Mutisya v Autosprings Manufacturers Limited (Appeal 7 of 2022)
[2023] KEELRC 1309 (KLR) (2 June 2023) (Judgment)

Neutral citation: [2023] KEELRC 1309 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS

APPEAL 7 OF 2022

B ONGAYA, J

JUNE 2, 2023

(FORMERLY HCCA NO. 127 OF 2017)

BETWEEN

JAMES MUTUNGA MUTISYA ..... APPELLANT

AND

AUTOSPRINGS MANUFACTURERS LIMITED ..... RESPONDENT

(Being an appeal from the judgment and decree of the Hon. I. M. Kahuya, Senior Resident Magistrate, Machakos in CMCC No. 44 of 2014 delivered on 12.04.2018)

JUDGMENT

1. The appellant is James Mutunga Mutisya. He filed the memorandum of appeal on 18.02.2021 through Shem Kebongo & Company Advocates. The appellant appealed against the quantum of damages upon the grounds that the learned trial Magistrate erred in law and fact as follows:

    a. By deciding the case without considering all the evidence on record.

    b. By wrongly evaluating the evidence on record and threby arriving at a wrong conclusion that the accident in question was substantially caused by the appellant.

    c. By failing to appreciate law or duty imposed upon the respondent towards the appellant while on duty thereby arrived at a wrong conclusion all together.

    d. By failing to consider the appellant's submissions and authorities on both liability and quantum and entirely relied on respondent's.

    e. In holding the manner in which the accident occurred could not have been prevented as it was basically ab accident which finding is not supported by the evidence before court or any logical inference.

f. By apportionment of liability as it was based on wrong principles hence occasioning injustice to the appellant.

g. By refusing to give an order of costs in favour of the appellant.

h. Failing to follow principles in awarding costs.

i. By failing to award costs to the appellant by sufficiently considering the length of tome the case had taken together with the hefty expenses consequently incurred.

2. The appellant prayed for the appeal to be allowed, the judgment of the Honourable Magistrate delivered on 12.04.2018 and ensuing decree to be set aside.

3. The appellant filed submissions on 20.04.2023. The respondent did not file submissions and despite service of the relevant mention notice the respondent did not attend Court.

4. The Court has considered the material on record. The Court returns as follows.

5. On the role of Court on first appeal, it is that the Court will revaluate the evidence before the trial Court and make its own conclusions bearing in mind that it is the trial Court which took the evidence and the appellate Court does not have that direct benefit of the trial Court. The Court will not interfere with the trial Court's findings unless it is shown that there exists an error or misdirection in principle on the part of the trial Court.

6. The 1st issue urged in the appellant's submissions is that the trial Court erred by apportioning liability between the parties at 50:50. In apportioning the liability as such, the Court observed that the respondent had failed to provide the appellant safety boots while the appellant in cross-examination stated that the accident had occurred because of the appellant's slipping. The trial Court found that the appellant's evidence that the respondent failed to provide him ith protective clothing and also exposing him to unsafe working environment had not been rebutted. The Court has considered the evidence and indeed it was that the respondent failed to provide the appellant protective gear including safety boots. The Court finds that the appellant's lamentation is correct that the trial Court erred when it found thus, "In fact, the entire accident was basically "accidental" since the Defendant would not have done anything to stop him from slipping. However, I believe he would have cushioned him from severe injury had he provided him with safety boots which was not the case here." The Court finds that there was an error in analysis. First, if the safety boots were provided, the appellant would not have slipped as he would had enjoyed a stronger grip with the surfaces. Second, with the safety boots in place, even if the grip with surfaces failed and the appellant slid as it happened, he would not have been pierced on his right leg or heel. In the instant case there was nothing attributable to the appellant that made him prone to the accident except that he had not been provided with the safety boots. The slipping was indeed the inherent risk that the safety boots would be required. It is not said for example the respondent had provided the boots but the appellant failed to use them – thereby contributing to the slipping and serious poking into his heal. The Court finds liability for the respondent at 100%.

7. While making that finding the Court has considered the decision of the Court of Appeal in *Purity Wambui Muriithi –Versus- Highland Mineral Water Company Ltd* [2015] eKLR thus,

> "Section 6(1) of the *Occupational Safety and Health Act* provides, "Every occupier (employer) shall ensure the safety, health and welfare at work of all persons working within his workplace."

It therefore, follows that as a general rule the employer is liable for any injury or loss that occurs to his employees while at the workplace as a result of the employer's failure to ensure their safety. Does

this mean that the employer would always be liable in all circumstances regardless of what caused the accident in question? We do not think so. We say so because where an accident happens due to employees own negligence it would be unfair to hold the employer liable. Further section 13(1) (a) of the *Occupational Safety and Health Act* Provides;

"13(1) Every employee shall, while at workplace-(a) ensure his own safety and health and that of other persons who may be affected by his acts or ommission at the workplace." Therefore, the employee is also required to take reasonable precaution to ensure his/her safety at the workplace while performing his/her duties."

8. The Court has found that in the instant case there is no established contributory negligence as there is no established act or ommission by the appellant that has been shown to have contributed to his slipping such as failure to be careful (as suggested by the trial Court) or failure to actually use the provided safety boots. The appellant case for 100% apportionment of liability for the respondent is upheld.

9. On quantum, it is submitted for the appellant inapplicable authorities for the respondent were relied upon at the expense of disregarding the truly applicable authorities by the appellant. The appellant suffered cut wound on right foot sole. He suffered pain and bleeding. He was put on antibiotics, analgesics and injections tetanus toxoid. He sustained soft tissue injuries, moderate in degree. Prognosis was fair.

10. The trial court considered *Channan Agricultural Contractors Ltd –Versus- Fred Barasa Mutayi* [2003] eKLR awarding Kshs.130, 000.00 for blunt injuries to the chest, head and cut wound to the left leg and *Simon Muchemi Atako & Another –Versus- Gordon Osore* [2013] eKLR awarding Kshs. 120, 000.00 for similar blunt and cut injuries. Taking into account inflation and that the sole wound had already healed the Court awarded 80, 000.00. the appellant submits that the award should have been Kshs.130, 000.00. The appellant relies *Kenya Tea Packers Ltd –Versus- Jared Kiplangat Kirui*[2014]eKLR where for injuries of cut wound to the sole of the left foot, contusion to the left foot and cut tendon on the left foot, the High Court upheld an award of Kshs.100,000.00. The Court finds that in the instant case the injuries did not go beyond the soft tissue injuries on the right sole. The Court finds that the Award of Kshs. 80, 000.00 by the trial Court were reasonable and justified. They will not be disturbed.

11. The appellant faults the trial Court in not awarding the appellant costs of the suit. In denying the award of costs, the trial Court stated,

> "With respect to costs and interest of the suit, the same is denied since both parties deliberately delayed this case for many years and it had to take the Court's firm intervention for it to proceed to its logical conclusion."

The appellant has not attacked the trial Court's reasons for denying the costs. The appeal on that ground must fail. The Court of Appeal in *Kiska Limited –V- DE Angelis* (Civil Appeal No. 9 of 1968) [1968] EACA 14; (17 July 1968) De Lestang, Ag –P held,

> "Where a trial court has exercised its discretion on costs, an Appellate Court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where reasons arc given if it considers that those reasons do not constitute "good reason" within the meaning of the rule." The Court is guided accordingly.

In conclusion the appeal is hereby determined as partly allowed with orders:

1. The respondent to bear 100% liability awarded at Kshs. 80,000.00 in general damages payable by 01.08.2023 failing interest to run thereon from the date of this judgment till full payment and the trial Court's decree varied to that extent.

2. The denial of costs by the trial Court to both parties is upheld.

3. The respondent to pay the appellant's costs of the appeal.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 02ND JUNE, 2023.

BYRAM ONGAYA, PRINCIPAL JUDGE