Pembe Flour Mills Ltd v Akunda & another (Employment and Labour Relations Appeal 67 of 2024) [2025] KEELRC 311 (KLR) (5 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 311 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS APPEAL 67 OF 2024

JW KELI, J

FEBRUARY 5, 2025

BETWEEN

PEMBE FLOUR MILLS LTD .... APPELLANT

AND

ELPHAS OMULANDO AKUNDA .... 1ST RESPONDENT

READY CONSULTANCY CO. LTD .... 2ND RESPONDENT

(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Nairobi (Hon. G.A. MMASI (Mrs.) S.P.M., presiding) delivered on or about the 8th February, 2021 in NAIROBI CMCC No.2039 of 2017)

JUDGMENT

1. The Appellant dissatisfied with the judgment of Hon. G.A. Mmasi, Senior Principal Magistrate in Nairobi Law Courts in Nairobi CMCC No. 2039 of 2017-elphas Omulando Akunda Versus Ready Consultancy Co. Ltd & Pembe Flour Mills Ltd delivered on the 8th February 2021 filed a memorandum of appeal dated 4th march 2021 against the entire judgment on both liability and quantum in relation to the Respondents and sought for the following orders:-

    a) The judgment on liability against the Appellant be set aside and the 1st Respondent's/ Plaintiff's suit against the Appellant be dismissed with costs to the Appellant.

    b) Without prejudice to prayer (a) above the award in general damages for pain, suffering and loss of amenities be set aside and dismissed or reviewed downwards in light of the 1st Respondent's injuries.

    c) Without prejudice to prayer (a) above the award for loss of future earnings be set aside and dismissed or reviewed downwards in light of the 1st Respondent's recovery.

d) Without prejudice to prayer (a) above the award for loss of future medical expenses be set aside and dismissed or reviewed downwards in light of the 1st Respondent's recovery.

e) Without prejudice to prayer (a) above the award for special damages be set aside and dismissed as against the Appellant.

f) That the costs of this Appeal be granted to the Appellant in any event.

Grounds of the appeal

2. The learned magistrate erred in law and in fact in holding the Appellant and the 2nd Respondent jointly and severally liable for the 1st Respondent's injuries.

3. The learned magistrate erred in law and in fact in holding the Appellant liable despite the overwhelming evidence which pointed directly to the 2nd Respondent's full liability as the 1st Respondent employer.

4. The learned magistrate erred in law and in fact by misinterpreting and misapprehending the terms of the contract between the Appellant and the 2nd Respondent as well as the evidence on record and thereby arriving at a wrong finding by holding the Appellant liable for the 1st Respondent's injuries.

5. The Learned Magistrate erred in Law and in fact by overlooking the 1s' Respondent's own testimony and thereby making an award in general damages for pain, suffering and loss of amenities which was manifestly excessive in light of the 1st Respondent's injuries and his recovery.

6. The Learned Magistrate erred in law and in fact by making an award and/ or an excessive award for loss of future earnings against the 1st Respondent's clear evidence on the recovery made by him and of his capacity and readiness to resume work.

7. The Learned Magistrate erred in law and in fact by making an award for future medical expenses while disregarding the 1st Respondent/Plaintiff's own testimony on the medical procedures he had already undergone before trial of the suit.

8. That the 1st Respondent's award in general damages is punitive to the Appellant and unjust for injuries which have substantially resolved over the course of time.

Background to the appeal

9. The 1st respondent was the plaintiff in the lower court. He filed a suit by way of plaint dated 14th march 2017 of work injury against the appellant and the 2nd respondent who he stated was the employer contracted by the appellant. He however attributed the injury to the negligence of the appellant. The plaintiff sought the following reliefs against the appellant and the 2nd respondent as follows:-

   a. General damages for pain, suffering and loss of amenities

   b. Damages for diminished earning capacity /loss of future earnings

   c. Special damages as pleaded in paragraph 6 of the plaint

   d. Costs of this suit.

   e. Interest on(a)(b) and (c) above at court rates.(pages 7-35 was the entire claimant's pleadings and documents)

10. The appellant entered appearance and filed a response being a statement of defence dated 8th June 2017(pages 37-39 of RoA), a list of documents dated 24th April 2018 being witness statement by Hamisi Bwika, and one document being a contract for outsourced staff between Pembe Flour Mills Ltd and Ready Consultancy Co. Ltd(pages 49-71 of RoA).

11. The Plaintiff filed to defence reply dated 19th June 2017(pages 47- 48 of RoA).

12. The claimant's case was heard by the trial court on the 25th April 2018 with PW1 being Dr. Wokabi who produced the medical report and was cross-examined by counsel for the appellant. The claimant was PW2 and relied on his statement and produced his documents as C-exh 1-12 and was cross-examined counsel for the appellant. The appellant's case was heard on the same date with DW1 as Hamisi Bwika. He produced the contract with 2nd Respondent and was cross-examined by counsel for the claimant/ 1st respondent.(proceedings at pages 90-100).

13. The parties filed written submissions after closure of defence case.

14. The trial court Hon G.A MMasi (SPM) on the 8th February 2021 entered judgment for the plaintiff as against the respondents jointly as follows:-

    A) General damages for injury Kshs. 2,500,000

    B) Special damages Kshs. 14000

    C) Loss of future earning capacity Kshs 2,253,873.60

    D) Costs of future medical Kshs. 400,000

    E) Costs of the suit. (Page 113 Of The Roa)

Determination

15. The appeal was canvassed by way of written submissions. Both parties filed.

16. This being a first appellate court, it was held in Selle v Associated Motor Boat Co. [1968] EA 123 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 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 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 the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

Issues for determination

17. The appellant identified the following issues for determination in the appeal:-

    a. Whether the appellant's evidence was overwhelming enough to exonerate it from liability.

    b. Whether the awards on quantum were excessive and whether they should be set aside and dismissed or reviewed downwards in light of the 1st respondent's recovery.

    c. Whether the appellant herein is entitled to the reliefs sought in the memorandum of appeal.

d. Who should bear the costs of the appeal.

18. The respondent in submissions identified the following issues for determination:-

a. Whether the learned trial magistrate erred in holding the appellant jointly and severally liable for the 1st respondent's injuries.

b. Whether the award for damages was excessive and punitive.

19. The court having perused the proceedings and pleadings before the trial court and the judgment and taking into account the submissions of the parties was of the considered opinion that the issues placed before the court at appeal were as follows:-

a. Whether the Learned Trial Magistrate erred in holding that the appellant and 2nd Respondent were jointly and severally liable for the 1st respondent's injuries.

b. Whether the awards on quantum were inordinately too high.

Whether the learned trial magistrate erred in holding the appellant and the 2nd Respondent jointly and severally liable for the 1st respondent's injuries

20. The appellant submitted that it was not the employer of the 1st Respondent as per its pleadings and relied on its exhibits (pages 49-50 of RoA). DW1 Hamisi Bwika denied the 1st Respondent was one of its employees. DW1 stated that the 1st respondent's name did not appear in the appellant's record of employees. He also testified that the appellant did not employ casuals but only permanent employees and relied on D-exhibit 1 which was a contract agreement on outsourced staff services with the 2nd respondent. The appellant relied on the contract to submit that the 2nd respondent was to provide it with workers covered by workmen compensation insurance cover. , the workers were to be regarded as independent service providers and not be considered employees of the appellant, the 2nd respondent was to provide protective clothing for its workers and safety gear and train the workers. That the 2nd respondent was a skilled professional and therefore the appellant cannot be shouldered with the burden of bearing liability of the 2nd respondent who by contract indemnifies the appellant. The appellant submitted that it was only responsible for polices, procedures and guidelines which it contended were not an issue in the claim.

21. The appellant submitted that the 1st respondent was a skilled worker and was liable for negligence wholly or substantially. The appellant submitted that during cross- examination the 1st respondent stated that the 2nd respondent was his employer and even completed the DOSH form, that the sacks which fell were arranged by the 2nd respondent's employees and he was paid salary by the 2nd respondent. The appellant relied on the decision in Purity Wambui Muriithi v Highlands Mineral Water Co. Ltd (2015)e KLR where the court relied on section 6 (1) of the *Occupational Safety and Health Act* to wit:- ''6(1) Every occupier shall ensure the safety, health and welfare at work of all Persons working in his workplace." And section 13 (1)(a) to wit:"13 (1) ''Every employee shall, while at the workplace—

a. ensure his own safety and health and that of other persons who may be affected by his acts or omissions at the workplace;" To submit that the employee is also required to take reasonable precautions to ensure his own safety while performing his dues. The Appellant asserted that the court should find some degree of liability against the 1st respondent who had some level of skill and experience having worked for both companies(appellant and the 2nd respondent) for a long time.

22. The appellant further relied on the decision in Kenya Power & Lighting v Okeyo and another (2022)e KLR where the court adopted the definition of independent contractor as stated in Charlesworth in Negligence, 4th Edition, Sweet and Maxwell on the subject of "independent contractors" declares that an employer is not liable for the negligence of an independent contractor or his servant in the execution of his contract. He writes: "Unquestioningly, no one can be made liable for an act or breach of duty, unless it be traceable to himself or his servant or servants in the course of his or their employment. Consequently, if an independent contractor is employed to do a lawful act, and in the course of the work he or his servant commits some casual act of wrong or negligence, the employer is not answerable."

1st respondent's submissions

23. The 1st respondent submitted that he had been employed in the appellant's premises since 2012 as a loader. That in 2014 the appellant entered into a contract with the 2nd respondent with regard to the provision of labour services(D-exh 1) while offloading bags at the appellant's premises, a high stack of sacks collapsed on him causing him severe injuries. That section 6 of the Occupation Safety and *Health Act* imposes non-delegable duties of occupiers of workplaces to wit: ''6(1) Every occupier shall ensure the safety, health and welfare at work of all persons working in his workplace." The 1st respondent relied on the decision in Maundu & 40 others v Beiersdorf East Africa Limited where Justice Rika in an employment arrangement of shared responsibilities on employees the court held :-''3.The obligations of the 2nd Respondent under the contract, no doubt affirms that the 2nd Respondent became a Co-Employer with the 1st Respondent, rather than an innocent bystander, who cannot be called upon to shoulder employment liability.'' The 1st respondent relied on the decision to state that the appellant and the 2nd respondent were co- employers as seen in paragraph 4.1 of the said contract of service (D-exb 1). The appellant under clause 4.1 was responsible for operating polies, procedures and guidelines which included health, safety and security policy hence a co-employer. That the 1st Respondent worked in the appellant's premises, used their equipment and remained under their operational contract. The appellant retained substantial authority over the working conditions and safety measures borrowing from what Justice Rika in Maundu case called co-employment.

Decision

24. The trial court entered judgment against the appellant and the 2nd respondent jointly and severally. Having evaluated the evidence before the trial court and case law cited by the parties, the court established that the 1st respondent was in 2012 employee of the appellant and in 2016 the appellant outsourced workers and the 1st respondent was then under the 2nd respondent.

25. The court confirmed that it was not in dispute that the 1st Respondent was injured at the appellant's premises while working for it. Section 6 of the Occupation Safety and *Health Act* imposes non-delegable duties of occupiers of workplaces to wit: ''6(1) Every occupier shall ensure the safety, health and welfare at work of all persons working in his workplace.'' An occupier is defined as follows:- "occupier" means the person or persons in actual occupation of a workplace, whether as the owner or not and includes an employer;'' The definition of occupier fitted into the appellant's status who did not deny it owned the place of work where the injury occurred. Under Section 6 of the Occupation Safety and *Health Act* the Appellant was liable for the safety and health of the 1st respondent at its premises. Secondly, though the contract of service had the 2nd respondent pay the 1st Respondent salaries, the court noted that the Appellant substantial control of the outsourced employees. The appellant under clause 4.1 of the said contract for service was responsible for operating policies, procedures and guidelines which included health, safety and security policy.

