Elgon Kenya Limited v Kamuya (Civil Appeal 352 of 2018)
[2022] KECA 1395 (KLR) (16 December 2022) (Judgment)

Neutral citation: [2022] KECA 1395 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 352 OF 2018

K M'INOTI, KI LAIBUTA & PM GACHOKA, JJA

DECEMBER 16, 2022

BETWEEN

ELGON KENYA LIMITED ..... APPELLANT

AND

PETER MUSYOKA KAMUYA ..... RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Nairobi (L. Njuguna, J.) delivered on 12{{^th}} July 2018 in High Court Civil Appeal No. 473 of 2016)

JUDGMENT

1. This is a second appeal from the decision of the Magistrates' Court delivered by Hon. E. K. Usui, Principal Magistrate, in CMCC NO. 7277 of 2012 at Nairobi where the trial court, in its judgment delivered on 6th July, 2016, apportioned liability as between the appellant and the respondent on 90:10 basis and awarded damages in the sum total of Kshs. 4,048,036/-.

2. Being dissatisfied with the aforementioned judgment, the appellant, Elgon Kenya Limited, preferred an appeal to the High Court of Kenya at Nairobi in H.C.C.A No. 141 of 2003 in which the learned Judge (Njuguna, J).) found that the appeal had merit and apportioned the liability as between the appellant and the respondent at 70:30 and reviewed the damages and awarded a total of Kshs. 2,711,156/= together with costs and interests.

3. A brief background of this appeal is that, at all material times, the appellant herein ran a factory in Nairobi and had employed the respondent as an assistant machine operator where he sustained injuries on the night of 11th/12th August 2009. The only common ground between the appellant and the respondent is that an accident occurred on the night of 11th and 12th and that the respondent was injured.

4. Vide a plaint dated 3rd September, 2012 and amended on 14th September, 2015, the respondent brought a suit against the appellant seeking damages for pain, suffering and loss of amenities, past loss of earnings before July 2015, loss of earnings before trial, future loss of earnings or diminished earning capacity, cost of prosthesis, cost of a helper or aid, workmen's compensation at Kshs. 627,096/- with interest, special damages at Kshs. 119,000/- and costs.

5. According to the respondent, the said accident was caused by the negligence of the appellant or its employees or agents. The respondent set out the particulars of negligence to include: that they subjected him to a risk of body injuries they knew or ought to have known; that they failed to have due regard for the respondent's safety; that they failed to provide safe means of work or a safe place of work or hand gloves; that they failed to provide a safe device for removing stack material, and also failed to provide the plaintiff with suitable protective wear.

6. More particulars of negligence were: that the appellant failed to guard off dangerous parts of the machine; failed to inspect or to service or to maintain the machine and/ or the switching system of the machine; failed to provide a device to prevent the cutters or blades from rolling/ moving when the machine was off; instructing the respondent to remove stuck material by hand; assigning the respondent to operate the machine in a dangerous manner; failed to guard against a foreseeable risk; instructing the respondent to remove stuck material from insecure or rotatable blades and failed to prevent materials from getting stuck.

7. The respondent through the amended plaint added more particulars to include: that the appellant failed to remove/clean leaked oil or slippery substances from the cutter's metal plate in time or at all; failed to provide a safe device for holding oily/slippery lumps; failed to replace a shutter of the lump cutter machine; assigning the respondent to operate a lump cutter without a security door or shutter; failed to service or maintain the lump cutter, or to repair the hydraulic system or leakage or spillage of hydraulic oils and failed to provide a stopper.

8. On its part, the appellant blamed the respondent for: failing to use the proper tools that were provided; failing to employ skill and attention; failing to observe workplace safety guidelines, and for not taking adequate measures to ensure his own safety and that of his co–workers while conducting his duties; and for failing to observe the instructions regarding his assigned tasks.

9. Upon hearing the parties, the trial magistrate apportioned liability on a 90:10 basis in favour of the respondent on the grounds that the respondent was provided with a poor system of work, which exposed him to a risk of injury. The trial magistrate added that the respondent, having been aware of the danger posed by the machine, should have exercised extra caution to avoid injury, but did not do so.

