Mbalava v Insight Management Consultants Ltd (Appeal E138 of 2021)
[2025] KEELRC 261 (KLR) (31 January 2025) (Judgment)

Neutral citation: [2025] KEELRC 261 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E138 OF 2021

NJ ABUODHA, J

JANUARY 31, 2025

BETWEEN

SAMWEL SIMIYU MBALAVA ..... APPELLANT

AND

INSIGHT MANAGEMENT CONSULTANTS LTD ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Honourable A.M Obura (CM) delivered on 8th October, 2021 in Milimani Chief Magistrates Court CMEL Suit NO. 5779 of 2017)

JUDGMENT

1. Through the Memorandum of Appeal dated 4th November, 2021 the Appellant appeals against the Judgment and decree of Honourable A.M. Obura Chief Magistrate delivered on 8/10/2021.

2. The Appeal was based on the grounds that:

    i. The Learned Magistrate erred in law and in fact by failing to take consideration, and/or give due weight to the Appellant's evidence tendered to the court at the hearing of the matter, facts and the written submissions filed on his behalf by his counsel and/ or the statutory law and the authorities cited by the Appellant's counsel, thereby arriving at a wrong decision.

    ii. The Learned Magistrate erred in law and in fact in dismissing the Appellant's suit and finding that the Appellant failed to prove negligence on the part of the Respondent on balance of probability.

    iii. The Learned Chief Magistrate erred in law and in fact in holding that Plaintiff did not lead clear evidence on the circumstances of the accident and finding that the details provided by the Appellant were very scanty.

    iv. The Learned Magistrate erred in law and in fact in failing to appreciate and give due consideration to the Appellant's counsel submissions that under the law it was the duty of

the Respondent to provide the Appellant with protective clothing and by holding that the Plaintiff did not provide proof that he requested for gloves.

v. The Learned Magistrate erred in law and in fact in by failing to take into consideration, and/ or give due weight to the submission by the Appellant's counsel that the Appellant's claim remained wholly unchallenged and uncontroverted as the Respondent did not lead any evidence controverting the Plaintiff's claim.

vi. The Learned Magistrate erred in law and in fact by holding that she would have awarded the Appellant Kshs. 80,000/= had he been successful in his claim.

3. The Appellant prayed that the Judgment by Honourable A.M. Obura in Milimani CMCC No. 5779 of 2017 delivered on 8th October, 2021 be set aside and Judgment entered for the Appellant as prayed in the Plaint with costs at the lower court and this Appeal.

4. The Appeal was disposed of by written submissions.

Appellant's Submissions

5. The Appellant's Advocates Sherwin Njoroge & Associates Advocates filed written submissions dated 8th November, 2024. Counsel submitted that the issues for determination are on liability and quantum. Counsel submitted on the role of the first Appellate relying on the case of Selle & Another vs Associated Motor Boat Co. Ltd & Others (1968) EA 123.

6. On the issue of liability, Counsel submitted that the learned magistrate in making her finding that the Appellant had not proved that the Respondent was liable for the accident held that the Appellant did not mention in his pleadings that his colleague Samuel Kangethe started the machine and also did not call an eye witness to corroborate his testimony.

7. Counsel submitted that in both the Plaint and the Statement the Appellant mentioned that the machine was turned on whilst he was replacing the rubber roller by someone he was working with and failing to mention the specific colleague by name could not be a reason for the lower court to find that the appellant had not proved his case.

8. Counsel further submitted that the issue of who took the Appellant to the hospital was not relevant and was neither here nor there in as far as liability for the accident was concerned. That the finding by the court that the Appellant did not state what actions he took to avert the accident could have been at best ground for the court to apportion liability.

9. Counsel submitted that it is the responsibility of the employer to provide its employees with protective gear and there is no requirement that the employees must demonstrate that they requested for the gear. That the Respondent never contended that the Appellant did not request for the protective gear but their contention was that he did not wear the protective gear provided.

10. Counsel relied on among others the case of Faith Mutindi Kasyoka v Safepark Limited [2019] eKLR and submitted that it was the duty of the Respondent to provide a safe system of work which included provision of the safety gears.Counsel submitted that the Respondent having stated in their defence that the Appellant was provided with the gear but failed to wear them, it was upon them to show that they provided the gear which they failed to do.

11. Counsel further submitted that the Respondent closed their case without calling any witness and averred that the accident was caused by the negligence of the Appellant by failing to take proper care while carrying out his duties, by failing to follow safety procedure and by failing to wear protective clothing.

