



REPUBLIC OF KENYA



KENYA LAW
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**Kofinaf Limited v Njuguna (Appeal E147 of 2021)
[2023] KEELRC 2703 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2703 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E147 OF 2021
K OCHARO, J
SEPTEMBER 22, 2023**

BETWEEN

KOFINAF LIMITED APPELLANT

AND

LUCY NJERI NJUGUNA RESPONDENT

JUDGMENT

Introduction

1. The appellant filed the appeal herein through a memorandum of appeal dated November 16, 2021 raising 6 grounds against the Judgment of the Honourable Senior Principal Magistrate as follows:-
 - a. That the learned trial magistrate erred in law and in fact in assessing damages at Kes 102,000/- and finding the defendant 100% liable for the accident in total disregard of the evidence and testimony adduced in Court thereby arriving at a wrong conclusion.
 - b. That the learned trial magistrate reached a wrong decision in law and in fact contrary to the evidence before him.
 - c. That the learned trial magistrate erred in law and fact in failing to consider and mis-appreciating the pleadings, evidence, submissions and case law by the Defendant and thereby arriving at a wrong conclusion of law.
 - d. That the learned trial magistrate erred in law and practice in awarding a manifestly excessive quantum of damages which was not commensurate with the nature of injuries suffered and/or loss proved.
 - e. That the learned trial magistrate erred in law and fact in failing to be guided by similar relevant authorities and case law in assessing quantum and therefore arriving at a wrong conclusion.



- f. That the learned trial magistrate erred in law and fact by misdirecting herself and acting on a wrong principle of law in assessing liability.
2. On the above grounds, the Appellant prayed for orders that:-
 - a. This appeal be allowed and the learned trial magistrate's judgment, decision and decree on quantum be set aside and quashed and be substituted by this honourable court's orders.
 - b. This honourable court do adjudicate and determine the issues of liability and quantum and arrive at a just judgment in light of the evidence on record.
 - c. The costs of this appeal and proceedings be provided for.
3. The appellant filed their Record of Appeal dated February 15, 2022 on March 3, 2022.
4. On July 15, 2022, the appeal came up before this Court for directions, when the Court gave directions that the same be canvassed by way of written submissions. The parties obliged the directions. Their submissions are on record.

Appellant's Case

5. Through a plaint dated March 20, 2013 filed by the respondent herein before the trial court, the respondent contended that through a workplace incident, she suffered injuries whilst in the course of her employment with the appellant. She attributed the occurrence of the incident to the appellant's and or its agents or servant's, negligence, and breach of contractual and or common law duty of care.
6. That it was an express or implied term of the employment contract between her and the appellant, or the appellant's express or implied common law contractual duty, to provide her with a safe and proper workplace, adequate and efficient working equipment, proper and efficient supervision, an effective system of working as well as protective devices and clothing.
7. She asserted that in breach of its above-stated obligations, and its duty of care owed to her, on or about January 5, 2020, the appellant and or its agents allowed and or caused the respondent to be attacked, beaten and roughed up by persons unknown to her, who were the appellant's agents and or employees, without any lawful cause or reason.
8. That at the material time, the respondent was carrying on her duties as a coffee picker on the appellant's farm at the instructions of the latter's supervisor. It later dawned on her that the people who attacked and assaulted her were permanent employees of the Appellant who were on strike, and who were out to ensure that no work would go on at its farm.
9. It was her case before the trial court that as a result of the unlawful and unjustified attack, she suffered injuries to wit, soft tissue injuries on her legs, chest and back. Further, as a result of the injuries, she incurred certain expenses. By reason of this, the Appellant was legally liable to pay her both general and special damages.
10. At the trial, the Respondent testified and presented 4 other witnesses, Paul Karanja, Julia Thuiya Kariuki, Anthony Kariuki, Dr. Kiama Wangai and Peter Mutua, to testify in fortification of her case. Before being cross-examined, the witnesses had their witness statements that had been filed adopted as their evidence in chief. The Respondent's documents that had been filed under her List of Documents dated March 20, 2013 and further list of documents dated 3rd February 2017, were tendered as her documentary evidence without any objection from the Appellant.



