Jumbo North(EA) Limited v Onyasi (Appeal 029 of 2022) [2023] KEELRC 24 (KLR) (20 January 2023) (Judgment)

Neutral citation: [2023] KEELRC 24 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

APPEAL 029 OF 2022

NJ ABUODHA, J

JANUARY 20, 2023

BETWEEN

JUMBO NORTH(EA) LIMITED .... APPELLANT

AND

JAIRUS NYAATA ONYASI .... RESPONDENT

JUDGMENT

1. The appellant herein was the defendant in Eldoret CMCC No 310 of 2016 wherein the respondent had sued for general and special damages for injuries sustained by him in the course of his employment.
2. The respondent in his amended plaint dated July 15, 2016 stated that at all material times, he was employed by the defendant as a General worker and that on or about October 3, 2014 or thereabout he was lawfully engaged on duty when the machine which he was using split into two and one piece of the metal hit him as a result of which his 3rd and 4th left fingers were injured. The respondent blamed the appellant for his injuries, alleging negligence on the part of the appellant and/or its agents, servants or other employees for his injuries.
3. The appellant denied the respondent's claim vide its amended defence dated July 20, 2016.
4. The matter proceeded to full trial where the learned trial magistrate heard the parties and their witnesses and, in his Judgment delivered on June 16, 2017, the trial Magistrate found appellant 100% liable to the respondent and awarded him Kshs 200,000/= in general damages and Kshs 7,200/= as special damages.
5. Being aggrieved by that decision, the appellant lodged this appeal *vide* a memorandum of appeal dated July 6, 2017 on the grounds that; -
   i. That the learned trial magistrate erred in law and fact in holding the appellant herein 100% liable in negligence without considering the evidence tendered in court.

ii. That the learned trial magistrate erred in law and fact in failing to take into account the fact that the respondent did not prove negligence on the part of the appellant.

iii. That the learned trial magistrate erred in law and in fact in failing to evaluate, consider and determine all the issues raised in the pleadings and in the evidence especially as to how the accident occurred hence an erroneous judgment.

iv. That the learned trial magistrate erred in law and in fact in failing to find that the evidence adduced as to the circumstances leading to the alleged accident did not conform to the facts laid out in the plaint.

v. That the learned trial magistrate erred in law and in fact in holding the appellant wholly liable for the respondent's injuries when no initial treatment notes were produced in proof of the injuries allegedly sustained by the respondent.

vi. That the learned trial magistrate erred in failing to consider and/or take into account the submissions filed by the appellant hence an erroneous judgment.

vii. That the learned trial magistrate erred in law and in fact in applying the wrong principles of law in assessment of damages hence an erroneous award.

viii. That the learned trial magistrate erred in law and in fact by proceeding to assess damages in the sum of Kshs. 207,200 in favour of the respondent which quantum was excessive in the circumstances and not supported by the law or evidence as the respondent had sustained soft tissue injuries which injuries had completely healed.

ix. That the learned trial magistrate erred in law and in fact in failing to consider the provisions of order 21 rule 4 of *Civil Procedure Rules*

x. That the learned trial magistrate erred in law and in fact in failing to consider and apply the provisions of the *Evidence Act* and in particular section 107,108 and 109.

xi. That the learned trial Magistrate erred in law and in fact in failing to hold that the respondent had not proved his case on a balance of probability as expected by law.

6. Consequently, the appellant sought for judgment against the respondent and prayed for the trial court's judgment to be set aside and the respondent's claim to be dismissed with costs.

7. On July 4, 2022, the court gave directions for the appeal to be canvassed by way of written submissions. The appellant filed its submissions on July 19, 2022 whereas the respondent filed his on August 24, 2022.

Appellant's submissions

8. The appellant has submitted that the issues for determination for this appeal are;

i. Whether the respondent's claim was properly instituted and whether the court had jurisdiction to entertain the matter.

ii. Whether the respondent was injured on October 3, 2014 while in the cause of employment

iii. Whether the respondent proved his case on a balance of probability as against the appellant to warrant 100% liability

9. On the first issue, it was submitted that the respondent's claim was not properly instituted and the subordinate court had no jurisdiction to entertain the matter because the suit was filed as a result of the injuries sustained in the cause of duty and as such it follows that being a work injury claim which is governed by the *Work Injury Benefits Act* 2007. Under the Work Injury Benefits for injuries sustained in the cause of duty were to be referred and or filed before the Director of Occupational Safety and Health Services.

10. According to the appellant, the suit as instituted was irregular, offended the cited provisions of the law and therefore could not legally be adjudicated by the subordinate court. It was contended that the court lacked jurisdiction to entertain the matter and therefore any action and/or orders and/or judgment entered in the matter is of no effect for want of jurisdiction.

11. On the second and third issues as to whether the respondent was injured on October 3, 2014 while in the cause of employment and whether the respondent proved his case on a balance of probability as against the appellant to warrant 100% liability, counsel submitted that indeed the respondent was injured on October 3, 2014 while in the cause of employment but maintained that the respondent was negligent as he did not report any hazardous defects on the machines and equipment in the safety arrangements to the supervisor despite the appellant having a safety policy in place.

12. It was submitted that the respondent did not adduce any evidence to show that he took all the necessary care of his own safety in undertaking his duties despite being aware of the risks involved and that as such, the respondent did not establish any fault on the part of the appellant to warrant a finding on liability.

Respondent's submissions

13. The respondent on his submitted that the issues for determination were;

    i. Whether the respondent proved his case on a balance of probability against the appellant.

    ii. Whether the award of Kshs 200,000 as general damages by the trial court was justified.

    iii. Whether objection as to the jurisdiction can be raised at this stage and if so, is the issue of jurisdiction raised by the appellant merited.

14. In addressing the first issue, counsel for the respondent submitted that the trial magistrate correctly held that the respondent had proved negligence against negligence against the appellant. It was submitted that the respondent proved negligence as required by section 107 and 109 of the *Evidence Act* that the appellant had failed to provide a safe working environment. It was further contended that the trial court's finding that the appellant was liable for negligence as it failed to demonstrate that it had put in place a guard to shield employees and/or that the appellant was supplied with safety gears for instance gloves.

15. As to the issue of whether the award of Kshs 200,000 as general damages by the trial court was justified, it was submitted that the said award was reasonable in the circumstances noting that the cut wounds on the 3rd and 4th left fingers were more serious and that the trial court gave reasons in its judgment for the award.

16. On the last issue as to whether an objection as to the jurisdiction can be raised at this stage, counsel for the respondent submitted that the said issue is an afterthought since it is not among the grounds of appeal raised in the appellants memorandum of appeal and that this court should not entertain the same as the appellant is seeking to introduce the ground of jurisdiction through the backdoor.

17. In the end, the court was urged to dismiss the appeal with costs as it is not merited.

18. This being a first appeal, this court has a duty to re-evaluate all the evidence adduced before the lower court with a view to drawing its own conclusions thereon while giving due allowance for the fact that it did not have the benefit of seeing or hearing the witnesses. In *Selle & another vs. Associated Motor Boat Co. Ltd & others* [1968] EA 123, this principle was elucidated thus:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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..."

19. I have carefully considered the evidence that was presented before the lower court. The plaintiff/ respondent testified and called one witness in furtherance of his case. He testified as PW2 and stated that on the October 3, 2014, he was in the course of his employment at Jumbo North(EA)Ltd where he sustained cut words to the 3rd and 4th fingers of the left hand. He stated that he was treated at Uasin Gishu District Hospital as an outpatient and later on he was examined by Dr. Joseph Sokobe and issued with a medical report which he paid Kshs 6,000 and Kshs 1,500 as consultation fees

20. The respondent called Dr Sokobe who testified as PW1. PW1 confirmed to examining the respondent and stated that the respondent had sustained cut wounds on the 3rd and 4th left fingers, which were soft tissue injuries and that he had recovered by the time he examined him.

21. The appellant on its part called one witness, a Mr Lawrence Osoro who introduced himself as the appellant's supervisor and testified as DW1. He confirmed that indeed the respondent was injured on the fateful day while on duty but was categorical that he had been issued with protective gears, i.e gloves. DW1 stated that the respondent was the one operating the machine and as such it was incumbent on him to report any fault in the machine.

22. With that evidence, parties closed their respective cases and the court retired to write the impugned judgement after directing parties to file written submissions.

23. I have analysed the proceedings of the lower court, the appeal before me and the rival submissions at length and I find that the main issues for determination are;

    i. Whether the trial court was clothed with jurisdiction to handle this matter

    ii. Whether the appellant was liable for the accident

    iii. Whether the respondent proved his case on a balance of probability to warrant the amount awarded.

24. On the first issue that has been raised by the appellant, I agree with the respondent that the issue of jurisdiction ought to have been raised on the onset at the trial court. However, it is worthy to note that cases of this nature were filed before the Director Occupational Safety and Health after the enactment of the *Work Injuries Benefits Act 2007* (WIBA) which came into force on 2nd June 2008 by Gazette Notice No. 60 of May 23, 2008.

25. There has been a series of litigation surrounding this issue ranging from the High court to the court of Appeal and even to the Supreme court where the superior court recently pronounced itself on the issue

in *Law Society of Kenya v Attorney General & another* [2019] eKLR in its judgment that was delivered on December 3, 2019.

26. It is worth noting that the instant case was heard and determined by the trial court before the Supreme court pronounced itself on the issue at hand.

27. Suffice to say, I note that the issue of jurisdiction was not raised as a ground in the memorandum of appeal by the appellant. It is therefore my considered view that the issue of jurisdiction is a nonstarter at this point.

28. I will now proceed to address the other pertinent issues of liability and quantum awarded by the trial court. It is not in dispute that the respondent was employed by the appellant and that he was injured while on duty on October 3, 2014.

29. On the issue of liability, I have analysed the testimony of PW2 and DW1 in the trial court. The respondent in his testimony stated that on the fateful day, he was carrying out his duties when the machine he was using split into two and one piece of the metal hit him on his 3rd and 4th left fingers as a result of which he sustained injuries.

30. DW1 on the other hand blamed the respondent for the accident. He stated that the respondent was in control of the machine and that had there been a malfunction in the machine, he should have detected and reported the issue to the relevant authority but he chose not to.

31. Taking all issues into consideration, it is my view that the respondent had no role to play as regards the splitting of the machine. The machine was the appellant's property and as such it was incumbent on it to ensure that it was in good condition before allowing the respondent to operate it. I therefore agree that the appellant was 100% liable for the accident.

32. The next issue that I will deal with is with regard to the award of the trial court. The court awarded the respondent Kshs 200,000 as general damages and Kshs 7500 as special damages based on the injuries he sustained.

33. From the trial court's file and particularly Dr Sokobes's medical Report which was produced as PEXh 2a, the respondent sustained cut wounds on the 3rd and 4th left fingers. The respondent in his submissions at the trial court had sought for Kshs 300,000 as compensation for the injuries sustained.

34. The appellant on the other hand had urged the court in their submissions to award Kshs 70,000 to the respondent while placing reliance on the case of *Sokora Plywoods Limited vs Moses Mburu Mutua* (2016) eKLR where the respondent had sustained cut wound over the left middle finger and the court on appeal upheld Kshs 70,000.

35. The trial court awarded Kshs 200,000/- for injury to two fingers. In the case cited by the appellant, the plaintiff was similarly injured but on one finger. It is apt to state at this point that this court as an appellate court will not interfere with any quantum of award merely because it is felt too high or too low. For the court to interfere the appellant must show that the award was either too high or two low as to reveal that the trial court did not apply itself properly to the facts of the case or took into consideration irrelevant facts. The court has carefully reviewed the award of the trial court and is not persuaded that it is too high as to reflect an erroneous evaluation of facts and authorities applicable to similar injuries.

36. In conclusion the appeal is found without merit and is hereby dismissed with costs.

37. It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 20TH DAY OF JANUARY, 2023

ABUODHA NELSON JORUM

JUDGE ELRC