12. Counsel relied on among others the case of Wama Pharmacy (K) Ltd v Monsato Kenya Ltd [2020] eKLR and submitted that failure to adduce any evidence meant that the evidence adduced by the Plaintiff was uncontroverted and therefore unchallenged. Counsel further relied on the case of William Kabogo Gitau vs George Thuo on what amounts to proof on a balance of probabilities and submitted that the Appellant's evidence and testimony is more likely than not, what took place. That the learned magistrate failed to give due weight and consideration to the Appellant's testimony and evidence despite finding that the accident happened.

13. Counsel submitted that the court being faced with only the testimony of the Appellant and having found that the accident occurred, counsel submitted that it would have been superfluous for the court to require evidence from an eyewitness to corroborate his evidence. That this court should find the Respondent 100% liable for the Accident.

14. On the issue of quantum, counsel submitted that the Appellant testified that he sustained a serious deep cut on his right little finger and he produced a Medical Report dated the 17th May, 2016 from Kaloleni Health Services and the Medical Report dated the 7th June, 2017 from Dr. A.O. Wandugu as proof of the extent of his injuries.

15. Counsel submitted that the Appellant whilst relying on among others the case of Spin Knit Limited Vs. Johnstone Otata [2006] eKLR submitted that an award of KShs. 300,000/= would be sufficient to compensate him.

16. Counsel submitted that the Respondent submitted that an award of KShs. 50,000/= was sufficient and the court held that if the Appellant had proved his case, she could have awarded KShs. 80,000/= on account of general damages.

17. Counsel submitted that the award of KShs. 80,000/= was inordinately low considering the nature of injuries suffered by the Appellant and comparable authorities and that an award of Kshs. 300,000/= was sufficient to compensate the Appellant for the injuries he sustained and relied on the case of Odinga Jacktone Ouma v Maureen Achieng Odera [2016] eKLR on comparable injuries attracting comparable awards. Counsel also relied on the case of Butt v Khan (1981) KLR 349 Law.J.A on when the appellate court could disturb an award of damages made in the lower court.

Respondent's Submissions

18. The Respondent's Advocates Wainaina Ireri Advocates LLP filed its submissions dated 14th November 2024 and submitted that he who alleges must prove while relying on sections 108 and 109 of the *Evidence Act*. According to Counsel, the Appellant had a duty to prove that the Respondent was negligent which the Appellant did not meet burden before the Trial Court, a shortcoming duly recognized by the Learned Trial Magistrate in her judgment and that the Appellant failed to prove the said particulars of negligence pleaded in the Plaint.

19. Counsel submitted that the trial court found the information given by the Appellant very scanty because the Appellant failed to explain who switched on the machine; how a rubber roller would result in a cut injury instead of a crush injury; how a rubber roller would pick the small finger out of five fingers and how gloves would stop a rubber roller from inflicting injuries.

20. Counsel submitted that the Appellant only gave a sequence of events leading to the accident without establishing the blameworthiness and causation attributed to the Respondent.

21. Counsel submitted that the assertion by the Appellant that a finding of fact that the accident indeed occurred should automatically lead to a finding of liability was erroneous and did not per se imply that the employer was to blame.

22. Counsel relied on among others the case of South Nyanza Sugar Company Limited v Josephat Tongi Ondigi [2009] KEHC 1237 (KLR) and submitted that the occurrence of an accident in a place of work does not per se imply that the employer is to blame. Negligence and/or breach of duty must be sufficiently proved. Counsel further relied on the case of *Statpack Industries vs James Mbithi Munyao Nairobi HCCA No. 152 of 2003* and submitted that equally proof of an injury was not sufficient to hold an employer liable for the accident.

23. Counsel submitted that it was not shown to the Court that the Appellant's nature of assignment required gloves as a necessity and which the Respondent had failed to provide and the Appellant equally failed to demonstrate to the trial Court how the gloves would have prevented the accident and subsequent injury.

24. Counsel submitted that the Appellant also admitted that he had never complained nor wrote to the Respondent requesting for protective gloves and was denied. The failure to show the proof meant that the Appellant had not established the legal basis of the requirement of gloves.

25. Counsel submitted that it is also trite law that the absence of a Defence witness does not absolve the Plaintiff from discharging the burden of proof and demonstrating on a balance of probability that they should succeed as against the opposing party. Counsel relied on the case of Gichinga Kibutha v Caroline Nduku [2018] eKLR and submitted that it is not automatic that in instances where the evidence is not controverted, the claimant's claim shall have his way in Court.

