Prosel Limited v Timothy (Appeal E242 of 2023)
[2024] KEELRC 2821 (KLR) (14 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 2821 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E242 OF 2023

NJ ABUODHA, J

NOVEMBER 14, 2024

BETWEEN

PROSEL LIMITED ..... APPELLANT

AND

AMIANI MUDOGA TIMOTHY ..... RESPONDENT

(Being an appeal from the Judgment of Honourable PETER MUTHOLI (SRM) delivered on 12/8/2020 in Chief Magistrates Court MILIMANI CMCC NO. 3217 of 2017; Amiani Mudoga Timothy vs Prosel Limited)

JUDGMENT

1. Through the Memorandum of Appeal dated 7th September, 2020, the Appellant appeals against the Judgment of Honourable Peter Mutholi (SRM) delivered on 12/8/2020.
2. The Appeal was based on the grounds that:
    i. The Learned Magistrate erred in finding and holding the appellant 85% liable.
    ii. The Learned Magistrate erred in law and fact in awarding damages to the Respondent amounting to 253,000/=.
    iii. That the quantum of damages is excessive and an erroneous estimate of the damages that may be awarded to the Respondent considering the circumstances of the case before the subordinate court and the weight of the precedents in similar circumstances.
    iv. The Learned Magistrate erred in law and fact and misdirected himself in failing to consider the submissions by the appellant together with the authorities relied on by the appellant.
    v. The Learned Magistrate erred in law and facts by disregarding established principles in awarding damages in the case before him.

3. The Appellant prayed that the appeal be allowed; the suit be dismissed with costs to the Appellant of this appeal and lower court and that in the alternative this Honourable Court be pleased review and reduce the amount of damages awarded by the learned magistrate.

4. The Appeal was disposed of by written submissions.

Appellant's Submissions

5. The Appellant's advocates MNM Advocates LLP filed written submissions dated 7th March, 2023. On the issue of whether the Appellant was to blame for the accident, Counsel submitted on liability that the duty to establish that the injury was caused by employer's negligence by breach of statutory or common law duty was upon the Respondent. That the Respondent failed to discharge the duty of proving the same as required in Section 107 and 108 of the *Evidence Act*.

6. On employer's duty, counsel submitted that the Respondent being a trained and experienced welder was expected to exercise due care and skill in operating the grinder. That the grinder had no defect as pleaded, it is the Respondent who failed to follow the instructions in fastening the bar firmly and couldn't expect the Appellant to be his eyes all through and relied on the case of Eastern Produce (K) Limited v Allan Okisai Wasike(2014) eKLR.

7. Counsel submitted that the duty cast on the employer to his employees is not to be an insurer. That the employer's duty is to exercise safety, exercise of due care and skill. Counsel relied on the case of Khetia Garments Limited V Mark Otuko Maleko 120 751 eKLR on this assertion. It was the Counsel's submission that the Appellant demonstrated that it had exercised safety, due care and had instilled skill in the Respondent and the Respondent was to blame for his actions with no proof of liability against the Appellant.

8. On the issue of quantum of damages, Counsel submitted that the only injury the Respondent was able to prove was a cut on the right hand which was a soft tissue injury with one hospital visit and no further follow up.

9. Counsel submitted that Kshs. 60,000/= would be a commensurate compensation to the Respondent and relied on among others the decision in Shamilar Flowers Ltd v Noah Munianqo Matianyi (2011) eKLR. On special damages counsel submitted that the Respondent did not tender any receipt as evidence to prove the pleaded Kshs 3,000/= as special damages.

Respondent's Submissions

10. The Respondent's advocates Waiganjo Wachira & Co. Advocates filed written submissions dated 4th April, 2023. On the issue of whether the findings of the trial court on liability should be reversed, Counsel submitted that the Appellant conceded that the Respondent was an employee of the Company and that it had provided the Respondent with all the safety requirements necessary for undertaking his task. Counsel submitted that during hearing, the Appellant's witnesses testified that none of them witnessed the accident.

11. Counsel submitted that the Respondent blamed the Appellant for failing to provide him with a safe working environment. That the court was satisfied that the Respondent discharged the burden of proof to warrant judgment being entered in his favour. The respondent was never supplied with quality protective gear that would prevent him from sustaining injuries if an accident occurred. Counsel submitted that the Respondent discharged the burden of proof to warrant the same being affirmed by this court.

12. Counsel relied on the case of Josephat Kaliche Ambani v Farm Industries Limited [2016] eKLR and submitted that it had proved on a balance of probability that the Appellant had a statutory duty and obligation to provide a safe working environment including not exposing him to tasks which could result to injury or loss.

13. On the issue of whether the findings of the trial Court on quantum should be reversed, counsel submitted that the Respondent suffered deep cut on the right hand and a foreign body on the right hand. Counsel submitted that the trial court while considering among other factors inflation concluded that an award of Kshs 250,000/= was sufficient. That at the trial court the Respondent had proposed Kshs 500,000/= while the Appellant had proposed Kshs 60,000/= but the court considered the proposals and awarded the Respondent the Kshs 250,000/=.

14. Counsel relied on among others the case of Equity Bank Kenya Ltd & 2 others v David Githuu Kuria [2020] eKLR while submitting that the award of the trial Court was reasonable and should be affirmed and the court should dismiss the Appeal with costs.

Determination

15. The court has considered the pleadings and submissions filed by the parties herein and proceeds to analyse them as follows.

16. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its own findings and conclusions as was held by the Court of Appeal for East Africa in Peters –vs- Sunday Post Limited [1958] EA 424. The appropriate standard of review established in cases of appeal can be stated in three complementary principles:

    i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

    ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

    iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

17. The Judgment of the trial court was that the Respondent had sufficiently proved that the accident had indeed occurred as pleaded and judgment was entered against the Appellant at the liability rate of 85:15 in favour of the Respondent.

18. On the issue of quantum the trial court found that while considering the injuries sustained, opinion of doctors, authorities and the rate of inflation, Kshs 250,000/= for General Damages and Kshs 3,000/= for special damages was adequate compensation.

19. The court observes that the the appeal is mainly on the trial court's finding on liability and quantum. Having considered the evidence as presented in the record of appeal before court, it was not in dispute that the respondent was injured while in the course of his lawfully assigned duties at the Appellant premises.

The Appellant as the Respondent's employer had a duty of care to provide a safe working environment for the Respondent. Halsbury's Laws of England, 4th Edition volume 15 at paragraph 560 states:-

> " At common law an employer is under a duty to take reasonable care for the safety of his employees in all the circumstances so as not to expose them to an unnecessary risk."

20. 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."

21. The Respondent contended that the accident occurred due to negligence on the part of the Appellant while the Appellant contends that the Respondent was an experienced welder and was equally provided with protective gear. The Appellant contended that the Respondent was expected to exercise due care and skill in operating the grinder. That the grinder had no defect as pleaded it is the Respondent who failed to follow the instructions in fastening the bar firmly and he couldn't expect the Appellant to be his eyes all thorough.

22. The court is therefore tasked with analysing what the Appellant was supposed to do to prevent the accident from happening. The Respondent had a duty as a trained and experienced welder who had worked for 12 years with the Appellant to exercise due care but the Appellant had to exercise its supervisory role as held by the trial court. The Appellant was supposed to provide the quality gear to the Respondent because it was foreseeable anything could happen with the grinder.

23. The court therefore agrees with the trial court that the Appellant ought to have provided the Respondent with quality protective gear so that in case of such an accident the injuries could be mitigated. The court takes note of the period the Respondent had worked for the Appellant and observes that if at all he was negligent he could not have worked for those years without history of such accidents. There must have therefore been an issue with the grinder.

24. Based on the evidence adduced before the trial Court, the learned Magistrate was justified in making the findings of fact based on the material before him and his observation of the three witnesses who testified. He in fact made a finding that the protective gloves were not of the right quality and no evidence to suggest that the Respondent was negligent since no one witnessed the events. The co-welder who testified did not also witness the event and learnt of it after it had occurred. In any case the trial court apportioned the Respondent 15% liability to show that the Appellant was not fully to blame.

25. In *Sheldon Shadora vs. Stanley S. Shadora Civil Appeal No. 210 of 1995*, the Court of Appeal held that:

> " Although in a first appeal the Court is entitled to rehear the dispute, it must be remembered that the trial court had the advantage of hearing and seeing the witnesses testify before him... A Court of Appeal will not normally interfere with the finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the Judge is

> shown demonstrably to have acted on wrong principles in reaching the findings he did... An appellate court will be slow to interfere with a Judge's findings of fact based on his assessment of the credibility and demeanour of a witness who has given evidence before him."

26. In the court's view, based on the evidence that was adduced before the Learned Trial Magistrate, he was entitled to arrive at the findings of fact in the manner he did. Nothing has been placed before the court in this appeal to convince it that the said findings of fact were based on no evidence or misapprehension of evidence or that the Learned Trial Magistrate demonstrably acted on wrong principles in reaching the findings he did. There is therefore no justification to warrant interfering with the Learned Magistrate's findings on fact and this court declines to do so.

Whether the trial learned Magistrate erred in its quantum awards

27. Considering that the trial court acted within its discretion to award the said damages which are discretionary in nature; this court as an appellate court will proceed carefully so as not to interfere with the trial Court's discretion unless certain conditions are satisfied as was held in the case of Gitobu Imanyara & 2 Others vs Attorney General (2016) eKLR. The Court of Appeal stated thus: -

> It is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 ALL E.R. 297. It was echoed with approval by this Court in Butt v. Khan [1981] KLR 349 when it held as per Law, J.A that:
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> > 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."

28. The court has considered the Appellant's submissions on the quantum of damages and the authorities cited by Counsel. The Court of Appeal in Simon Taveta v Mercy Mutitu Njeru Civil Appeal No. 26 of 2013 [2014] eKLR restated the principle that damages should be determined by the nature and extent of injuries sustained and comparable awards made in the past. From the court's re-evaluation of the evidence, the court finds that the learned trial magistrate referred to the relevant evidence on record, the nature of injuries and inflation.

29. Upon considering the authorities relied upon by the Appellant, it ought to be noted that injuries to one person will never be fully comparable to other person's injuries. What a court ought to consider is "as far as possible comparable" to the other person's injuries, and the after effects.

30. The Court notes that the cases relied on by the Appellant were decided around 2011 to 2016 and now it is 2024 where the court must look at inflation and bearing in mind that the Respondent was injured in 2017 which is now over seven years. The cases relied upon by the Respondent were more recent as 2020 where courts awarded Kshs 250,000/= and Kshs 300,000/= for similar injuries. The

Respondent's injuries were deep cut wound on the right hand and a foreign body on the right hand. The Respondent testified that he was henceforth unable to use the hand well.

31. From the foregoing, the court does not find any reason to disturb the quantum of damages awarded by the trial court as the same was reasonable and not inordinately too low or too high to be varied as compared to the injuries sustained by the Respondent. The award of special damages of Kshs 3,000/ = was justified since the Respondent produced medical records to show he attended hospital which he could not attend for free he had to pay

32. In the upshot the Appeal fails for lack of merit. It is hereby dismissed with costs to the Respondent.

33. It is so ordered.

DATED AT NAIROBI THIS 14TH DAY OF NOVEMBER, 2024 DELIVERED VIRTUALLY THIS 14TH DAY OF NOVEMBER, 2024.

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION