fateful day and that he sustained second degree burns. To prove the said injuries he produced as exhibits, Medical Examination Report otherwise called P3 Form, and Treatment cards. The P3 form

was filled by Dr.Ngehu of Thika Level 5 Hospital on 16th May 2017 and indicated the injuries suffered as second degree burns on the dorsal region of the right hand , scalp and face 4%.

42. There is no evidence to rebut the said injuries or to show that they were not suffered during the accident. Consequently, I find and hold that the appellant is entitled to compensatory damages for pain, suffering and loss of amenities and any incidental special damages pleaded and proved.

43. Both parties submitted on what would be the reasonable quantum of damages in this case. The appellant proposed a sum of Kshs.800,000 and cited relevant cases decided about 20 years ago where the court awarded between Kshs.120,000 and Kshs.250,000. On the other hand, the respondents proposed Kshs.200,000 and cited cases which were decided 12 or 9 years ago.

44. I find the cases cited by the respondents comparable to the instant case because they involved second decree burns. However, considering the inflation factors and time passage, I consider Kshs.400,000.00 to be reasonable compensation. Compensation is not meant to punish the defendant or to unjustly enrich the claimant, but to compensate the victim for the injuries suffered.

45. As regards the claim for special damages, the appellant pleaded Kshs.550 and produced a corresponding receipt for obtaining motor vehicle copy of Records from the National Transport and Safety Authority (NTSA). The respondents are not opposed to the same and therefore I award the appellant Kshs.550 as special damages.

46. In view of the matters highlighted above, I find and hold that the trial court fell into error by dismissing the appellant's suit with costs contrary to the evidence on record. Consequently, I find merits in the appeal and allow it in the following terms: -

   a. The entire judgment of Hon.S.K.Nyaga RM delivered on 19th May 2020 is hereby set aside.

   b. Judgment is entered for the appellant against the respondents as follows: -

      i. General damages......Kshs.400,000.00

      ii. Special damages..............Kshs. 550.00

      Total Kshs.400,550.00

      iii. Costs of the appeal and the lower court plus interest at court rates from the date of the judgment.

DATED, SIGNED AND DELIVERED AT NYERI THIS 19TH DAY OF JULY, 2024.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE