



**Solpia Kenya Limited v Kanunga (Appeal 21 of 2023)  
[2023] KEELRC 971 (KLR) (24 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 971 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL 21 OF 2023  
NJ ABUODHA, J  
APRIL 24, 2023**

**BETWEEN**

**SOLPIA KENYA LIMITED ..... APPELLANT**

**AND**

**AUGUSTINE MUSYIMI KANUNGA ..... RESPONDENT**

**JUDGMENT**

1. Through a memorandum of appeal filed on April 9, 2018, the Appellant contended among others that:
  - i. The Learned trial Magistrate erred in Law and disregarding the Appellant’s evidence on record and erroneously finding that the Appellant breached the duty of care owed to the to the Respondent
  - ii. The Learned trial Magistrate erred in law and fact in apportioning liability against the weight of evidence.
  - iii. The learned Trial Magistrate erred in law in awarding General damages at Kshs 480,000/- as to amount to a misapplication of the principles of assessment of damages.
  - iv. The Learned trial Magistrate erred in law and in fact in finding in the Respondent’s favor without considering legal precedents the Appellant.
  - v. Learned trial Magistrate erred in’ law and in fact in awarding damages where no negligence was proved by the Respondent.
2. The Appellant therefore asked the Court to set aside the judgment delivered on March 21, 2018, dismiss the award on quantum and make an order on the costs of the appeal.
3. In support of the appeal, Mr Mwende for the Appellant submitted that though there is a general rule that the employee was liable for any injury or loss that occurs to his employees while at workplace as



a result of the employee's failure to ensure their safety, this did not mean that the employer would always be liable in all circumstances regardless of what caused the accident in question because there are scenarios where accidents occur due to the employee's own negligence. In this regard, the Trial Magistrate erred in not taking into consideration the provisions of Section 13(1)(a) of the *Occupational Safety and Health Act* which required every employee while at workplace to ensure own safety and health and that of other persons who may be affected by his acts or omissions at work place.

4. According to Counsel, the employer's duty of care is not absolute and does not extend to cases where the employee is acting negligently or carelessly. In this case, Counsel submitted the Magistrate erred by stating that the defence did not prove that they availed the requisite equipment like the ladder to the plaintiff to enable him use. According to Counsel, DW1 confirmed that the company had aluminum ladders they use to climb high storage in their facility. The Claimant ought therefor to have common sense and fetched the ladder for use when retrieving the scale.
5. On apportionment of liability, Counsel submitted that apportionment of liability is a discretion which the Appellate Court will only interfere when it is clearly wrong or based on no evidence or an application of wrong principles. In this regard, Counsel submitted that the Trial Magistrate erred when she failed to appreciate that as much as the employer owes the employee duty of care, the employee should in turn ensure his safety while undertaking duties in workplace.
6. Regarding quantum, Counsel submitted that the Trial Magistrate ought to have taken into consideration the severity of the Respondent's injuries. The Respondent's injuries were fully treated and he healed and worked until he was declared redundant.
7. Counsel further confirmed that the Court relied on the expert testimony of one Dr Okere who was a physician and lung specialist. The Respondent's injuries were on his left hand which had fractured. Thus the Trial Magistrate erred on relying on an expert who lacked the specialty in orthopedics hence failed to appreciate the nature of the injuries that befell the Respondent.
8. The Respondent on its part submitted in the main that the Respondent was an employee of the Appellant working as an Assistant Supervisor. He was instructed by his Manager to climb a shelf and pick a scale and in the process he slipped and fell breaking his left hand.
9. According to Mr Singora, the Respondent blamed the Appellant for assigning him duties he was not employed to do, and failing to provide him with a ladder to use and safe means of doing the task assigned. Counsel further submitted that despite the fact that he requested for a ladder, his Manager Mr Joo ordered him to climb the shelf and fetch the scale in the process of which he fell and broke his hand. Failure to provide the Respondent with proper tools to perform the tasks assigned was an act of negligence on the part of the Appellant.
10. Counsel further submitted that both DW1 and DW2 confirmed that they did not witness the accident and did not produce any accident report before the Court to corroborate their statements. Further despite alleging that the Respondent picked the scale on his own, they never denied he received instructions from Mr Joo nor was the said Joo called to deny that he instructed the Respondent to fetch the scale.
11. On the issue of expert evidence, Counsel submitted that the Trial Magistrate did not err in relying on Dr Okere's report because although he was a lung specialist, the Doctor confirmed to the Court that he possessed the necessary experience having practiced as a general practitioner for a long time. Besides, the Appellant never requested for a second medical opinion or bring their own medical expert.
12. On the issue of quantum, Counsel submitted that the Lower Court's assessment and award were not inordinately high tow arrant inference by this Court.



