Kivyuvi v Wilham (K) Limited (Appeal 112 of 2023)
[2024] KEELRC 699 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 699 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL 112 OF 2023

NJ ABUODHA, J

MARCH 14, 2024

BETWEEN

JOHN MUTUA KIVYUVI ..... APPELLANT

AND

WILHAM (K) LIMITED ..... RESPONDENT

JUDGMENT

1. Through the Memorandum of Appeal dated 5th July,2018, the Appellant appeals against the Judgment of Honourable A.M Obura(Mrs) (PM) delivered on 7th June, 2018) in Milimani Chief Magistrates Court CMCC No 6145 of 2013 (John Mutua Kivyuvi v Wilham (K) Limited)

2. The Appeal was based on the grounds that:

    i. The Learned Magistrate erred in law and in fact in finding the Appellant (60%) liable for the subject accident yet from the evidence it was the Respondent who exposed the Appellant to danger knowingly by failing to provide the necessary protective gears.

    ii. The Learned Magistrate's finding on liability was speculative and unsupported by the evidence on record.

    iii. The Learned Magistrate erred in awarding the Appellant general damages of Kshs 60,000/= a sum which is ordinarily low compared to the injuries sustained by the Appellant.

    iv. The Learned Magistrate erred in law and fact in not taking into account and or giving due weight to the submissions before her on the issue of quantum and particularly on the award on general damages and the authorities in support.

    v. The Learned Magistrate erred in law and in fact in making an award on general damages which was unsupported by the medical evidence before her.

vi. The Learned Magistrate erred in law and in fact in failing to award witness expenses of Kshs 15,000/= being doctor's court attendance charges.

3. The Appellant prayed that the appeal be allowed with costs and the Judgment of 7th June,2018 be set aside to the extent of liability and general damages awarded and be substituted with its own findings on both issues.

4. The Appeal was disposed of by written submissions.

Appellant's Submissions

5. The Appellant in his submissions dated 6th November, 2023 submitted on ground (1) & (2) concerning the issue of 60% liability and the finding being speculative and unsupported by the evidence. According to the appellant, the trial magistrate had on record oral evidence which buttressed the filed statement.

6. The Appellant submitted that on the material date he was working in the stores department when a chain fell on his hand. That the machine was in good condition when he begun using it and that it was only after a box got stuck and he tried to remove it that the chain fell on his thumb injuring him.

7. It was his submission that the Respondent Company did not provide him with any gloves in the number of years he had worked operating said machine and added that the department of maintaining of machines had existed but seeming each individual assigned to a machine would maintain the same.

8. It was the Appellant submissions that the oral evidence adduced in Court during the main hearing proved the Appellant's assertion that the Respondent Company had not taken any safety measures to protect its employees against foreseeable cases of injury.

9. The Appellant further submitted that during the defence case, the Respondent called one Jossyline Kibaya, a HR Officer at the respondent company at the time who in her evidence in Chief produced records she wanted the court to consider as evidence that no accident had been reported by the Appellant on 4/7/2008. According to the appellant, the witness was not working in the company at the material time and that there was indeed a department for maintaining of machines used by employees themselves in the Company thereby confirming the Appellant's testimony that he had the right to pull out the box when it got stuck to allow the machine to continue operating. He therefore had no duty to call the maintenance department as alleged by the defence.

10. It was the Appellant's submissions that from the records, it was clear that the Appellant was engaging in his assigned duties and it was the duty of the Respondent to ensure the safety of their employees and as such ought to have found the respondent 100% Liable.

11. The Appellant submitted that the Court in arriving at its conclusion on liability observed that the Appellant had been maintaining the machine and had in fact confirmed that the same was in good condition prior to the occurrence of the accident. The Court felt that the Appellant had the skill and knowledge to operate said machine and that the accident had occurred due to the manner in which he handled the stuck box. This conclusion according to the appellant, was contradictory to the court's observation that the Appellant would service the machine based on the fact that whilst there was in fact a servicing department, the same did not carry out its functions as it was not as familiar with said machines as the Appellant and fellow colleagues were.

12. The Appellant submitted that the trial Court very well acknowledged the fact that the Appellant knew the machine well enough to have been cautionary around it. That it left the burden of proof to the Respondent to explain why despite having a servicing department, the same was not equipped to

function and knowing well this fact, did not take any precaution to protect its staff by issuing them with gloves.

13. The Appellant relied on the case of *Segwick Kenya Insurance Brokers v Price Water House Coopers* Kenya, High Court Civil Appeal No 720 of 2006 (Nairobi) and *Boniface Muthama Kavita v Canton Manufactures, Ltd* [2015] eKLR on the duty of care in the employee-employer relationship.

14. The Appellant further relied on section 3 and 6(1) and (2) of the *Occupational Safety and Health Act* on the employer's statutory obligation to ensure safety at the workplace which is not restricted only to areas of control. The Appellant relied on the Court of Appeal case of *Purity Wambui Murithii v Highlands Mineral Water Co. Ltd*, [2015] eKLR on the above provisions of the act.

15. On the grounds (3), (4) & (5) of the appeal concerning issue general damages being low compared to injuries sustained, the Appellant submitted that according to the medical report prepared by Dr. Moses Kinuthia which was produced in court during the hearing, the plaintiff sustained a deep cut wound on the right thumb and the report further stated that he was treated at a local clinic where the modes of treatment included stitching of cut wound under local anesthesia, analgesics, antibiotics, tetanus toxoid injection and wound care at Uzima Medical Clinic.

16. The Appellant further submitted that it had been reiterated innumerable times that an appellate Court can only interfere with the sum awarded where an Appellant demonstrates that the award is too high or so low as to amount to an outright error in assessment of damages, or that in coming to that assessment the Court took into account an irrelevant matter or that it failed to take into account a relevant matter. The Appellant relied on the Court of Appeal in *Ken Odondi & two others v James Okoth Omburah t/a Okoth Omburah & Company Advocates* [2013] eKLR on this submission. That the same position was further upheld by the East African Court of Appeal in *Henry Hidaya Ilanga v Manyema Manyoka* (1961) EA 705, 709, 713. The Appellant submitted that the court did not award him adequate compensation for the pain suffered and relied on the cases of *Devki Steel Mills Ltd v James Makau Kisuli* [2012] eKLR among others where the Courts awarded a sum of Kshs. 250,000/ =,350,000/= and 200,000/= for different injuries ranging from soft tissue injuries and injury on fingers.

17. The Appellant concluded that there were reasonable grounds that this appeal should be allowed and the award issued by the lower court be substituted by this court as failure to do so would be a denial of substantive justice. He prayed that the court reviews the award on liability and finds the Respondent 100% liable and the award of general damages with costs to the Respondent.

Respondents Submissions

18. The Respondent filed its submissions dated 1st December, 2023 and submitted that it will wholly rely on its submissions filed at the lower court dated 7th May, 2018. It collapsed the grounds of Appeal in to two headings; liability and quantum.

19. On the heading of liability he submitted that the Appellant failed to demonstrate what the trial Magistrate took in to account or failed to take in to account thereat arriving at the decision that she did which he considers to be erroneous. The Respondent submitted that the trial Magistrate rightly applied herself in apportioning liability at 60% against the Appellant. That the reason was that the Appellant during hearing confirmed that he struggled to pull out the stuck box leading to the chain getting cut and the subsequent injury. That if the Appellant had not struggled in pulling the stuck box the chain would not have cut.

20. It was the Appellant's submission that there was no way the Respondent would have prevented the Appellant from doing what he did as this was self-inflicted injury. The Respondent therefore submitted that the trial magistrate was proper in holding the Appellant 60% to blame.

21. On the second heading of quantum the Respondent submitted that it relied on its submissions in the lower court. On ground 6 of the Appeal the Respondent submitted that it was covered under costs which were awarded to the Appellant in the lower court. The Respondent in conclusion invited the court to uphold the lower court judgment and to dismiss this appeal with costs.

Analysis & determination

22. The jurisdiction of this Court as a first appellate Court has since been settled in the often cited case of *Selle v Associated Motor Boat Company Limited* [1968] E.A 123 thus:-

> An appeal to this court from a trial by the High Court is by way of 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.....or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

23. From the record and the judgment of the trial Court it is would seem uncontested that the respondent had a maintenance department that ought to have serviced the machine the appellant was using. However the appellant took it upon himself to remove the stuck box and in the process injured himself. According to the appellant him and his colleagues were more familiar with the machine more than the maintenance department. This in the opinion of the Court was a deliberate assumption of risk and there was nothing the respondent could do.

24. The trial court had the benefit of listening to oral evidence and observing the witnesses. This Court as an appellate Court will therefore not interfere with the decision of a lower court simply because put in the same position it could have decided differently. This Court has carefully considered the judgment of the lower Court vis a vis the evidence presented before it and is persuaded that the trial court competently dealt with the dispute before it and arrived at a just decision in the circumstances.

25. The Court therefore finds no reason to interfere with the judgment of the trial Court both on the apportionment of liability and quantum. The appeal is therefore found without merit and is hereby dismissed with costs.

26. It is so ordered.

DATED AT NAIROBI THIS 14TH DAY OF MARCH, 2024

DELIVERED VIRTUALLY THIS 14TH DAY OF MARCH, 2024

ABUODHA NELSON JORUM

JUDGE