W. E. Tilley (M) Limited v Libese (Appeal 11 of 2017)
[2023] KEELRC 1159 (KLR) (15 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 1159 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL 11 OF 2017

NJ ABUODHA, J

MAY 15, 2023

BETWEEN

W. E. TILLEY (M) LIMITED ..... APPELLANT

AND

JOSEPH JAPHETH MUSASIA LIBESE ..... RESPONDENT

JUDGMENT

1. By a memorandum of appeal filed on August 30, 2017, the Appellant herein faulted the judgment of the lower court on grounds inter alia:

    i. That the Learned Trial Magistrate erred in fact and in law by failing to failing to judiciously analyze the evidence on record thereby arriving at a finding that the Appellant was 100% liable which finding is untenable, unfair and manifestly unjust.

    ii. That the Learned Trial Magistrate erred in fact and in law by awarding the Respondent Kshs.400,000/= as general damages on the face of the medical evidence on record that indicated that he had sustained purely soft tissue injuries which award is unfair, highly excessive, exaggerated and inordinately high.

2. In support of the appeal, Mr. Muriuki for the Appellant submitted that the Appellant could not have foreseen that a nail trap would be laid on the road and that the Appellant could not be expected to have the attacks by the thugs. It was further submitted that even if the Respondent had been provided with a turn boy that would not have offered security against armed thugs. In any even criminals do not announce the time of their intended attacks.

3. Counsel further submitted that provision of security for the citizens was the responsibility of the state and not private citizens. The Appellant could not therefore be held liable for criminal activities which it had no capacity to avert.

4. Mr. Muriuki further submitted that the Appellant called its workshop manager who testified that drivers are strictly instructed to park their motor vehicles and get safe accommodation before 7.00 pm while traveling. The Respondent thus flouted the said instructions by driving at night thus exposing himself to danger. According to the witness the Respondent in his own statement stated that he had stopped at Mai Mahiu at around 7.00 pm to wait for a colleague who was driving a different motor vehicle belonging to the company. After waiting to close to an hour and failing to reach his colleague, he decided to drive alone to Suswa.

5. From the foregoing, Counsel submitted that it was apparent that the Respondent fully understood the inherent risks involved in driving at night. By deciding to drive at night against express instructions by his employer, the Respondent took upon himself the risk associated with driving at night. He was thus solely to blame for the incident which was not foreseeable by the Appellant.

6. In support of these submissions Counsel relied on the case of *Mini Bakeries Limited v Reuben Kaloki Muindi* HCCA No. 942 of 2004, *Hudson Luvinzu Elavonga v Kenroid Ltd* [2016] eKLR and *Abadalla Baya Mwanyule v Said t/a Jomvu Total Service Station* [2004] eKLR.

7. On quantum, Counsel submitted that they submitted before the Trial Court that an award of Kshs.100,000/= would reasonably compensate the Respondent and relied on authorities submitted before the Trial Court.

8. In the case *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123, it was held that:

> " 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."

9. The Appellant has complained that the Trial Court erred in law and fact in holding the Appellant fully liable for the injuries sustained by the Respondent in the course of his employment when he was attacked by criminals along Mai Mahiu Suswa Road.

10. It was the Respondent's evidence before the Trial Court that on the material date, he was sent to collect fish from Homabay. By bad luck the vehicle stepped on a nail trap and got a puncture. He stopped to change the tyre. In the process some people emerged from the bushes and beat him up and took all he had including the vehicle keys.

11. In cross examination he stated that he no turn boy on the material day and if he had one he could have fixed fast.

12. The Appellant's witness Mr. Daniel Waiharo stated that the Respondent was advised not to drive after 7.00 pm because of security reasons and there was no need to drive at night due to the nature of the Appellant's work. It was his evidence that the Respondent could not have foreseen the possibility of the attack.

13. *Halsbury Laws of England* 4th Edition Vol. 16 paragraph 562 discusses the extent of employer's duty and states in material part as follows:

> " It is an implied term of the contract of employment at common law, that an employee takes upon himself risks necessarily incidental to his employment. Apart from the employer's duty to take reasonable care, an employee cannot call upon his employer, merely upon the

ground of their relation of employer and employee, to compensate him from an injury which he may sustain in the course of his employment in consequence of the dangerous character of the work upon which he is engaged."

14. The Court of Appeal in the case of *Abadalla Baya Mwanyule v Said t/a Jomvu Total Service Station* [2004] eKLR relied on by the Appellant stated that:

> "We think, what we have stated above is enough to show that the employer owes no absolute duty to the employee and the only duty owed is that of reasonable care against risk of injury caused by events reasonably foreseeable or which would be prevented by taking reasonable precaution."

15. The Respondent as a driver had a personal duty to take reasonable care not to expose himself to risk of attack or injury in the course of his work as a driver. Indeed any ordinary and experienced driver as the Respondent was deemed to know the possible risk a driver could be exposed to while stopping to change a tyre at night. There was possibility of driving on a flat tyre for a reasonable distance until safe to stop. It did not emerge from the evidence that the tyre was too damaged to move him any further to reasonable safe location for tyre change.

16. The Court further observes that the Appellant stated that drivers were advised not to drive beyond 7.00 pm. They were required to park the vehicle in safe area and look for a safe accommodation. This was contained in the Appellant's witness statement which was served on the Respondent well in advance. He never rebutted this. A mere omission to produce such a policy in Court does not negate its existence or reasonableness in the circumstances. The Respondent in his own sense of safety was expected to be aware of that. He did not allege that he sought to stop at Mai Mahiu when it got to 7.00 pm and was refused.

17. From the foregoing, the Respondent exposed himself to risk which he could have avoided. The Trial Court to this extent erred when it did not apportion liability for negligence in this respect.

18. The Appellant on the other had was negligent in allowing the Respondent to embark on such a journey alone without the company of a turn boy. The Court agrees with the Respondent that it would have bene faster to change the tyre if they were two of them. Based on this, the Court will apportion liability at 70% against the Appellant.

19. On quantum, the Trial Court awarded the Respondent Kshs.400,000 on account of damages for pain and suffering. The Trial Court in making the award stated as follows:

> "The Plaintiff submitted for an award of Kshs.700,000/- for pain, suffering and loss of amenities and cited the case of Joseph Kiptonui Koskei vs KPLC Co. Limited [2010] eKLR Nature of injuries sustained by the plaintiff in this case is different from the present case. Injuries are not comparable. The defendant submitted for an award of Kshs.100,000/- and quoted two decided cases: Kreative Roses Limited vs Olpher Kerubo Osumo [2014] eKLR an award of 50,000/= was made for soft tissue injuries. Eastern Produce (K) Limited (Savani Estate) vs Gilbert Muhunzi Makotsi [2013] eKLR an award of Kshs.70,000/- was made for soft tissue injuries. I have considered the nature of plaintiff's injuries consistent durability to his eye and ear, cited awards plus the incidence of inflation. I find an award of Kshs.400,000/- is adequate compensation for pain, suffering and loss of amenities."

20. In the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR the Court stated:

> "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."

21. The Court has reviewed and considered the nature of the Respondent's injuries, the authorities submitted before the Trial Court and analysis by that Court vis a vis the award and is not persuaded that it is too high to warrant interference by the Court. This ground of appeal therefore fails.

22. In conclusion, this Court will allow the appeal only to the extent of apportionment of liability for negligence at 70% as against the Appellant. The Respondent shall bear 30% contributory negligence.

23. Each party shall bear their own costs of the appeal

24. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 15TH DAY OF MAY 2023

Abuodha J. N.

Judge

In the presence of:-

No appearance for the Appellant

Okao for the Respondent