10. On damages, the court entered Judgment in favour of the respondent as hereunder:

    1. General damages for pain, suffering and loss of amenities Kshs.

       2,500,000/=

    2. Loss of earning capacity Kshs. 1,838,040/=

    3. Cost of prosthesis Kshs. 400,000/=

    4. Special damages Kshs. 2,000/=

       Loss 10% contribution = Kshs. 474,004/=

       Less paid under workman's compensation Kshs. 218,000/= Payable Kshs. 4,048,036/=.

5. Costs and interest."

11. The appellant proffered an appeal in the High Court by filing a memorandum of appeal dated 14th July, 2016 with 14 grounds of appeal. The appeal was canvassed by way of written submissions. Upon consideration of the pleadings, the evidence and the judgment of the trial court, the learned judge (L. Njuguna, J.) noted that the respondent was all along aware that the machine did not have a shutter or a functional one at all. The judge added that the respondent therefore decided to operate the machine knowing that it was not in a proper working condition and, in so doing, exposed himself to a risk which he knew or ought to have known.

12. The learned judge overturned the ruling of the trial magistrate on liability and apportioned liability between the appellant and the respondent in the ratio of 70:30.

13. On the quantum of damages for pain and suffering the learned judge found that the trial magistrate's award of Kshs. 2,500,000/= was proper and not excessive, and did not interfere therewith.

14. On loss of earning capacity, the trial magistrate had awarded the sum of Kshs. 1,838,040/= calculated at 9.010x12x17 based on the presumption that the respondent was totally incapacitated as a result of the accident and amputation of the arm. However, the learned judge found that the respondent could have lost one half of his earning capacity in which case the court used 9,010x12x18x ½ as the correct formula and awarded the sum of Kshs. 973,080.

15. In the end, the appeal partially succeeded and judgment was entered for the respondent as hereunder:

    a. Liability

        i. 70%: 30% in favour of the respondent against the appellant.

    b. General damages

        i. For pain and suffering – Kshs. 2,500,000/=

        ii. Loss of earning – Capacity – Kshs. 973,080/=

        iii. Cost of prosthesis – Kshs. 400,000/=

    c. Special damages (i) Kshs. 2,000/=

        Subtotal – Kshs. 3,873,080/=

        Less 30% (contributory negligence)

        - Kshs. 1,161,924/=

    Total - Kshs. 2,711,156/= together with costs and interests. General damages to earn interest from the date of this judgment and special damages from the date of filing of the suit."

16. Although the appellant was partially successful on the question of liability and award of damages for loss of earning capacity, it was not satisfied with the judgment of the learned judge. As result, it filed the appeal before us citing 16 grounds as set out in its memorandum of appeal dated September 19, 2018. It is not necessary for us to recite the said grounds verbatim. We take the liberty to summarize them as follows: taking into account irrelevant facts, thus arriving at the wrong decision; holding that the manner in which the accident occurred could not have been prevented even if the respondent had safety gadgets; failing to hold that the respondent was the author of his own misfortune; failing to hold

that the respondent had been forewarned to carry out his duties with utmost care; failing to hold that the respondent was outside the scope of the terms of the contract of employment; that the injuries were contributed to by his lack of adherence to his treatment regime and his doctor mishandling; by failing to evaluate the facts as pleaded on a balance of probabilities and by adjudging the appellant as 70% liable; and by awarding damages that were inordinately high.

17. The parties filed written submissions, which we have considered pursuant to rule 58(1) as the respondent did not attend the hearing on October 3, 2022 even though they had been served. On its part, the appellant's counsel Mr. Karanja Njenga indicated that they would rely wholly on their written submissions. The appellant submitted that the respondent was the author of his misfortune as he ignored the safety procedures that were in place, that the respondent deliberately used a machine which he claims to have known that was faulty and that he failed to follow the prescribed treatment procedure. In the circumstances, it was the appellant's position that liability should be apportioned equally between the parties and that the damages awarded are inordinately high.

18. We have carefully considered the record of appeal, the written submissions, and the authorities. The appellant prays that this Court allows the appeal, set aside both the judgment of the High Court dated 12th July 2018 and the judgment of the trial magistrate dated July 6, 2016, and grant the appellant costs of the appeal.

19. This is a second appeal and the approach that we should adopt is set out in many decisions of this court. In *Kenya Breweries Ltd vs. Godfrey Odoyo* [2010] eKLR, Onyango Otieno, J.A. expressed himself as follows:

> "In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This court, on second appeal, confines itself to matters of law unless it is shown that the two 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."

20. On the issue of damages, the court has pronounced itself in the case of *Butt vs. Khan* [1978] eKLR Civil Appeal No. 40 of 1977 as follows:

> "An appellate court will not disturb an award of damages unless it is so 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."

21. We have considered the grounds raised by the appellant and form the view that the issues for determination are: did the learned judge misapprehend the evidence that was adduced, so that the judgment is based on an incorrect basis; did the court consider matters it should not have considered, or did it fail to consider matters it should have considered; is the sum awarded for damages so inordinately high or low as to represent an entirely erroneous estimate; and did the judge proceed on wrong principles or misapprehend the evidence in some material respect.

22. We have carefully scrutinized the judgment of the learned judge and note that she properly directed her mind to the relevant legal principles that the appeal before the court was a first appeal, and that the court had to re-evaluate the evidence and render its independent findings.

23. A careful perusal of the learned Judge's decision shows that she went through the evidence on record in detail as she was enjoined by law to do, and having done so, arrived at an independent decision.

For instance, the learned Judge noted that on loss of earning capacity, the trial magistrate awarded Kshs. 1,838,040 calculated as 9,010x12x17 based on the presumption that the respondent was totally incapacitated as a result of the accident and amputation of the arm.

24. However, the court considered the fact that the respondent worked as a machine operator and could not continue working as such because of the amputation but opined that that did not mean he was rendered totally incapacitated. The court added that the respondent could take up other light tasks upon healing, which would not necessarily require the use of both forearms. The court thus awarded Kshs. 973,800 calculated as 9,010x12x18x1/2. This, we find, was proper.

25. A close reading of the learned Judge's decision clearly demonstrates how she re-evaluated and re-analyzed the entire evidence on record before deciding to uphold the trial court's findings. She found no reasons to interfere with the other limbs of damages awarded. The learned Judge took into account all the relevant factors. The award of damages that she awarded was not inordinately high or low to warrant disturbance by this court.

26. As already stated, and at the risk of repetition, the learned Judge properly re- evaluated the evidence and correctly observed that the appellant, who was operating the machine knew that it was not in a proper working condition for some time, and yet he knowingly proceeded to operate the machine. The learned judge held that the respondent was all along aware that the machine did not have a shutter or a functional one at all and still exposed himself to a risk which he knew or ought to have known.

27. Indeed, employees should know that they also have a responsibility to take care of their safety and should not expect the employer to bear full liability. The court in *Amalgamated Saw Mills vs. David K. Kariuki* [2016] eKLR held that:

> "An employer cannot babysit an employee especially in manual tasks that need no special training or supervision. He must work and at the same time take precautions on his own security and safety."

28. The Court of Appeal in the case of *Makala Mailu Mumende vs. Nyali Golf County Club* [1991] KLR 13 stated thus:

> "No employer in the position of the defendant would warrant the total continuous security of an employee engaged in the kind of work the plaintiff was engaged in, but inherently, dangerous. An employer is expected to reasonably take steps in respect of the employment, to lessen danger or injury to the employee. It is the employer's responsibility to ensure a safe working place for its employees."

29. In conclusion, the appellant has not demonstrated how the learned judge misapprehended the evidence on record, hence arriving at a wrong decision. We are not persuaded that the learned judge considered extraneous or irrelevant matters or failed to consider relevant material placed before her that could have influenced the outcome of the case.

30. In the circumstances, we find that the first appellate court analyzed the issues of fact and law properly, and we have no justification to interfere with that judgement. For this reason, the appeal is hereby dismissed with costs to the respondent.

Dated and Delivered at Nairobi this 16th day of December, 2022.

K. M'INOTI

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR