Kenya Agricultural Research Institute v Mutava (Civil Appeal 300 of 2019) [2023] KECA 1470 (KLR) (8 December 2023) (Judgment)

Neutral citation: [2023] KECA 1470 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 300 OF 2019

DK MUSINGA, S OLE KANTAI & LA ACHODE, JJA

DECEMBER 8, 2023

BETWEEN

KENYA AGRICULTURAL RESEARCH INSTITUTE ..... APPELLANT

AND

NICKSON MUTHOKA MUTAVA ..... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Machakos (Nyamweya, J.) dated 20th January, 2016 in H.C.C.A. No. 93 of 2012)

JUDGMENT

JUDGMENT OF KANTAI, JA

1. This is a second appeal from the Judgment of the High Court of Kenya at Machakos (Nyamweya, J. – as she then was) delivered on January 20, 2016 where the Judge set aside a Judgment of a Magistrate's Court where the respondent's suit had been dismissed.

2. Section 72 of the *Civil Procedure Act* on second appeals provides that:

> "(1) Except where otherwise expressly provided in this *Act* or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely—
>
> a. the decision being contrary to law or to some usage having the force of law;
>
> b. the decision having failed to determine some material issue of law or usage having the force of law;

c. a substantial error or defect in the procedure provided by this *Act* or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

(2) An appeal may lie under this section from an appellate decree passed *ex parte*."

3. That provision has received judicial pronouncements in many cases of this Court and elsewhere. This is what we said of that mandate in the case of *Charles Kipkoech Leting v Express (K) Limited & another* [2018] eKLR:

> "This is a second appeal. Our mandate is as has been enunciated in a long line of cases decided by the Court. See *Maina v Mugiria* [1983] KLR 78, *Kenya Breweries Ltd v Godfrey Odongo*, Civil Appeal No. 127 of 2007, and *Stanley N. Muriithi & another v Bernard Munene Ithiga* [2016] eKLR, for the holdings inter alia that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the Courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See also the English case of *Martin v Glywed Distributors Ltd (t/a MBS Fastenings)* 1983 ICR 511 where in, it was held inter alia that, where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

Let me put the appeal before us in perspective.

4. The respondent, Nickson Muthoka Mutavi was employed as a casual worker by the appellant, Kenya Agricultural Research Institute as such in the Project Engagement Contract Form produced as an exhibit before the magistrate. This was for the period January 1, 2008 to March 31, 2008 on terms set out in the said contract which was executed on December 20, 2007. It was claimed in the plaint filed at the Chief Magistrates' Court at Machakos that on January 14, 2008 while the respondent was so employed, he was instructed by the appellant to connect irrigation pipes and that while doing so he was electrocuted and suffered serious electrical burns which endangered his life. Various particulars of breach of statutory duty and negligence were set out and the respondent claimed special and general damages and future medical expenses against the appellant. The appellant delivered a defence where the claim was denied it being claimed that if any accident occurred then the respondent was solely to blame for it as he had negligently exposed himself to danger. The suit was heard where the respondent testified, produced various documents including a medical report from Machakos General Hospital and called his colleague as a witness, who had witnessed the accident. The respondent's case was then closed and the appellant chose not to call any evidence. In the Judgment that followed, the trial Magistrate found that the accident had occurred due to the presence of an external factor – live electrical wires by Kenya Power and Lighting. The Magistrate found that the case had not been proved and dismissed it.

5. The respondent filed an appeal to the High Court at Machakos and in the Judgment I have referred to the Judge reviewed the evidence and found that the Magistrate had erred in law and fact in dismissing the suit. The Judgment of the Magistrate was set aside; the Judge found that the respondent had contributed to the accident to the extent of 20% and awarded special and general damages as follows:

a. General damages 3,000,000

b. Special damages 47,148

= 3,047,148

Less 20% contribution 609,429.60

= 2,437,718.40

6. Those are the findings that provoked this appeal, which is contained in a Memorandum of Appeal drawn for the appellant by its lawyers, M/S Anthony Burugu & Company Advocates, where 9 grounds of appeal are set out. These range from an attack of the Judge on first appeal who is said to have erred in law by failing to properly evaluate the evidence recorded in the trial Court, thereby arriving at the wrong conclusion on who was to blame for the accident; that the Judge erred in law by blaming the appellant which did not call evidence at the trial; that the Judge erred in finding that the respondent had seen the electric wires but was still blameless for the accident; that apportionment of liability was wrong; that the Judge did not consider the submissions that were on record; that the Judge was wrong in assessing general damages and was wrong in relying on the case of *Charles Kimani Nganga v Kenya Power & Lighting Company* [2006] eKLR when severity of injury was not at par with injuries suffered by the respondent and, finally, that the assessment of the damages payable was erroneous.