11. The Appellant resisted the Respondent's claim through a Statement of Defence dated 5th September 2013 denying the Respondent's claim and entitlement to the reliefs she had sought.
12. The Appellant was emphatic that if any harm was suffered by the Respondent, it was a result of her negligence, recklessness and/or carelessness, and wholly attributable to her; that the incident was caused by the illegal and/or criminal acts, committed by persons and/or strangers who were acting without the Appellant's knowledge or authority; that the Appellant provided the necessary security to staff and their premises, as such it could not be blamed for negligence and breach of the duty of care. Further, the incident complained of occurred during an illegal strike involving the employees of the Appellant and unidentified strangers. It could not be liable for criminal activities of those people.
13. The Appellant presented two witnesses, one Eunice Wanjiku Ng'ang'a and James Mburu Muiruri. Equally, these witnesses adopted their witness statements filed in the matter as their evidence in chief. The Appellant's documents were admitted as documentary evidence.
14. The Trial Court rendered its Judgment in favour of the Respondent on 8th October 2018, finding the Appellant 100% liable for the incident that resulted in the injuries suffered by the Respondent, and awarded her general damages of Kes 100,000/- and special damages of Kes 2,000/- plus costs of the suit, and interest.
15. The Trial Court's finding on liability was substantially anchored on the fact that the Respondent had availed sufficient evidence to prove that she was indeed an employee of the Appellant who sustained workplace injuries. Further, the Appellant owed a duty in law to take reasonable care of its employees while at their place of work which it failed to discharge, in the circumstances of the matter.
16. The Appellant, being aggrieved by the decision of the Trial Court, filed the present Appeal.

Appellant's Submissions

17. The Appellant filed submissions dated 3rd November 2022. It submitted that after the Trial Court delivered its judgment, it raised an objection regarding its jurisdiction in light of Supreme Court Petition 4 of 2019, but the Court didn't give attention to the objection.
18. The Respondent's claim was brought under the framework of the *Work Injury Benefits Act*, 2007, which came into effect on the 2nd of June, 2008. Section 16 of the Act ousted the jurisdiction of Courts to entertain claims arising out of workplace accidents or diseases causing disablement or death. The appellant held the position that the learned trial magistrate ought to have dismissed the claim.
19. The Appellant further asserted that by dint of the provisions of section 90 of the *Employment Act*, the respondent's claim was time barred having been filed outside the three years contemplated therein. The workplace incident occurred on the 5th of January 2010, whilst the statement of claim was filed on the 21st of March, 2013. The Respondent's claim originated from a matter in the course of an employer-employee relationship, thereby placing the dispute under the scope of the stated provision.
20. The appellant took the view that the trial court should have awarded minimal costs or dismissed the matter altogether. The trial magistrate misdirected herself by applying a wrong principle of the Law in assessing liability.

Respondent's Submissions

21. In her submissions dated July 27, 2023, the respondent sets out the mandate of this Court as a first Appeal. Elaborating on the duty, reliance was placed on the judicial statements cases of *Selle v Associated*



Motor Boat Co [1968] EA 123 and *Coghlan v Cumberland* (1898) 1 Ch. 704 in its interpretation of such mandate.

22. The Respondent submitted that in order for this Court to effectively discharge its role in rehearing by giving the material that was placed before the trial court a fresh eye, and reach its own independent conclusion, it becomes imperative that the appellant places all the material forth in the appeal. The record of appeal dated February 15, 2022 filed before this Court is missing crucial documents that were produced by the Appellant before the trial court including a treatment card, 3 other cards from Gatundu hospital, proceedings, pleadings, consent letter and payment records for CC 20 of 2011, as well as the transport cards. The exclusion of the documents was deliberate and intended to mislead this Court. As there is no complete record before the Court, the Respondent submits that the appeal is incompetent pursuant to order 42 rule 13 (4) and ought to be dismissed.
23. The Respondent is categorical that the evidence that was tendered before the trial Court by the witnesses of both the Respondent and Appellant clearly demonstrates that; the Respondent was an employee of appellant, she was at the appellant's premises at the material time, she was assaulted by the appellant's employees who were striking, the injuries sustained were a result of the appellant's negligence and breach of statutory duty, and that in a matter CC 20 of 2011, arising out of the incident the subject matter of the claim before the trial Court, the claimant therein was by consent compensated for injuries that she had suffered following the incident.
24. That the settlement of the above-stated claim, settled the issue of liability on the incident and resultant injuries. By reason of the premise, the respondent did prove the appellant's liability. The learned trial magistrate didn't err in law and or fact as alleged by the appellant.
25. The respondent further submits that there was a general duty owed by the employee by the employer, which the Defendant failed to discharge. To buttress this point, the Respondent sought support from the holding in the cases of *Wilson's & Clyde Coal Co Ltd v English and Paris v Stepney Borough Council* [1951] AC 367.
26. That for the foregoing reasons, the court should not interfere with the discretion of the trial court which awarded Kes 100,000/- as general damages.

