Tononoka Rolling Mills Limited v Peter (Employment and Labour Relations Appeal 95 of 2022) [2023] KEELRC 2239 (KLR) (18 September 2023) (Judgment)

Neutral citation: [2023] KEELRC 2239 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS APPEAL 95 OF 2022

K OCHARO, J

SEPTEMBER 18, 2023

BETWEEN

TONONOKA ROLLING MILLS LIMITED ..... APPELLANT

AND

JAMES KILONZO PETER ..... RESPONDENT

JUDGMENT

Background

1. The appeal before me arises from a judgment of the Learned trial Principal Magistrate in Milimani Commercial Magistrate's court Civil Case No. 6468 of 2016, which was delivered on the 21st of September, 2018.

2. Imperative to state that this appeal was first lodged in the High Court as High Court Civil Appeal No. 472 of 2016 before it was transferred to this court for hearing and final disposal.

3. Through a plaint dated 15th August 2016, the Respondent impleaded the Appellant in the above-stated suit claiming special and general damages for injuries that he sustained as a result of a workplace accident that occurred on 11th August 2014. The Respondent contended that the accident occurred as a result of the Appellant's breach of statutory duty and or contractual obligations.

4. Upon being served with the summons to enter appearance, the Appellant did enter an appearance and filed a statement of defence on the 7th of December 2016. In the statement of defence, the Appellant denied; the occurrence of the accident; that the Respondent sustained any workplace injuries on or about the 11th of August 2014; that the Respondent was entitled to the reliefs he had sought.

5. At the trial the Appellant testified in support of the claim, while the Respondent presented one witness, Samuel Mwema to testify in support of its case. Upon considering the evidence by the parties, the Learned trial Magistrate rendered himself on the matter through his judgment dated 21st September

2018. In the said judgment, the Learned trial Magistrate held that the Appellant was to be blamed 100% for the accident and awarded the Respondent general damages of KShs.200,000/- for the injuries and loss of amenities, and special damages of KShs.2,000/-.

The Appeal

6. Aggrieved by the decision of the learned trial magistrate, the Appellant filed the instant appeal assailing the judgment on the following principal grounds;

   i. That the Learned trial Magistrate erred in law and in fact in finding as he did on liability at 100% against the Appellant; contrary to the evidence on the record.

   ii. That the Learned trial Magistrate therefore acted in error when he failed to properly evaluate the evidence on record thus arriving at an erroneous decision in apportioning liability and computation of damages payable thus making an erroneous and grossly excessive award in general damages.

   iii. That the Learned trial Magistrate erred in law and in fact in finding as he did, that the Respondent was entitled to an award of KShs.200,000/- in general damages which was manifestly excessive in the circumstances for the soft tissue injuries.

   iv. That the Learned Magistrate erred in law and in fact by failing, as he did, to analyse the submissions and most recent decisions of the court of record with similar circumstances and injuries as those suffered by the Respondent and hence arriving at a wrong decision.

The Appellant's submissions

7. The Appellant submitted that it was the duty of the Respondent to prove that on the material day, an accident occurred at his workplace consequence of which he sustained injuries. To buttress this plaint, the respondent placed reliance on the case of Statpack Industries vs. James Mbithi Munyao, NBI HCCA No. 152 of 2003 (2005) eKLR, where the court held:

> "Coming now to the more important issue of "causation", it is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily a result of someone's negligence. An injury per se is not sufficient to hold someone liable for the same."

8. The Appellant submitted that while the Respondent testified before the trial Magistrate that he sustained injuries on 11th August 2014 in the course of his employment at the Appellant's premises, stand No. 1, the Appellant's witness was able to demonstrate that on the mentioned date, the Respondent was working at Stand No. 2; that on that day no accident occurred at stand No. 2 or any place within its premises.

9. By reason of the foregoing premises, there wasn't any basis for finding it 100% liable for the injuries that were allegedly suffered by the Respondent.

10. The Appellant argued grounds 2, 3, and 4 of the appeal jointly, and urged the court that should it find for any reason that the Appellant is liable for the alleged industrial accident, then, it should find that the Learned trial Magistrate erred in not finding that the Respondent contributed to the occurrence of the accident, and consequently apportion liability.

11. The Appellant submitted further that the Respondent alleged to have suffered; deep burns and cuts to the right shoulder and deep burns and cuts to the right buttocks. An award of KShs.200,000/- was excessive. Citing the decisions in Ndungu Dennis vs. Ann Wangari Ndirangu & Another (2018) eKLR and Devki Steel Mills Ltd vs. Jared Osodo [2014] eKLR. The Appellant urged this court to substitute the award of the Learned Trial Magistrate with a sum of KShs.60,000/-.

The Respondent's Submissions

12. The Respondent made his submissions in two parts, on liability and quantum. On liability, he submitted that it is evidently clear that on the material day, he was at the Respondent's premises on employment, and that he got injured in the course of his employment.

13. The Respondent submitted further that from the evidence on record, there is no doubt that he was able to establish that the Appellant didn't provide a safe working condition, as the accident occurred out of malfunctioning of a machine. The Appellant's own witness admitted the fact that the Appellant did not provide the Respondent with safety gear.

14. To buttress the point that the Appellant breached a statutory duty of care, the Respondent placed reliance on the provisions of Section 6 (1) and (2) of the *Occupational Safety and Health Act*, No. 15 of 2016, which provides:

> " (1) Every occupier shall ensure the safety, health, and welfare at work of all persons working in his workplace .....
>
> (2) The provision and maintenance of a working environment for every person employed that is safe, without risks to health, and adequate as regards facilities and arrangements for the employees' welfare at work."

15. Further reliance was placed on the case of Oluoch Eric Gogo vs. Universal Corporation Limited (2015) eKLR, and Mumias Sugar Co. Ltd vs. Charles Namatiti CA 151 of 1987, where the Court of Appeal held:

> " An employer is required by law to provide safe working conditions of work in the factory and if an accident occurs while the employee is handling machinery the employer is responsible and will be required to compensate the injured employee."

16. By reason of the premises, this court should uphold the Learned Trial Magistrate's decision on liability.

17. On quantum, it was submitted that this court can only disturb the Learned Trial Magistrate's decision if only it is convinced that in assessing the damages, he took into account an irrelevant factor, or left out a relevant one, or that the amount awarded was inordinately low or inordinately high that it must be a wholly erroneous estimate of damages. To bolster this submission the decision in Kemfro Africa LTD t/a Meru Express Services and Another -vs- Lubia & Another (No.2) (1985) eKLR was cited.

18. The Appellant has not demonstrated in this appeal that any of the said conditions exist in this appeal to warrant this court to disturb the award of quantum by the Learned Trial Magistrate.

Analysis and Determination

19. I have carefully considered the lower court pleadings, and judgment. I have also carefully considered the grounds of appeal and the parties' respective submissions, only a single principal issue emerges for

determination, thus whether the Trial Magistrate was entitled to arrive at the conclusions he did on liability and quantum.

20. Before I delve further into the issue, it is imperative to appreciate from the onset that the jurisdiction of a first Appellate Court while hearing an appeal is wide like that of a Trial Court. It is upon the first Appellate Court to consider and appreciate the entire evidence and may come to a different conclusion away from that of the trial court.

21. In the case of Prudential Assurance Company of Kenya Limited, on the role of a first Appellate Court, the Court of the Appeal stated:

> " As a first appellate court, it is our duty to treat the evidence and material tendered before the superior court to a fresh and exhaustive scrutiny and draw our own conclusions bearing in mind that we have not seen or heard the witnesses and giving due allowance for this - Selle v Associated Motor Boat Company Limited [1968] EA 123."

22. At the hearing before the Learned Trial Magistrate and in the submission filed herein, the Appellant asserted that on the 11th of August 2014, no accident occurred at the Respondent's workplace or at all. On the other hand, the Respondent maintained that on the material day, he was assigned the duty of pulling a metal rod from the milling machine when the machine malfunctioned causing the metal case to disengage from the machine. Resultantly, causing him burnt injuries.

23. As to whether or not an accident occurred in the manner alleged by the Respondent or not at all, was, and becomes a central issue for interrogation before the Trial Magistrate and this Court, respectively.

24. To demonstrate that the alleged accident did not occur at all, the Appellant's witness (DW1) testified that on the alleged date, the Respondent was not working at stand No. 1 as he alleged but at stand No. 2. He produced an attendance sheet to confirm this. Further that the Daily Production Report for the 11th of August did not capture the occurrence of any accident. There was no report of any accident.

25. Cross-examined by the Counsel for the Respondent, Mr. Makori, the Respondent's witness testified that the Respondent's company maintains an injury report register and that this notwithstanding, the Respondent did not avail the register to the court. Section 122 of the *Occupational Safety and Health Act* (No. 15 of 2007), provides:

> " There shall be kept in every workplace a register in a prescribed form called the general register, and there shall be entered in or attached to that register-
>
> a. Certificate of registration of the workplace;
>
> b. Every other certificate issued in respect of the workplace by the Director under this Act;
>
> c. The prescribed particulars as to the washing, whitewashing, colour washing, and painting of the workplace;
>
> d. The prescribed particulars as to every accident and case of occupational disease occurring at the workplace of which notice is required to be sent to the occupational safety and health officer under the provision of any law for the time being in force."