26. The court then upheld the decision in Maundu case by Rika J to hold that the appellant and the 2nd respondent were co-employees for shared roles in the employment. The court held that the trial court did not err in award of judgment against the appellant jointly and severally with the 2nd respondent. The court found no evidence was placed before the trial court to prove negligence attributable to the 1st Respondent. In the upshot the court upheld the decision of the lower court on liability.

Whether the awards on quantum are inordinately too high.

27. The trial court in judgment granted to the claimant awards as follows:-

  a) general damages for injury Kshs. 2,500,000

  b) Special damages Kshs. 14,000

  c) Loss of future earning capacity Kshs 2,253,873.60

  d) costs of future medical Kshs. 400,000

28. The appellant submitted that the injuries according to Dr. Wokabi's medical report was of fractures to the pubic bones and urethra injury with 45% permanent disability. They relied on the decisions cited in Naom Momanyi v G4S Security Service Limited & Another(2018)e KLR and Gogni Rajope Constrution company Limited v Francis Olewe (2015) e KLR where in both cases award was given of Kshs. 300,000. On loss of future earnings, the appellant submitted that 1st Respondent at trial admitted to have recovered and even resumed work. On special damages the appellant opined only Kshs 2000 was justified as 2nd respondent paid the hospital bills as per evidence of the 1st Respondent at trial.

1st respondent's submissions

29. The 1st Respondent relied on Dr. Wokabi's medical report and evidence at cross-examination where he submits the injuries were grievous and he could not exert pressure on the abdomen due to the pubic injuries hence incapable of resuming his work of loading. He submitted that the trial court exercised judicial restraint in the award as a similar case cited in Peace Kemuma Nyangera v Micheal Thuo (2013) e KLR the court awarded 3 million Kenya Shillings for comparable injuries.

Decision

30. The trial court relied on the decision cited by the 1st respondent in Peace Kemuma Nyangera v Micheal Thuo (2013) e KLR. The injuries in that decision were:-

  a) Fracture of the sacrum bone – lowest back bone spine

  b) Fracture of the right superior pubic ramus of the pubic bone – right hip bone

  c) Fracture of the right ischium bone part of the pelvis – lower part as one sits down

  d) Haematoma on both thighs

  e) Haematoma in the lumbar - sacral – lower part of spine between the 2 buttocks.

  The High Court entered judgment with respect to the injuries General damages Kshs. 2,500,000/-. This was a 2014 decision.

31. The court noted the decisions cited by the appellant had non-comparable injuries. The court holds that the trial court awarded the general damages on comparable injuries and hence the Court on appeal

had no basis to interfere with the said award of general damages for the injuries of the 1st Respondent for the sum of Kshs. 2,500,000.

32. On the award for loss of future earnings, the Court observed the medical report of Dr. Wokabi was emphatic on the extent of injuries to the effect that the claimant could no longer exert pressure on the abdomen due to extensive pubic bone injuries. The 1st Respondent was a loader. The Court found that the injuries limited the 1st Respondent's ability to earn. The court observed the 1st Respondent's statement at cross-examination that he went back to work after the catheter was removed. This did not in any way persuade the court to interfere with the award taking into account the Doctor's evidence. The court having not seen the witness(See Selle) hesitated to interfere with the award taking into consideration the gravity of the injuries as explained by Dr. Wokabi.

33. On special damages the court found that the same were justified vide receipts produced by Dr. Wokabi (page 94 ROA). The court holds that the special damages were specifically proved.

34. In conclusion, the appeal is held to be without merit and is dismissed with costs to the 1st respondent. The judgment and decree of the Chief Magistrate's Court at Nairobi (Hon. G.A. MMASI (Mrs.) S.P.M., presiding) delivered on or about the 8th February, 2021 in Nairobi CMCC No.2039 of 2017 is upheld.

35. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 5TH DAY OF FEBRUARY , 2025.

J.W. KELI,

JUDGE.

In The Presence Of:

Court Assistant: Otieno

Appellant: - absent

1st Respondent: - Githae h/b Wanjohi