26. Counsel submitted that the Appellant admitted that the said colleague Samuel Kangethe, who allegedly switched on the machine, had not been mentioned in his initial witness statement or anywhere else in his pleadings but was introduced during cross examination; that the Appellant failed to adduce any evidence to prove that indeed the said Samuel Kangethe was an employee at the Respondent's Company nor was the said Kangethe called as a witness to corroborate his allegations.

27. Counsel submitted that parties are bound by their own pleadings and that any evidence produced by any of the parties which is not supportive or is at variance with what is stated in the pleadings must be ignored.

28. Counsel relied on the case of the case of Ogando v Watu Credit Limited & another [2024] KEHC 3074 (KLR) and submitted that trial Court was right to ignore oral evidence that was not in tandem with the pleadings.

29. Counsel submitted that the Appellant had used the said machine from 2011 to 2017 and hence was acutely familiar with the machine's functionality and the attendant's risks which showed that the Appellant knew the existing dangers and was under obligation to be cautious.

30. On the issue of quantum counsel relied on the case of Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited [2015] eKLR and submitted that an Appellate Court should not interfere with assessment of damages of the trial Court unless the same is found to be inordinately low or high.

31. Counsel submitted that the trial court, in its thorough assessment, held that it would have awarded the Appellant Kshs. 80,000/- as general damages and Kshs. 2,000/- as special damages had the Appellant's suit succeeded.

32. Counsel submitted that the assessment of the general damages by the trial court was in line with precedent in cases of similar nature and severity as at the date of the injury and the award by the trial Court is supported by case law among others the case of Kenya Nut Co. Ltd vs David Wafula Wechili(2020) KEHC 2065 (KLR).

33. Counsel submitted that the assessment of damages by the Trial Court was both reasonable and proportionate to the specifics of the case, particularly given the nature and extent of the Appellant's injuries.

34. Counsel submitted that the Appellant has not provided any substantive basis for this Court to interfere with the Trial Court's assessment of damages, nor shown that the suggested award was inconsistent with established principles or prior similar cases.

35. Counsel submitted that the Trial Court's determination on liability and damages be upheld as it aligns with judicial precedent and falls within a fair and just range under the circumstances.

Determination

36. The court has considered the record of Appeal and submissions filed by the parties herein and observes that the principles which guide the court in an appeal from a trial court are now well settled. In Selle And Another v Associated Motor Boat Company Ltd & Others, [1968] EA 123, Sir Clement De Lestang, Vice President of the Court of Appeal for East Africa stated those principles as follows: -

> "An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it 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 this 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 the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

37. The Judgment of the trial court was entered as against the Appellant on the basis that the he did not prove negligence on the Defendant's part on a balance of probability as required in civil claims. Having considered the appeal, the evidence in the Record of Appeal and the submissions on record the court takes the view that the issues for determination are mainly two, that is to say;

    a. Whether the Appellant proved his case on a balance of probabilities.

    b. Whether the Appellant was entitled to reliefs sought.

Whether the Appellant proved his case on a balance of probabilities

38. This court is an agreement with the trial court that indeed the Appellant was an employee of the Respondent and he was injured at the place of work while he was replacing a rubber roller on the machine. The Appellant alleged that he was replacing a rubber roller on the machine when it was suddenly turned on without his knowledge and injured his right small finger and that the accident was caused by the negligence of the Respondent who failed to provide protective gear.

39. On the other hand, the Respondent's case was that Appellant failed to take proper care in the course of his duty and failed to wear safety gear provided by the Respondent.

40. Section 107(1) of the *Evidence Act*, provides that:

> " Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

41. This was the position on Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, in which the Court of Appeal held that:

> " As a general proposition under section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act."

42. T he Learned Trial Magistrate decided that the Appellant satisfactorily proved that he was employed by the Respondent at all material times and but the Appellant failed to prove that the Respondent was liable for the alleged accident and to compensate him for his injuries. The respondent however never called any witnesses to dispute the appellant's assertions before the lower Court. No evidence was therefore presented by the Respondent to controvert the Appellant's claim that he was not provided with protective gear. The Appellant did not have to prove that he requested for the protective gear as it was the role of the Respondent to provide for the same whether requested or not and further, now that there was an issue before the trial court that the respondent did not provide protective gear, it was incumbent upon the respondent to lead evidence that it indeed provided protective gear.

43. This Court is fully aware that it is the responsibility of an employer to provide protective gear to an employee as was held by the Court of Appeal in the case of Makala Mailu Mumende Vs Nyali Golf County Club [1991] KLR 13 that an employer to take reasonable steps in respect of the employment, to lessen danger or injury to the employee as it is his responsibility to ensure a safe working place for its employees.