7. When the appeal came up for hearing before us on October 9, 2023, both parties were absent despite having been served with a Hearing Notice on September 27, 2023 at 3.21 p.m. They had however filed written submissions, which I have considered. It is submitted for the appellant that the Judge on first appeal considered matters which she should not have considered; that the respondent lifted a pipe too high that it touched the said live electric wire. The appellant cites a decision of the High Court sitting in Meru – *AMK (suing as the mother & next friend of JMK v Kenya Power & Lighting Company Limited* [2020] eKLR for the proposition that:

> " The defendant is the sole installer, distributor and supplier of electric energy in Kenya. It has a statutory duty of supervising, inspecting and maintaining its electric installations under Section 52 of the *Energy Act*. This calls for a high degree of vigilance on its part in order to avert accidents."

8. It is submitted for the appellant that the Kenya Power and Lighting Company Limited (Kenya Power) had the duty of care to all citizens of Kenya to ensure that citizens were not harmed by the electricity it supplies and that the suit by the respondent should have been against Kenya Power. It is further submitted that the Judge erred in finding that negligence had been proved and for finding against the appellant which did not call any witness in support of the defence. The appellant faults the Judge in the way she assessed damages and maintains that the award by the trial Magistrate should have been maintained.

9. The respondent in his written submissions gives a history of the case and reminds us of our duty as a second appellate Court to deal only with matters law. It is submitted that the case was proved to the required standard and the respondent cites Section 3 of the *Occupational Safety and Health Act* (Cap 514 Laws of Kenya) which provides for safety, health and welfare of persons at work. Section 6 of that *Act* requires every employer to ensure the safety, health and welfare of all persons working at a workplace

and further requires an employer to provide and maintain a plant and systems and procedures of work that are safe and without risk to health:

> " The provision of such information, instruction, training and supervision as it is necessary to ensure the safety and health at work of every person employed...".

10. It is further submitted for the respondent that he (the respondent) testified before the trial Magistrate that he was not provided with any protective gadgets like gloves, gumboots or anything else, thus subjecting him to an unsafe working environment which led to the accident. On the appellant failing to call any witness in support of the defence, a High Court of Kenya decision is cited – *Board of Trustees Meru Diocese Kirimara Parish v Dores Wanja Bore* [2020] eKLR where it was held:

> "It is trite that uncontroverted evidence is weighty and courts will rely on it to prove facts in dispute. The evidence cannot be controverted by allegations in the statement of defence if the defendants fails to call a witness to adduce evidence and be cross-examined to test the evidence. It follows that the statement of defence is nothing more than mere allegation."

11. The respondent submits that the appellant was negligent and in breach of statutory duty in failing to give instructions to the respondent on hazards posed by electric lines that passed through its property where the respondent was deployed to work. The respondent submits, finally, on the issue of assessment of damages that the Judge was entitled to enhance the same considering the injuries that the respondent had suffered.

12. I have considered the whole record and submissions made and as seen earlier in this Judgment, only issues of law fall for determination, this being a second appeal.

13. It was claimed in the plaint that the respondent was deployed by the appellant to carry out work and that while so engaged a pipe he was moving touched an overhead live electric wire and he was electrocuted in the process. Particulars of negligence and of breach of statutory duty were set out and the respondent testified on the occurrence of the accident and called a witness who had witnessed the events as they unfolded. The appellant did not call any witness to support the defence where occurrence of the accident had been denied. The Judge considered the evidence that had been recorded by the Magistrate, provisions of statute including the *Occupational Safety and Health Act* and various case law and came to the conclusion that the respondent had proved his case to the required standard. The Judge found that the evidence by the respondent that he was employed by the appellant at its farm at Kiboko and that while so employed he was injured was not disputed or controverted by the appellant. The Judge found that the fact of employment had been proved through oral evidence and by the employment contract that had been tendered in evidence. She also found that the respondent had proved that the appellant had not provided him with any protective gear; it did not provide any supervision and there were no warnings on existence of live electric wires. On the Magistrate's finding that electric wires were an external factor thus the appellant was not liable, this is what the Judge found on the issue:

> The trial court's findings in this regard was that the electrical lines were external in the Respondent's farm which just happened to pass through the farm, and that the Respondent's instructions had nothing to do with the electricity lines. However, it has been held that an employer's duty of care will remain even if the place of work is not under his

control. In *Wilson v Tyneside Window Cleaning Co* (1958) 2 Q.B. 110 it was held as follows at pg 122:

> ... so viewed, the question whether the master was in control of the premises ceases to be a matter of technicality and becomes one of the ingredients albeit a very important one in a consideration of the question of fact whether in all the circumstances, the master took reasonable care."

14. The Judge also found that the appellant acted in breach of Section 6 of *Occupational Safety and Health Act* as it did not provide a safe working environment.

15. I agree with all these findings.

16. The respondent claimed that he was injured while at work through the negligence and breach of statutory duty by the appellant. He testified to those facts and that evidence was supported by a witness who had witnessed the accident and was also in the party that rescued the respondent and took him to hospital. Medical evidence from Machakos General Hospital which was produced before the Magistrate by consent proved occurrence and extent of injuries that the respondent had suffered.