13. This being the first appeal, it is an appeal on both law and facts. As a first Appellate Court, the Court is required to re-evaluate the evidence presented before the Trial Court and arrive at its own conclusions bearing in mind the Court did not have the advantage of seeing or hearing the witnesses. (*Selle & Another v Associated Motor Boat Co Ltd & Others* [1968] EA 123)
14. The Appellant complained that the Trial Court erred in law and fact in disregarding the Appellant's evidence on record erroneously finding that the Appellant breached the duty of care owed to the Respondent.
15. The Appellant called two witnesses. DW1 on material part stated:

“That the Defendant had ladders on standby to move items from heights and since the Plaintiff was a team leader, he was not required to do manual work like climbing ladders .... No one instructed him to climb the ladder. He further stated that he was called after the accident and that he did not witness the accident since he was not in the store.”
16. According to the Trial Magistrate, DW1 told the Court that stores were part of operations and since he oversaw all operations, he however was not responsible for disbursing materials in the store and had proof that ladders existed he further did not produce any protective gear issuance register. DW1 further informed the Court that she could not pick items from the store without authority.
17. The Trial Magistrate further noted from DW2 when she said the plaintiff was instructed to deliver the scale to maintenance room but after repairs it was the maintenance manager who was to return the scale. However the Plaintiff went to collect the scale by himself and used a plastic container to reach the scale which slipped and he fell down hence his injuries. DW2 further stated she did not witness the accident.
18. The Claimant (Respondent) on his part informed the Court that he was employed as a supervisor and his work was to supervise juniors but was injured when he was assigned to get items from the store which was not part of his duties. He just carried out deities outside his scope to avoid his service being terminated. He further told the Court that he was not given a ladder to assist him climb up to pick the scale and he was further not given boots. He was further not taught on the safest way to get the scale from the store.
19. The above is the Trial Court's summary of the evidence before it. Based on the above evidence, the Trial Court observed and found as follows on the issue of liability:

“I have weighed the evidence on a balance of probabilities and find that the plaintiff's testimony that he was instructed by Mr Joo to remove the scale from the store has not been challenged since Mr Joo was not called to recant that he indeed instructed and/or authorized the plaintiff to remove the scale from the store. I find that the plaintiff was instructed to remove the scale from the store and from the testimony of DW1 he told court that no one could get an item from the store without authority which evidence corroborated the evidence of the plaintiff that he could not have removed the scale from the store without authority and in his case Mr Joo gave him that authority hence if the plaintiff did not have authority then action could have been taken against the him but none was taken. As regards liability I find that the plaintiff partly contributed to the accident. He did not tell the court on what measures he took to ensure his safety when climbing to get the scale from a height in the store if he used the plastic container which slipped as a result he fell or any other item that he used then he did not settle on a safe equipment to climb on when getting the ladder, all circumstances considered, on the part of the defence they did not prove that they



availed the requisite equipment like the ladder to the plaintiff at the time enable him climb on height, they did not prove that they offered the requisite supervisions to him to ensure that he executed his task well to avoid the accident. They therefore breached their statutory duty to the plaintiff as an employee, by failing to provide the equipment for the job they exposed the plaintiff to risk while at his place of work in the circumstances I apportion 50% liability against the plaintiff and 50% against the defendants.”

20. The Court has carefully considered the Trial Court’s recording, analysis and finding on the evidence before it and is not convinced that it could have come to a different conclusion based on the evidence before the Trial Court. It is therefore not correct that the Learned Trial Magistrate erred in finding that the Appellant breached duty of care owed to the Respondent. Section 13(1)(a) of the Occupational Safety and Health Act while imposing the duty on an employee to ensure his own safety and health and that of others does not lessen the greater responsibility placed on the employer as the occupier of the premises where the work is being carried to ensure a safe working environment including safe work places and provisions of safety and protective gear where necessary.
21. The Appellant as rightly observed by the Trial Magistrate, never proved that it provided the Appellant with safe tools for the performance of the work he was assigned to perform. This ground of appeal therefore fails.
22. On quantum, the Trial Magistrate awarded the Respondent general damages at Kshs 480,000/= which was apportioned equally between him and the Appellant exclusive of special damages and costs. The quantum was arrived at after considering similar authorities as guide in tandem with the Respondent’s injuries. The Court has reviewed and considered the same and does not consider the award inordinately high to warrant interference. This ground of appeal is also rejected.
23. On the issue of expert testimony, Dr Okere stated that prior to specializing in lung diseases he had practiced as a general practitioner for a long period of time. The Court further takes judicial notice that in medical training all doctors are initially trained as general practitioners before specializing in their respective area of interest. In any event, if the Appellant was doubtful of Dr Okere’s medical opinion nothing prevented them from calling a second medical opinion.
24. In conclusion, the appeal is found without merit and is hereby dismissed with costs.
25. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 24<sup>TH</sup> DAY OF APRIL, 2023**

**ABUODHA J. N.**

**JUDGE**

**In the presence of:-**

Ndolo for the Appellant

No appearance for the Respondent

