Eldoret Grains Limited v Simiyu (Civil Appeal 147 of 2014)
[2025] KEELRC 1264 (KLR) (30 April 2025) (Judgment)

Neutral citation: [2025] KEELRC 1264 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

CIVIL APPEAL 147 OF 2014

MA ONYANGO, J

APRIL 30, 2025

BETWEEN

ELDORET GRAINS LIMITED ..... APPELLANT

AND

RICHARD MAKOKHA SIMIYU ..... RESPONDENT

(Being an appeal from the Judgment of Honourable P. Mbulika in Eldoret CMCC No. 676 of 2013 delivered on 5th December 2014)

JUDGMENT

1. This is an appeal from the judgment and decree of the Chief Magistrate's Court at Eldoret by Hon. P. Mbulika (RM) dated 5th December 2014 in CMCC No. 676 of 2013. The Respondent who was the plaintiff before the trial court, sued the Appellant (the defendant in the lower court) for damages as a result of the injuries he sustained while in the course of his employment.

2. After a full trial, the trial court rendered its decision where it found the Appellant 90% liable for the occurrence of the accident. The trial court then proceeded to award the Respondent general damages of Kshs. 100,000 less 10% contribution and special damages of Kshs. 1,500.

3. The Appellant was aggrieved by the judgment on both liability and quantum and filed a Memorandum of Appeal dated 23rd December 2014 citing the following grounds of appeal: -

    i. The learned trial magistrate erred in law and in fact in finding that the Appellant was 90% negligent when there was no evidence to that effect.

    ii. The learned trial Magistrate erred in law and in fact in entering judgment against the Appellant when the suit was tire barred under the *limitation of Actions Act*

iii. The learned trial magistrate erred in law and in fact in failing to find that the Respondnet was the author of his misfortune

iv. The learned trial magistrate erred in law and in fact in awarding general damages that were inordinately high

v. The learned trial magistrate erred in law and fact in failing to dismiss the Respondent's case

4. The Appellant prayed that the appeal be allowed, the learned trial magistrate's finding on both liability and quantum of damages be set aside and the Respondent's suit be dismissed with costs.

5. The Appeal was disposed by way of written submissions. The Appellant's submissions are dated 20th March 2020 while the Respondent's submissions are dated 25th May 2018.

Appellant's submissions

6. In its submissions, the Appellant submitted on the following issues: -

i. Liability

ii. Limitation of Action

iii. Quantum of damages.

7. On the issue of liability, the Appellant submitted that courts have held that it is not enough for a party to allege a failure to provide reasonable safe system of work and that the party must alleging liability must lead evidence and prove what the proper system was and in what way the same was breached. It is the Appellant's submission that the evidence tendered by both parties clearly indicates that the Respondent did not follow the instructions which he had been given in that he was careless and was not alert.

8. According to the Appellant, from the evidence tendered by the Appellant's witness at page 18 of the record of appeal, the employees were issued with gumboots by the factory but on the material day, the Respondent was not wearing his. It is submitted that the Respondent failed to prove liability against the Appellant, that he was the author of his own misfortunes. In support of this position the Appellant cited the case of *Stat Pack Industries v James Mbithi Munyao HCCA NO 152 of 2003*.

9. The Appellant further submitted that the learned magistrate erred in law and in fact in finding that the Appellant was 90% liable. The court was urged to find that the Respondent was negligent and hence fully to blame for the injuries he sustained.

10. On the second issue, the Appellant submitted that the learned magistrate erred in law and in fact in entering judgment against the Appellant when the suit was time barred under the *Limitation of Actions Act*. It is submitted that Section 4(2) of the Limitation of Action Act provides that actions founded on tort, such as this case, should be filed within 3 years, that the treatment chit of Moi Teaching and Referral Hospital indicates that the Respondent was injured on 17th September 2010 but this suit was filed on 10th October 2013 after lapse of the 3-year period stipulated in law.

11. The Appellant submitted that the Respondent did not give explanation as to why he delayed in filing the suit upon which the appeal herein is premised. According to the Respondent, the allegations made by the Respondent that negotiations were ongoing were not proved as no evidence was produced to support the same.