44. The court notes that the Appellant ought to prove that the Respondent was negligent in terms of the duty of care. This was held in the case of *Segwick Kenya Insurance Brokers –vs- Price Water House Coopers Kenya, High Court Civil Appeal No. 720 Of 2006* (Nairobi) Lesiit, J relying on the case of Capro Industries Limited Plc –vs- Dickman &others (1990) 1 ALL ER, 658, where the House of Lords held thus;

> " The three criteria for the imposition of a duty of care were foreseeability of damage, proximity of relationship and reasonableness or otherwise of imposing a duty of care. In determining whether there was a relationship of proximity between the parties the court, guided by situations in which the existence, scope and limits of a duty of care had previously been held to exist rather than by a single general principle, would determine whether the particular damage suffered is the kind of damage which the Defendant was under a duty to prevent and whether there were circumstances from which the court could pragmatically conclude that a duty of care existed."

45. From the above proposition this court asks the question whether assuming the Appellant had the said protective gear would they prevent the accident from taking place? The Courts answer to this question is that since the Appellant was using his hands to operate the said machine it was foreseeable he needed the gloves so that in case of an accident the gloves could mitigate the injury he would sustain.

46. The court also asks itself what was the Respondent supposed to do to prevent the said accident and answers this question that so long as the Appellant had worked with the same machine from 2011 to 2017 it was presumed he had the skill and knowledge of operating the same and it was upon him to take precaution of ensuring the machine was off before replacing the rubber roller. It was not upon the Respondent to supervise such an employee who had the necessary skill. There was nothing the Respondent could do to prevent the said accident apart from providing the protective gear required.

47. In the case of James Finlaly (K) Ltd v Benard Kipsang Koechi [2021] eKLR the court had this to say in support of the above assertion..

> However, it is my view that the said duty of care is not absolute and it does not absolve the employee from the duty to exercise due care to avoid exposing himself from foreseeable risk. An employee is not a robot that must be programmed to work in particular way. Consequently, an employee will solely or largely take the blame if he exposes himself to injuries due to his negligence.

48. On the issue of the colleague, one Samuel Kangethe switching on the Machine, it was upon the Appellant to be precise in his pleadings on who specifically switched on the Machine including calling or attempting to call the said Kang'ethe as a witness. The court appreciates that parties are bound by their pleadings and the Appellant was bound to plead that Samuel Kangethe was the person who switched on the machine which he failed to do.

49. To this end the court disagrees with the lower court that the Appellant did not prove negligence on the part of the Respondent despite the accident having occurred. The Court further concludes that the appellant failed to demonstrate that he did everything within his knowledge, experience and skill and the accident still took place. This therefore in the Court's view was a case of contributory negligence and apportions liability at 60% for the Respondent and 40% for the Appellant.

Whether the Appellant was entitled to reliefs sought.

50. The court having overturned the lower court's decision on liability the next issue is on the quantum of damages to be paid. The trial magistrate stated that if the Appellant proved his case he would be awarded Kshs 80,000/= as damages. This court will only interfere with the issues of quantum on the circumstances stated in the case of Butt v. Khan [1981] KLR 349 where it was held per Law, J.A that:

> " 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."

51. This court will therefore interfere with quantum herein if it is of the opinion that it could have been inordinately high or low. The Court has considered the Appellant's submissions on the quantum of damages, the authorities cited by Counsel in their submissions for this appeal. The medical report by Dr. Wandugu showed the Appellant sustained a deep cut wound of the right little finger coupled with blood loss. That the injuries resulted in permanent scars which are rather uncomestic in the affected areas. That the injuries by their effect in the connected tissues had resulted in permanent weakness of the right hand. The learned trial magistrate after considering the nature of the injuries and comparable cases where similar injuries were involved proposed an award of Kshs. 80,000/= for general damages and Kshs 2,000/= for special damages if the appellant became successful. Flowing from observations and precedent on circumstances when an appellate court can interfere with quantum of award by a

trial court, this court is satisfied with the assessment by the trial court and will not disturb the same save on the issue of contributory negligence.

52. From the forgoing, the Appeal is allowed as follows.

    i. Liability is apportioned at 60% against the respondent, the appellant bearing 40%.

    ii. Quantum of damages is retained at Kshs. 80,000/- as assessed by the trial court. That is to say the appellant is awarded Kshs. 48,000/-

    iii. The appellant shall have costs in the lower court but each party shall bear their costs of this appeal.

    iv. It is so ordered.

DATED AT NAIROBI THIS 31ST DAY OF JANUARY, 2025

DELIVERED VIRTUALLY THIS 31ST DAY OF JANUARY, 2025

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION