Reddamack Leather Centre Limited v Thiong'o (Employment and Labour Relations Appeal 30 of 2024) [2025] KEELRC 318 (KLR) (5 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 318 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS APPEAL 30 OF 2024

JW KELI, J

FEBRUARY 5, 2025

BETWEEN

REDDAMACK LEATHER CENTRE LIMITED ..... APPELLANT

AND

THOMAS THIONG'O ..... RESPONDENT

(Appeal from the Judgement/Decree of Hon. MR. D. W. Mburu (Principal Magistrate) in Milimani CMCCC No.1069 of 2016 dated 5 day of September 2017)

JUDGMENT

1. The Appellant herein, Reddamack Leather Centre Limited, being aggrieved by the Judgement/Decree of Hon. MR. D. W. Mburu (Principal Magistrate) in Milimani CMCC NO.1069 OF 2016 dated 5 day of September 2017) filed a memorandum of appeal 28th September 2017 seeking for the following Orders:-

    a) The Judgement and/or Decree dated 15th September 2017 be set aside and the Respondent be held 100% liable or ALTERNATIVELY be found to have substantially contributed to the occurrence of the accident.

    b) The Judgment on quantum be set aside.

    c) The Respondent be condemned to pay costs of this appeal and costs in the subordinate Court.

    d) This Honourable Court do grant such other and/or further relief it deems fit and just to grant.

Grounds of the appeal

2. The Learned Trial Magistrate erred in law and fact in holding the Defendant 100% liable for the occurrence of the accident when he knew or ought to have known that from the evidence adduced,

the Respondent trespassed into the machine area where he had no authority to enter into and operate the machines, and hence arrived at the wrong conclusions.

3. The Learned Trial Magistrate erred in law and fact in failing to find that from the evidence adduced by both parties, the Respondent was a casual labourer whose duties were to offload hides and skins far from the machine area, and the Respondent admitted that he was neither authorized to enter into the machine area nor trained to operate the fleshing machine and hence he failed to find that the Respondent was the author of his misfortune.

4. The Learned Trial Magistrate erred in law and fact in refusing and/or failing to visit the scene of the accident so as to get a clear picture of the position of the store, beam house, the fleshing machine and the paddles despite an application by the Appellant to do so. Had the trial Court visited the scene, it would have reached a different finding on liability.

5. The learned trial Magistrate erred in law and fact in holding that the Appellant did not provide and maintain for use a safe working environment for its workers despite overwhelming evidence to the contrary.

6. The learned trial Magistrate erred in law and fact in that he reached a decision which is contrary to the pleadings, evidence and submissions tendered before him.

7. The award on quantum is excessive in the circumstances considering the injuries sustained and the authorities cited.

Background to the appeal

8. The claimant filed a statement of claim dated 12th February 2016 alleging injury at the workplace and seeking general damages for pain and suffering and special damage of Kshs. 3000. The claimant relied on his witness statement of even date and produced his documents as C-exh 1 - 4 in support of his case. (pages 3-17 ROA was the claimant‘s case)

9. The appellant entered an appearance and filed a statement of defence dated 30th March 2016 and a witness statement of Robert Njoka Muthara of even date (pages 18-23 was the defence).

10. The respondent filed reply to defence dated 30th March 2016.

11. The claimant’s case was heard on the 28th March 2017 where PW1 was Dr. G.K Mwaura who produced the medical report and receipt of Kshs. 3000 and another receipt of Kshs. 5000 for court attendance all marked as C- exhibit 1,2 and 3. PW1 cross examined by counsel for the appellant. The claimant was PW2 in his case and adopted his witness statement as evidence in chief and was cross-examined by counsel for the respondent. The defence case was heard same date and DW 1 as Robert Njoka Muthara the Managing Director of the appellant who adopted his witness statement as evidence in chief and was cross-examined (pages 92-97 ROA were the trial court proceedings). After the hearing, the parties filed written submissions.

12. The Trial Court entered Judgment in favour of the respondent against the appellant on the 15th of September 2017 as follows:-

    Liability at 100%

    General damages Kshs. 500,000

    Special damages Kshs 3000

Determination.

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

14. 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

15. The appeal was on merit of the award of liability and quantum. The issues for determination were the issues addressed by the parties in their written submissions. The court framed the issues for determination to be:-Whether the trial court erred in its findings on liabilityWhether the quantum award was inordinately too high.

Whether the trial court erred in its findings on liability

16. The trial court held that the appellant was liable 100% for breach of duty of care under Section 6 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.

    (2) Without prejudice to the generality of an occupier's duty under subsection (1), the duty of the occupier includes—

        (a) the provision and maintenance of plant and systems and procedures of work that are safe and without risks to health;

        (b) arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;

        (c) the provision of such information, instruction, training and supervision as is necessary to ensure the safety and health at work of every person employed;

        (d) the maintenance of any workplace under the occupier's control, in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks to health;

        (e) the provision and maintenance of a working environment for every person employed that is, safe, without risks to health, and adequate as regards facilities and arrangements for the employees welfare at work;

        (f) informing all persons employed of—

            (i) any risks from new technologies; and

            (ii) imminent danger; and

g) ensuring that every person employed participates in the application and review of safety and health measures."