26. In my view, the register whose existence at workplaces is statutorily mandatory is meant to be set in as an aid in disputes relating to workplace matters as is in this case. The tone of the provision aforestated

is to the effect that whenever there is a dispute which necessarily requires the production of the register, duty lies on the occupier to produce an extract thereof, or the register itself.

27. In my considered view, production of the register or an extract thereof for the purposes of demonstrating the Respondent's assertion that there was no accident that occurred on the material day was highly imperative, considering the rival position that the parties had taken on the alleged occurrence of the workplace accident.

28. From the onset, the Respondent forcefully asserted that he suffered injuries as a result of a workplace accident. The Appellant took a contrary position. In the circumstances, the Appellant knew or ought to have known that to successfully discount the Respondent's position, production of the register was necessary. I am unable to fathom why the Appellant did not place the register before the Learned Trial Magistrate, yet the Appellant's witness clearly as stated hereinabove testified to its existence.

29. In the circumstances making an adverse inference on the failure to produce the register or an extract thereof was and is inevitable. In civil cases, an unfavorable inference has to be drawn where in the absence of an explanation, a party does not present evidence on a point essential to his or her case.

30. In the absence of any reasonable explanation by the Appellant as to why the register or an extract thereof was not produced yet it was an essential document to fortify its contention that the accident did not occur, leaves me with no option other than the conclusion that the production of the same would have not aided the Appellant's case, but support the Respondent's that the accident occurred on the material day.

31. By reason of the premises foregoing, I conclude that indeed an accident occurred at the Respondent's workplace on the stated day.

32. Having found as I have hereinabove, I now turn to consider whether or not the accident did happen as a result of the Appellant's negligence and or breach of statutory duty. The court takes cognizance of the principle of evidence as encapsulated under section 107 of the *Evidence Act* Cap 80 Laws of Kenya that 'he who asserts must prove'. The Respondent asserted that the accident occurred as a result of the Appellant's breach of statutory and or contractual duty. He had a duty to prove the breach on a balance of probabilities. As I shall shortly bring forth hereinafter, he discharged the burden before the trial court. In the case of Vitalis Juma Odera vs Sino-hydro Company Limited (2017) eKLR cited by the Counsel for the Appellant the court held:

> " The plaintiff must show a causal link between the negligence and injury. As Visram J., held in Stat-pack Industries v James Mbithi Munyao NBI HCCA No. 152 of 2003 [2005] eKLR,
>
> "Coming now to the more important issue of "causation", it is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily a result of someone's negligence. An injury per se is not sufficient to hold someone liable for the same."

33. In Halsbury's Laws of England, 4th Edition, it is stated in paragraph 662 (P.476):

> " The burden of proof in an action for damages for negligence rests primarily on the plaintiff who to maintain an action, must show that he was injured by a negligent act or omission for which the defendant is responsible. This involves the proof of some duty owed by the

defendant to the plaintiff, some breach of that duty and the injury to the plaintiff between which and the breach of duty and a causal connection must be established."

34. The *Occupational Safety and Health Act* under which the Respondent's case was instituted, provides in its preamble, thus:

> " An Act of Parliament to provide for the safety, health and welfare of workers and all persons lawfully present at workplaces, to provide for the establishment of the National Council for Occupational Safety and Health and for connected purposes."

35. This preamble is amplified in section 3 which provides for the purpose of the Act, thus:

> "(1) This Act shall apply to all workplaces where any person is at work, whether temporarily or permanently.
>
> (2) The purpose of this Act is to-
>
> a. Secure the safety, health and welfare of persons at work; and
>
> b. Protect persons other than persons at work against risks to safety and health arising out of, or in connection with, the activities of persons at work."

36. The Act has placed specific duties on the occupier of the workplace and this is discernible from the provisions of section 6, and relevant to this case under Part VII (Machinery Safety). No doubt that the Appellant owed the Respondent a duty for his safety at the place of work. Any breach of the duties or any of them resulting in an injury to the employee shall definitely attract liability against the employer.

37. That the employer has a duty to ensure the safety of its employees while at work, has numerously got judicial attention. In Boniface Muthema Kavita vs Carton Manufacturers Limited, civil Appeal No. 670 of 2003 (2015) eKLR the Court held:

> " The relationship between the Appellant and the Respondent as employer and employee creates a duty of care. The employer is required to take all reasonable precautions for the safety of the employee, to provide an appropriate and safe system of work which does not expose the employee to unreasonable risk."