12. The Appellant submitted that the Respondent did not give sufficient reasons or evidence as to why the suit was filed out of time so as to warrant the enlargement of time. In this regard, it was submitted that the learned magistrate erred in law and in fact in entering judgment against the Appellant when the suit was time barred under the *Limitation of Actions Act*.

13. The Appellant urged the court to find that the Respondent's suit was time barred, set aside the learned magistrate's judgment and dismiss the Respondent's suit with costs to the Appellant.

14. On the issue of quantum of damages, the Appellant submitted that from the medical report produced by PW3, Dr. S.I. Aluda, the Respondent had a cut on the right ankle which was tender and which had healed at the time of examination. It was averred that the injuries were classified as soft tissue injuries. On this basis, the Appellant submitted that an award of Kshs. 30,000 would suffice as general damages. In support of this position, reliance was placed on the case of Sokoro Saw Mills Limited v Grace Nduta Ndungu (2006) eKLR where on appeal an award of Kshs. 80,000 by the Magistrate's court was reduced to Kshs. 30,000 for soft tissue injuries to the right hip joint and the back.

15. The Appellant submitted that the award Kshs.100,000 as general damages by the trial magistrate is inordinately high. The Appellant urged the court to set aside the said award and replace it with an award of Kshs. 30,000.

The Respondent's submissions

16. On his part, the Respondent submitted that on 17th September 2010, he was in the employment of the Appellant and was on duty offloading metal beams from a trailer when his colleagues who were further inside the trailer pulled one heavy metal beam without notifying him as a result of which the metal plate of the beam injured his right ankle joint inflicting a cut wound.

17. The Respondent blamed the Appellant for negligence and breach of contract. He averred that it owed him a duty of care which was breached as a consequence whereof he suffered damage. The Respondent submitted that the Appellant being an occupier as defined in section 2 of the *Occupational Safety and Health Act*, 2007 is bound by section 6 to provide a safe and healthy environment to its employees. The Respondent submitted that he was also not provided with the necessary equipment such as boots to enable him carry out his duties safely.

18. On the averment that the suit was filed out of time the Respondent contended that he was granted leave by the trial court to file the suit out of time in Misc. Application No. 68 of 2013 which leave was not challenged whatsoever during cross-examination of the Plaintiff and/or by adducing rebuttal defence evidence to disprove the Plaintiff's assertion that the delay in filing suit was occasioned by the fact that the Appellant had promised to compensate the Respondent but did not do so. The Respondent submitted that the reason adduced falls within the ambit of section 27 and 28 of the *Limitation of Actions Act*. It was thus submitted that no material or evidence was put forth by the Appellant in the subordinate court to challenge the court's leave to file suit out of time.

19. With regard to the ground that the quantum of damages awarded was inordinately high, the Respondent submitted that the injuries he suffered on 17th September 2010 while working for the Appellant was corroborated by oral and documentary evidence produced in the trial court by PW1 who treated him and PW3 who prepared the medical report.

20. It is the Respondent's submission that the learned magistrate did not misdirect herself in finding that he had proved his case against the Appellant to the required standard of proof in civil matters on a balance of probabilities. On this basis, the Respondent submitted that the trial magistrate delivered a well-reasoned opinion which cannot be faulted.

21. In the end, the Respondent urged the court to dismiss the appeal and award him costs of this appeal together with interest from the date of judgment in the subordinate court until payment in full.

Analysis

22. The duty of this court as a first appellate court is set out in the case of Selle and Another v Associated Motor Board Company and Others [1968] EA 123 as follows: -

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of Fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanor of a witness is inconsistent with the evidence generally."

23. PW1 Richard Makokha Simiyu the Plaintiff in the trial court, told the court that on 17th September 2010, he was working at the Appellant's premises offloading metal beams from a trailer together with 13 of his colleagues. He testified that he was in the middle and the colleagues at the back were pushing the second beam without notifying the ones in the middle as a result of which the metal cut the Respondent on his right ankle joint. He stated that his supervisor took him to hospital where he was treated as an outpatient. That he was later examined by Dr S.I. Aluda who prepared a medical report.

24. The Respondent blamed the Appellant for the injuries he sustained alleging that he was not given protective gear. He further stated that had he been given a warning he would have moved and avoided the accident. The Respondent testified that he filed an application seeking leave to file suit out of time vide Miscellaneous Application No. 68 of 2013 where he explained that the delay in filing suit was due to the Appellant's promise that the matter would be settled out of court.

25. On cross examination the Respondent explained that he sustained the injury after his colleague who was behind pushed the metal beam. Further, that he was not issued with gumboots by the Appellant.

26. On re-examination, PW1 contended that the beam that was being pushed from behind cut him and not the one he was pushing.

27. PW2 was Dr. Paul Rono from Moi Teaching & Referral Hospital where the Respondent was treated after the accident. He confirmed that the Respondent was treated at the facility after sustaining a cut wound on the posterior side of the right ankle joint. He produced treatment chits as PExb 2.

28. The doctor who examined the Respondent and prepared a medico-legal report testified as PW3. He stated that the Respondent suffered soft tissues injury to the right ankle which had healed at the time of examination. PW3 stated that he charged the Respondent Kshs. 1,500 for the report.

29. The Appellant on its part called Godfrey Taabu Ojwang who testified as DW1. In his testimony, DW1 informed the court that he was the Respondent's supervisor on the material day. He blamed the Respondent for being careless and negligent in performing his work and maintained that had the Respondent followed instructions, he would not have been injured.

30. During cross examination DW1 stated that the metal beam was being handled by several employees and that the Respondent who was in the middle was hit by the beam from behind. He also stated that the Respondent did not have gumboots.

31. At the close of the defence case parties were directed to file written submissions. Thereafter, on 5th December 2014, the trial court entered judgment in favor of the Respondent awarding him general damages of Kshs. 100,000 less liability contribution of 10% and Kshs. 1,500 as special damages.

Determination

32. Upon analyzing the Memorandum of Appeal, the Record of Appeal and the rival submissions of the parties, I find that there are three limbs to this appeal:

    i. Whether the trial court failed to appreciate that the suit was statute barred

    ii. Whether the issue of liability was properly determined

    iii. Whether the trial magistrate misdirected itself in assessment of damages.

Whether the trial court failed to appreciate that the suit was statute barred

33. The Appellant has faulted the trial court for entering judgment in favor of the Respondent arguing that the suit was time barred under the *Limitation of Actions Act*. There is evidence that the Respondent, during trial, produced an Order granting him leave to file suit out of time. The Appellant however avers that the Respondent did not give explanation as to why he delayed in filing the suit. According to the Appellant, the explanation he gave in seeking leave was that there were negotiations going on between him and the Appellant, but he did not produce evidence to prove the existence of the said negotiations.

34. I have perused the record and noted that the order granting the Respondent leave to file suit out of time in the subordinate court was not filed in the Record of Appeal. However, upon perusal of the trial court file, the same was annexed to the Respondent's bundle of documents as item (g) in the list of documents dated 9th October, 2013. From a perusal of the same, it is evident that an ex parte order of leave to file suit out of time was issued on 3rd October, 2013 in Eldoret Chief Magistrates Court Miscellaneous Civil Application No.68 of 2013.

35. Section 28 (2) of the Limitations of Actions Act stipulates as follows: -

> "(2) Where such an application is made before the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the respondent, it appears to the court that, if such an action were brought forthwith and the like evidence were adduced in that action, that evidence would in the absence of any evidence to the contrary, be sufficient-
>
> a. to establish that cause of action, apart from any defence under section 4(2) of this Act; and
>
> b. to fulfil the requirements of section 27(2) of this Act in relation to that cause of action."

36. The trial Court found the grounds in support of the ex parte application by the Respondent to be satisfactory and in accordance with the aforementioned section and proceeded to grant the Respondent leave to file the suit out of time. In his submissions on Appeal, the Respondent averred that the delay in filing the suit in time was necessitated by negotiations it entered into with the Appellant to settle the matter out of court. On its part, the Appellant in its submissions contends that the Respondent did not produce evidence to prove the said negotiations. However, the Appellant has not denied that the parties entered into negotiations.

37. In the case of Rosemary Wanjiru Kungu vs Elijah Macharia Githinji & Autoplus Used Parts Trading Company Nairobi high court civil case no. 145 of 2010eKLR the Court observed as follows:

> " In the result, where the defendant or his representative such as the insurance company leads the respondent to believe that the claim is capable of being settled and in reliance thereof the respondent or his advocate refrains from filing the suit until after the limitation has run its course, that may constitute a good ground for extending time notwithstanding the provisions of section 27 aforesaid."

38. Considering this issue in totality, I am convinced that the trial court in granting the Respondent leave to file the suit out of time interrogated the reasons given by the Respondent that the delay in filing the suit was inadvertently caused by the negotiations of the parties. There is no evidence on record to lead this court to believe otherwise as the application before the court which granted the orders are not part of the record of appeal. In the circumstances, I have no reason to fault the order by the subordinate court in granting leave to the Respondent to file the suit out of time.

Whether the issue of liability was properly determined

39. The Appellant has argued that the trial court misdirected itself by apportioning liability against the Appellant at 90% despite overwhelming evidence to the contrary. According to the Appellant, the Respondent was the author of his misfortunes as he knew the risk in the work he was engaged in and was negligent while performing the work. That the Appellant cannot therefore be held responsible for his negligence.

40. The Respondent in his testimony before the trial court stated that on the material day he was offloading metal beams with his colleagues from a trailer when his colleagues at the back pulled one heavy metal beam without notifying him as a result of which the metal plate of the beam injured his right ankle joint inflicting a cut wound. It was his testimony that he was not issued with gumboots by the Appellant. DW1, in cross examination confirmed that the Respondent did not have gumboots when the accident occurred.

41. The Appellant owed a duty of care to its employees and was required to have provided them with appropriate safety gear such as safety boots which would have averted the accident. On this basis, I find that the decision by the trial court to hold the Appellant 90% liable for the injuries sustained by the Respondent was well founded and I uphold it.

Whether the trial magistrate misdirected itself in assessment of damages

42. The principles which guide appellate courts in interfering with awards of damages by lower courts have been laid down in several court decisions. In the case of Kemfro Africa limited v Lubia & Another (No.2) [1987] KLR 30, Kneller JA held as follows: -

> " The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal for Eastern Africa to be that it must be satisfied that either the judge in assessing the damages, took into account an irrelevant factor or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage."

43. In his testimony before the trial court, the Respondent stated that he sustained a cut wound on his right ankle while in the course of performing his duties. Although the medical report by Dr. S.I. Aluda

was not filed in the Record of Appeal, I have seen it in the trial court file and analyzed the evidence of the medico-legal doctor who testified as PW3. I have noted that he stated that the Respondent suffered soft tissue injury on the right ankle. Dr. Aluda noted that the wound had healed and left a scar, even though the Respondent had accessional pain in the injured regions that subsided with use of analgesic.

44. The Appellant in its submissions stated that the award of Kshs. 90,000 awarded to the Respondent by the trial court was excessive for a mere cut wound. In its submissions before the trial court, found at page 28 of the Record of Appeal, the Appellant had opined that an award of Kshs 30,000 as general damages was sufficient.

45. In the case of Timsales Limited v Penina Achieng Omondi [2011] eKLR where the Respondent sustained a deep cut wound on the left index finger and severe soft tissue injuries to the left index finger, the court awarded the Plaintiff Kshs. 60,000/= in general damages.

46. Taking my cue from the above authority and keeping in mind the rival arguments put forth by counsel for the parties, I would agree with the Appellant's counsel that the quantum award by the trial magistrate was on the higher side and would justify interference by this court.

47. The case relied upon by the Appellant being Sokoro Saw Mills Limited v Grace Nduta Ndungu (2006) eKLR is in my view not very relevant to the instant case as the injuries are different even though they were more serious than the injury sustained by the Respondent herein. I also find the case too old taking into account changes in the cost of living.

48. It is my considered view that in the circumstances of this case, an award of Kshs 40,000 would be reasonable compensation for the injury sustained by the Respondent as general damages. The injury was of soft tissue and had healed well by the time the Respondent was examined by Dr. S.I. Aluda. I am guided by the First Schedule in the *Work Injury Benefits Act* which provides for the degree of disablement for purposes of compensation, which for example assesses the loss of a toe other than the great toe at 1%.

49. The Appellant did not appeal against the award on special damages.

50. Accordingly, I uphold the decision of trial court in respect of special damages. I however set aside the award of general damages and substitute therefor an award of Kshs. 40,000.

51. Each party shall bear its costs of the Appeal. The award of costs in the lower court shall remain undisturbed.

52. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 30TH DAY OF APRIL 2025

MAUREEN ONYANGO

JUDGE