Spinners and Spinners Limited v Mutiso (Employment and Labour Relations Appeal 2 of 2017) [2024] KEELRC 2111 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 2111 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS APPEAL 2 OF 2017

MN NDUMA, J

JULY 25, 2024

BETWEEN

SPINNERS AND SPINNERS LIMITED .... CLAIMANT

AND

JULIUS MUTUNGA MUTISO .... RESPONDENT

JUDGMENT

1. The appeal was brought vide a memorandum of appeal filed on 13/6/2016. The gist of the appeal as summarized in the submissions by the appellant is:-

    a. For finding that the respondent was injured while in its employment when there was no evidence adduced to prove as such.

    b. For disregarding its evidence on record.

    c. For failing to judiciously analyze the appellant's submissions on record and the case law cited.

    d. Awarding the respondent damages when no sufficient evidence of injury had been tendered.

2. It was aptly stated in the case of Selle versus Associated Motor Boat Company Ltd 1968 EA that: -

    > 'it is the duty of the court to reconsider the evidence adduced before the trial court and re-evaluate it so as to draw its own independent conclusion and to satisfy itself that the conclusions reached by the trial court are consistent with evidence."

3. The court will therefore independently consider afresh the evidence adduced by the parties and reach its own conclusion bearing in mind the law applicable and that the court need not substitute the findings of the trial court with its own merely because the appeal court would have reached a different conclusion on the facts and remembering that the trial court had the advantages of listening to the witnesses directly and was best suited to determine matters of credibility.

5. In the present matter, the appellant in the main contests the finding by the trial court that the respondent was injured in the course of employment. It states that the respondent did not discharge his burden of prove which rested with him and that the trial court erred in law and fact by shifting the burden of proof on the appellant and by doing so arrived at a wrong decision hence causing injustice to the appellant.

6. The appellant further states that the damages awarded to the respondent were excessive in the circumstances of the case and should be set aside and/or reduced.

7. The evidence as per appeal record was adduced firstly by Dr. Jane Ikonya (PW1) who testified that she examined the respondent on 17/11/2014. That the respondent informed her that he was injured at the spinners and spinners Ltd, the appellant's premises. That he was injured by a machine while he worked and sustained a cut wound on the right thumb with removal of finger nail. That he was managed at the company's clinic where the wound was attended to and dressed. The doctor stated that the claimant complained of numbness of the right thumb. The doctor observed a scar on the right thumb. The doctor stated that the respondent had suffered pain and blood loss on the injury sustained. That he had suffered moderate soft tissue injuries. The doctor assessed the injury to have caused the respondent partial incapacity of about 5%. The doctor produced a medical report and a receipt of Kshs. 3,000/= fees. The doctor stated that she had also charged Kshs. 7,000/= for the court attendance.

8. Under cross-examination by advocate Muriuki for the appellant the doctor referred to treatment notes and said that the thumb had a healed scar but because of the numbness the respondent had incapacity.

9. PW2 was the respondent himself who testified that on 23/3/2012 he was at work at the respondent's premises as a machine operator. That while he attended the machine, the machine restarted itself and the respondent was injured on the right thumb. That he screamed for help and was taken to hospital. That on 27/8/2012, he was paid Kshs. 43,000/= under WIBA. That he had never been injured before. That the machine was old and it restarted itself but they were forced to work with it. That he was supplied with overall only. That he had no gloves. That his thumb was numb and prayed to be awarded damages for the injury.

10. Under cross-examination, the respondent said he used different machines at work. That he had a letter of appointment. That he worked for 12 hours including overtime. That there was a clocking system. That on 23/3/2012, he had started work at 7 a.m. That the accident occurred at 12:00 mid-day. That a machine operator was present at the scene of the accident. The respondent did not have treatment notes. That he was treated at Ruiru Health Centre also. That he was taken to hospital by his supervisor Zudori. That after the accident the respondent did not go back to work on the same day. That he reported back to work on 23/3/2015. That the fault was electronic and not mechanical. That he had no record of attending duty, as the records were kept by the appellant.