17. There was no dispute that the respondent was the occupier and employer.

18. The appellant led evidence before the trial court that the Respondent was to blame for the accident on two fronts, operating the machine while unauthorized and secondly, being at the place of work while supposed to be at tea break. The trial court found the evidence of RW1 to be unreliable as he was not at the place of the injury. The respondent told the trial court that he was a general worker and was working under the instruction of a supervisor who he said was called Haron and who told him to take the skins next to the machine and he slid on a skin which was on the floor. RW1 did not witness the accident. He told the trial court Haron was the supervisor and stated he was not at work. Who then was supervising the respondent at work that material time? The employee stated he was wearing boots at the of accident which the court finds he was not careless at workplace.

19. The court having evaluated the evidence before the trial court held that the appellant failed to ensure a safe working place and safety at work place by ensuring the floor was safe (free of slippery skins) and the machine was not exposed to injure the respondent. It was the duty of the employer to ensure the respondent was supervised at all times taking in to account his level of education and the danger of working near the machine. Having evaluated the facts, the court at appeal found no basis to disturb the award of 100% liability on part of the appellant applying the provisions of section 6 of the *Occupational Safety and Health Act*.

Whether the quantum award was inordinately too high.

20. The court on appeal can only interfere with quantum of award as stated in James Gikonyo Mwangi V D.M(2016) e KLR that: ''The principles for assessment of damages were set out by the Court of Appeal for East Africa, and subsequently adopted by our Court of Appeal in the following cases:

    1. Kanga vs Manyoka [1961] EA 705, 709, 7013.

    2. Lukenya Ranching and Farming Co-op. Society Ltd vs Kavoloto [1979] EA 414, 418, 419.

    3. Kemfro Africa t/a Meru Express & Anor. vs A.M.Lubia & Anor [1982-88] I KAR 727.

    4. C.A. No.66 of 1982 Zablon Mangu vs Morris W. Musila (unreported)

    From the above authorities, Appellate Court will interfere with the exercise of discretion by the trial court when assessing damages if the trial court;

    a. Took into account an irrelevant fact or,

    b. Left out of account a relevant fact or,

    c. The award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.'' The court upheld the said principles in the determination of whether the award of quantum by the trial court was a fair estimate of the damages.

21. The respondent suffered injuries as stated in the medical report produced by Dr. G.K Mwangi to be:

    crush injuries – right 3rd and 5th fingers (wounds and fractures)

    Traumatic amputation -1 and 2nd digits – distal phalanges.

The Doctor assessed the injuries at a permanent degree of incapacity at 6% for the amputated digits. Stated there were residual scars on the right-hand fingers and stiffness and assessed permanent degree of incapacity at 5%.

22. At trial the appellant submitted that the they relied on the decision in Simba Posho Mills Ltd v Fred Michira Onguti with similar injuries as the claimant where on appeal Justice Kimaru in judgment dated 29th January 2005 reassessed the general damages payable to the respondent to be Kshs. 180,000. The appellant submitted that the trial court did not take into account relevant factors especially the injuries sustained by the respondent and the fact of degree of incapacity of 5/% and the Respondent had healed.

23. The respondent reiterated its submissions on comparable authorities at trial court.

24. The Court on perusal of the impugned judgment found the trial court in its decision (at page 105 of ROA) considered the decision relied on by the appellant and those of the Respondent. The Trial court held that the authority in Simba Posho Mills Ltd v Fred Michira Onguti relied on by the appellant involved less serious injuries than those of the Respondent and the decision was old by 15 years.

25. The respondent had sought an award of Ksh. 800,000 as general damages and relied on authorities in Pyramid Packaging Ltd v Humprey Wanjala (2012)e KLR where the plaintiff suffered the amputation of left index, middle and ring fingers and general damages were assessed at Ksh. 650,000. There were also other two authorities cited by the respondent. The appellant had opined Kshs. 150,000 was sufficient compensation relying on the precedent in Simba Posho Mills Ltd v Fred Michira Onguti. In this case the disability was assessed at 8 %. (page 40 ROA). The Court holds that the injuries in Simba Posho Mills Ltd were comparable save for the question of 15 years since the judgment was delivered. Taking into account inflation within 15 years lapse of the decision, the court did not find the award of Kshs. 500,000 for the injuries sustained by the respondent to be inordinately high. The court upheld the quantum award of Kshs. 500,000 by the trial court.

26. In the upshot the appeal was held to lack merit and was dismissed. The Court upheld the Judgement/ Decree of Hon. MR. D. W. Mburu (Principal Magistrate) in Milimani CMCCC NO.1069 OF 2016 dated 5 day of September 2017 in entirely.

27. Costs of the appeal to the respondent.

28. It is so Ordered.

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

JEMIMAH KELI,

JUDGE.

In the presence of:

Court Assistant: Otieno

Appellant: - Kanyi Ngatia h/b Mureithi

Respondent: -Kisiangani