Analysis and Determination

27. Firstly, this being a first Appeal, this Court is obliged to re-evaluate the material that was placed before the trial Court and come to its own independent findings and conclusions. This position was set out in the case of *Selle v Associated Motor Boat Co* [1968] EA 123); see also (*Abdul Hameed Saif v Ali Mohamed Sholan* [1955] 22 EACA 270) where the Court held: -

“An appeal to this Court from a trial by the High Court is by the 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. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Sholan* (1955), 22 EACA 270)”.



28. Elaborating on the duty the Court of Appeal [of England] in *Coghlan v Cumberland* [1898]1 Ch.704 stated;

“ Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong...When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen.”

29. It is with this lens that I shall interrogate the Appellant’s appeal herein. True as submitted by Counsel for the Respondent an effective and legal discharge of the duty of a first Appellate Court as described in the authorities cited above will certainly require that all the relevant material that was placed before the trial Court be availed before it. Procedure rules have defined when and how the material shall be placed before the Appellate Court. Certainly, it is before the hearing of the Appeal and through a record of Appeal. Where parties decide to proceed with the hearing of the appeal, knowing very well or when they ought to know that all the relevant materials have not been placed before the Court, such a move would impede the first Appellate Court from effectively rendering itself on the Appeal and subject it to the risk of committing injustice in the matter. In my view, the safest, fairest and legal action that the Court faced with such a situation must take is to pronounce the appeal incompetent.
30. The Respondent contended that the Appellant deliberately omitted to include all the documents that were tendered before the trial Court in its record of Appeal. She has listed a number of them. My view is that only a failure to include relevant documents, documents which have a bearing on matters raised in an appeal can render the appeal incompetent. The Court notes that the Appellant did tender as her Exhibit 2, proceedings in CC 20 of 2011 [see page 133 of the record of appeal], alleging that the matter involved one of her colleagues who had been injured in similar circumstances and the Respondent. By consent, the Respondent shouldered liability and compensated the colleague. The learned trial Magistrate mentioned this matter in his judgment. This was a crucial document as regards the liability of the Appellant, which unfortunately for an inexplicable reason[s], the Appellant decided not to place before this Court. I note that the Appellant has forcefully attacked the learned Magistrate’s finding on quantum. A complete and fair reassessment of the evidence on the injuries suffered by the Respondent requires that this Court looks at the medical records inclusive of the Gatundu Hospital Register which was produced as defence exhibit 2. The same is not in the record of Appeal.
31. As the above crucial documents were deliberately or otherwise omitted in the record of appeal, I find the appeal herein incompetent.
32. The appellant submitted on the import of the provisions of section 90 of the [Employment Act](#), on the respondent’s claim that was initiated before the trial court. The Court notes that this issue which is jurisdictional was not raised before the trial Court. In fact, the jurisdiction of that Court was admitted in the Appellant’s statement of defence, paragraph 10. I note further that the matter is not raised on any of the grounds set forth on the memorandum of appeal filed herein. An Appellant cannot be allowed to argue his or her appeal outside the ground [s] set out in his or her memorandum of appeal,



without leave of the Court. A memorandum of appeal serves the very essence that pleadings in a suit do, notifying the adversary of the case he or she is to meet and delineating matters in contention. This Court cannot start entertaining matters that were not at all raised before the trial Court, and the memorandum of appeal.

33. The Appellant submitted further that after judgement it raised a jurisdictional issue before the trial court, that the respondent's suit offended the prescripts of the *Work Injury Benefits Act*, more specifically section 16 of the same. It was contended that the court didn't have jurisdiction to entertain the suit and that the trial court ignored to attend to the issue. This court makes a conscious decision to ignore the submissions for the following reasons;
- [a]. The jurisdiction of the trial Court was expressly admitted in the appellant's pleadings, see paragraph 10. Parties are bound by their pleadings in an adversarial system such as is ours. It was bound by this admission.
 - [b]. The record of the trial does not reflect at all that the issue was raised as alleged, and even if it was the trial court could not have competently dealt with it as at the time it was allegedly raised the court was functus officio.
 - [c]. The jurisdictional issue raised in submissions by the Appellant does not form part of the grounds of appeal put forth on the memorandum of appeal filed herein.
34. Good practice dictates that jurisdictional issues be raised at the earliest opportune moment possible in the relevant proceedings. This is so to enable the court confronted with the issue to determine whether or not it is seized with the requisite jurisdiction to interrogate the matter before it and see whether it can down its tools expeditiously where it turns out that it doesn't have the jurisdiction. The scarce judicial time shall have been saved, that of the parties too. Further, it will help the party whose matter is likely to be affected prejudicially by the jurisdictional issue to in time make a decision to salvage his or her sinking case, for instance, by moving to an appropriate forum, before it is caught up with the limitation of time. It will be inequitable for the Appellant to raise jurisdictional issues that were never raised before the trial Court on appeal.
35. This Court finds the provisions of order 2 rule 4 of the *Civil Procedure Rules 2010*, which is couched in mandatory terms, relevant to the matter at hand. the said order 2 rule 4 provides:-
- “4. Matters which must be specifically pleaded [Order 2, rule 4.]
- (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example, performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—
 - (a) which he alleges makes any claim or defence of the opposite party not maintainable;
 - (b) which, if not specifically pleaded, might take the opposite party by surprise; or
 - (c) which raises issues of fact not arising out of the preceding pleading.”