11. DW1 Bernard Ngugi Kamau testified for the respondent as safety and training officer since the year 2000. That the respondent was his work mate. He relied on a statement of claim dated 23/1/2015. That there was a system of clocking which was a biometric. That the system worked in the year 2012. DW1 said the respondent was at work on 23/3/2012 and that he worked for 11 hours. That in case of injury one was to report the incident to their office. That the respondent reported to work on 24th March 2012. That he did not report to work on 25/3/2012. That on 26/3/2012, the respondent worked on a day shift. DW1 produced a master report for the period 21st March to 20th April 2012 as exhibit.

12. DW1 produced a copy of accident register and stated that no accident was reported involving the respondent on 23rd March 2012. The register was produced as exhibit 2.

13. Under cross-examination by advocate Muturi for the respondent, DW1 insisted that on 23/3/2012, the respondent was not involved in an accident. DW1 said he did not have the employment file of the respondent. DW1 said the respondent had a clinic but was a contracted service. DW1 said he could not remember the respondent getting injured at all.

14. DW1 said he was not concerned with payments made to injured employees. DW1 said the clocking system was biometric and not manual.

15. In the judgment, the learned trial magistrate identified the first issue for determination to be whether the respondent was injured on the said day at the company premises. The magistrate stated that DW1 produced an accident register which did not have the respondent's name. The magistrate found that DW1 was not the respondent's supervisor. The magistrate found that the best person to refute the testimony by the respondent on the issue of injury was the supervisor and not DW1. The magistrate found that failure to call the supervisor led to the inference that his evidence "might be prejudicial to their own case."

16. The magistrate observed: -

> " I heard the plaintiff testify and observed his demeanor his testimony was consistent even during cross-examination. I therefore find that the plaintiff was injured at his place of work."

17. This court finds no basis to fault the consideration of evidence adduced before court as to the matter whether the respondent sustained injury on the 23/3/2012 while at work. DW1 did not have direct evidence on the matter since he was not at the scene of the accident. The respondent had named the supervisor who was at the scene of the accident and took the respondent to hospital immediately the accident occurred.

18. The Appellant did not offer any explanation why it did not call the supervisor of the respondent to testify as to whether the respondent suffered any injury on the material day.

19. There was no dispute as to whether the claimant was at work on the day. The trial court weighed in on the demeanor of the respondent and the veracity and consistency of the evidence adduced by the respondent and on that basis believed her testimony and found that her testimony was credible and represented the truth.

20. This court cannot fault this finding on credibility by the magistrate having not listened to the witness first hand. see Selle case (Supra).

21. Accordingly, the court finds that the appellant has provided no basis to upset the finding of the trial magistrate on the issue of liability.

22. Furthermore, the trial court found that the respondent was 100% responsible for the accident, the respondent having adduced no evidence at all to dispute the version told by the respondent as to how, when and why the accident occurred.

23. The court has considered the testimony of the claimant and that of the doctor on the injury sustained and the lasting impact on the thumb. The court has considered the reasons of the trial magistrate based on the submission on quantum placed before the trial court.

24. The court further considered the decisions in HCCA No. 122 of 2017 where the court awarded Kshs. 400,000/= general damages for similar injury suffered by the plaintiff and decision in HCCA No. 36 of 2017 where the High Court on appeal awarded Kshs. 250,000/= for soft tissue injuries with no permanent incapacity and dismissed the appeal on quantum.

25. In the final analysis the court finds the appeal lack merit in its entirety and dismisses the same on liability and quantum.

26. Accordingly, the court confirms the award by the trial court as follows: -

    i. Kshs. 100,000/= general damages

    ii. Kshs. 3,000 special damages

    Total award Kshs. 103,000/=

    iii. Costs in the court below and in the appeal.

DATED AT NAIROBI THIS 25TH DAY OF JULY, 2024

MATHEWS NDERI NDUMA

JUDGE

Appearance:

Mr. Mugambi for appellant

Mr. Muturi for respondent

Mr. Kemboi Court Assistant