17. The appellant, which had filed a defence which denied the claim chose not to call any evidence at all. In the event, the allegations in the defence were not proved in any way at all and as was held by Madan, JA in Civil Application NAI 12 of 1978 in *CMC Aviation Limited v Kenya Airways Limited (Cruisair Limited)* [1978] eKLR:

> "The pleadings contain the averments of the three parties concerned. Until they are proved or disproved or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them, proof is the foundation of evidence. As stated in the definition of evidence in Section 3 of the *Evidence Act*, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted to investigation is proved or disproved. Averments are matters the truth of which is submitted for investigation! Until their truth has been established or otherwise they remain unproven ..."

18. I agree with the Judge that even if the appellant was not responsible for, or in control of the said electricity lines it was under a duty to give advice, instructions or orders about the hazards posed by the said live wires that passed through its premises and that the appellant did not bring any evidence on any safety precautions it had taken at all. The appellant breached its statutory duty to provide a safe place to work and was negligent in not giving any instructions on how to avoid a hazard that was at the place it deployed the respondent to work. It failed to give any protective gadget to the respondent and there was no supervision provided at the place of work. All the grounds of appeal on the finding on liability fail and are hereby dismissed.

19. The appellant complains in other grounds of appeal that the Judge was wrong to make the awards of damages.

20. The Magistrate dismissed the suit and held that had she found for the respondent she would have awarded general damages at Ksh.1,500,000. The Judge considered the issue and re-assessed general damages at Ksh.3,000,000.

21. The respondent had in the plaint claimed general damages for pain, suffering and loss of amenities, special damages Ksh.48,548, future medical expenses, costs of the suit and interest and any other or further relief that the Court may deem fit and just to grant.

22. The medical report from Machakos General Hospital produced by the parties by consent showed injuries suffered by the respondent as:

    i. 3rd degree burns on right abdomen = 7% surface area

    ii. 3rd degree burns of both hands on Palma aspect

    iii. 4th degree burns of right leg with loss of the same limb at below knee level

    iv. 3rd degree burns left foot

23. The respondent was admitted at the said hospital from January 14, 2008 to May 12, 2008 and on discharge he complained of pain on left foot; he had difficulty in walking using prosthesis due to missing leg and he had difficulty working as a casual labourer.

24. The Judge found that special damages had been proved through production of receipts.

25. On general damages, the Judge relied on the case of *Charles Kimani Nganga v Kenya Power & Lighting Company* [2006] eKLR where a sum of Ksh.2,500,000 had been awarded after the plaintiff suffered burns and blisters on both legs; wounds and scars on both hands and the leg and scars on both hands and left leg.

26. The Judge considered the injuries suffered by the respondent and found:

> " In the present appeal in addition to similar injuries suffered by the Appellant, the medical report by Dr. Kimuyu dated 15th July 2010 that was produced by consent of the parties as the Appellant's exhibit 2, also showed that he suffered permanent incapacity of 48%. Further, that the Appellant's fitted prosthesis did not fit as it was shorter than the other limb, and he would require fitting of new prosthesis which was estimated to cost Kshs. 80,000/= as at the date of the report. In the premises and taking into account inflationary factors, I do find that the sum of Kshs 3,000,000./= would be a reasonable award for general damages."

27. The Judge enhanced general damages to Ksh.3,000,000.

28. It is trite law that an appellate Court will not interfere with an award of damages unless it finds that the same is so high or so low to warrant an appellate court to interfere. That is what Law, JA said in the oft-cited case of *Butt v Khan* [1982-1988] KAR 1:

> " An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

29. The Judge, in my view, considered the injuries suffered by the respondent and considered various case law involving similar injuries and found that the assessment of general damages by the Magistrate was low and did not reflect awards in similar cases and appropriate inflationary factors. The Judge considered the facts before her and gave reasons why she interfered with the award on general damages. The Judge considered the assessment of general damages by the Magistrate to have been erroneous and therefore interfered with it. The injuries suffered by the respondent were very serious and the Judge was right to enhance the award of general damages to reflect the said injuries and the effect of inflation to earlier awards in similar cases.

30. I would dismiss the appeal and award costs to the respondent here and in the courts below.

CONCURRING JUDGMENT OF D. K. MUSINGA, (P).

31. I have had the benefit of reading, in draft, the opinion of Kantai, J.A. I am in full agreement with the reasoning and the conclusion arrived at by the learned judge.

32. As Achode, J.A. also agrees, the final orders of the Court shall be as proposed by Kantai, J.A.

JUDGMENT OF L. ACHODE, J.A

33. I have had the advantage of reading in draft the judgment of Hon. Kantai, J.A. I am in full agreement with his reasoning and conclusions and, therefore have nothing useful to add.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF DECEMBER, 2023.

S. ole KANTAI

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JUDGE OF APPEAL

D.K. MUSINGA, (P.)

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

SIGNED

DEPUTY REGISTRAR