36. On the need to plead matters like limitation of time, I agree with the apt statement in the Court of Appeal decision of *Stephen Onyango Achola & another v Edward Hongo Sule & another* [2004] eKLR where the Court held: -

“Support for order VI rule 4 (1) and (2) is to be found in *Halsbury’s Laws of England*, 4th Edition, vol 36 at paragraph 48 page 38 headed:

“Matters which must be specifically pleaded: The defendant must in his defence plead specifically any matter which he alleges makes the action not maintainable or which, if not specifically pleaded might take, the plaintiff by surprise, or which raises issues of fact not arising out of the statement of claim. Examples of such matters are performance, release, any relevant statute of limitation, fraud or any act showing illegality. Other matters which must be so pleaded are the Statute of Fraud, and the provision of the Law of Property Act, 1925 which requires contracts for the sale or disposition of land to be in writing, and, it seems, any ground of objection to the jurisdiction of the Court.”

Mr Onsongo, the learned counsel for the second respondent, simply raised the issue of limitation by way of a preliminary objection. Under order VI rule 4 (1) and (2) the respondents were obliged to specifically plead limitation based on statute, that is, Act No 5 of 1974, before being allowed to sue it as the basis of their preliminary objection...

The second respondent having failed to specifically plead the issue of limitation in its defence it was not entitled to rely on that issue and base its preliminary objection on it; nor will the second respondent be entitled to rely on that defence during the trial of the suit unless it amends its defence. It is trite law that cases must be decided on the issues pleaded and we need not cite any authority for that proposition. It is equally not to be forgotten that a party who is entitled to rely on the defence of limitation is perfectly entitled to waive such defence and thus let the suit proceed to trial on its merit.”

37. By reason of the premises, I am not persuaded to consider the jurisdictional issues raised in the appellants’ submissions. They cannot come to aid the success of its appeal.
38. Keenly looking at the grounds of appeal set out in the Appellant’s memorandum of appeal, there cannot be any difficulty in concluding that they raise only two central issues for determination, whether or not the learned trial magistrate was right in; finding liability against the appellant at 100%; and award the Respondent general damages of Kes 100,000 for the injuries she suffered.
39. This Court directed that the appeal herein be canvassed by way of written submissions. In pursuance thereto, the Appellant filed submissions “in support” of its appeal. Interestingly, the submissions did not address the two central issues totally. The submissions wholly zeroed around matters that were not the subject matter of the grounds of appeal. It is upon this premise that I conclude that the grounds of appeal were not argued, impliedly the Respondent abandoned them.
40. The abandoned grounds touched on matters that the Learned Trial Magistrate had exercised discretion on. As to when an Appellate Court can interfere with a decision arrived at by a trial Court in the exercise of judicial discretion, the law is now settled. Expressing its view on it the Court in *Mbogo & another v Shah* [1968] EA 93, at page 96 stated;

“An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which it should not have acted upon or



failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion....”

41. The absence of any submissions demonstrating that the Learned Trial Magistrate misdirected himself or acted on matters that he should have not or that he failed to consider matters that he should have, makes me find no reason to disturb the Learned Trial Magistrate’s findings on liability and quantum.

42. In the upshot, I hereby dismiss the Appeal herein with costs to the Respondent.

READ, DELIVERED AND SIGNED THIS 22ND DAY OF SEPTEMBER, 2023.

OCHARO, KEBIRA.

JUDGE

In the presence of:

Mr. Wambugu for Appellant

Mr. Munyua for the Respondent

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

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OCHARO KEBIRA

JUDGE