38. Having said as I have hereinabove, the question which comes up is, did the Respondent demonstrate on a balance of probabilities before the trial court that the Appellant was negligent and or in breach of the statutory duties? Imperative to state at this point that the Respondent had particularized the Appellant's breach of statutory duty and or contractual obligations and negligence in his pleadings, thus;

a. Exposing the plaintiff to risk of damages or injury which the defendant knew or ought to have known.

b. Failing to take any or any adequate precautions for the safety of the plaintiff in which he was engaged in the said work.

c. Failing to provide proper or any supervision at all.

d. Failing to provide and or maintain a safe system of work and or issue the plaintiff with suitable protective clothing i.e. gumboots as to enable him carry out his work in safety.

e. Failing to warn the plaintiff of the dangers that faced him while he was engaged in his work.

f. Failing to provide the plaintiff with safety measures.

g. Failing to repair the said machine when they knew or ought to have known that it was defective.

39. The Respondent did in detail explain how the accident occurred. In my view, his evidence on the how was consistent and not shaken under cross-examination. The evidence showed that the Appellant did not adequately ensure a safe working system for its employee. In fact, a clear look at the Appellant's witness's evidence reveals this. For instance, in his evidence in chief he stated:

> " The Machines are run by motors. Workers use tongs to hold hot metal bars and load onto the machine. The metal bars are fed into boxes. Metals pass through a total of 7 (seven) stands for rolling into final product of required shapes and size.....
>
> .....It would have been possible for the metal to reach the shoulder of a worker. The metal can even be thrown up if the machine has a problem.....

And under cross-examination;

> " There is a possibility of metal "jumping" from the machine. There is a possibility of injury if metal "jumps"

40. In the circumstances, the Appellant and without losing sight of the fact that, it had in its pleadings attributed negligence to the Respondent, was reasonably expected to demonstrate that at the material time, it had discharged all the relevant statutory obligations under section 6 (2) of the Occupational Safety & Healthy Act, and those contemplated under Part VII of the Act (Machinery Safety). In the circumstances of this matter. I have no doubt in my mind, that blurred by the position it had taken of "no accident occurred on the material day," the Appellant did not lead any evidence to disabuse the Respondent's evidence that the accident was not as a result of a breach of statutory duty on its part.

41. By reason of the above premises, I am inclined to and I hold that the Learned Trial Magistrate did not err in finding;

a. That an accident occurred as contended by the Respondent.

b. That the Appellant was 100% liable for the workplace accident.

Imperative to add that there wouldn't be any basis for the Learned Trial Magistrate to apportion liability as the Appellant did not lead any evidence to establish the particulars of negligence it had pleaded against the Respondent.

42. Lastly, I turn to consider whether the Learned Trial Magistrate did err in the award of general damages. In considering this aspect of the appeal I am alive to the principles enunciated in the case of Kenya Africa Ltd t/a Meru Express Services and Another vs. Lubia & Another (No.2) (1585) eKLR (supra).

43. In paragraph 5 of the Plaint, the Respondent pleaded:

> " By reason of the matters aforesaid, the plaintiff sustained severe injuries and has suffered loss and damages.
>
> Particulars of injuries

a. Deep burns and cuts on the right shoulder

b. Deep burns and cuts right buttocks."

These are the injuries reflected in the medical report dated 20th August 2016. The medical report was tendered as evidence by the Respondent before the Trial Magistrate.

44. Worth stating, there was a 2nd medical report that was tendered in evidence by the Appellant, a medical report dated 07/02/2017. The report indicated injuries as burns on the back of the right shoulder and burns on the left buttock. The Doctor's opinion was "the above named suffered from burns which have healed well left no permanent disability. We can consider temporary disability of one week only."

45. Imperative to state that according to the 2nd medical report, the Respondent did not suffer any "cuts". In his evidence under cross-examination, the Respondent confirmed that he did not suffer any cut wounds.

46. In his judgment the Learned Trial Magistrate states:

> " The plaintiff suffered deep burns and cuts, right shoulder and right buttock. He received treatment at Imani Medical Services. The medical report by Dr. Mwaura confirms the injuries."

I have carefully considered the judgment, it is clear to me that the learned Trial Magistrate in the awarding general damages did not at all consider the 2nd medical report by Dr. Edwin Madhiwa, and the above-stated piece of evidence of the Respondent under cross-examination. In my view, had he considered the same, he would have realized that the injuries as pleaded by the Respondent were exaggerated.

47. The court has considered the various decisions cited by the parties on quantum, the consideration coupled with the premise hereinabove (non-consideration of the 2nd report and Respondent's evidence on the injuries) impels me to conclude that in the circumstances of the matter the award on general damages was excessive. Consequently, I set aside, the award and substitute the same with one of KShs.120,000/-.

48. In the upshot the Appellant's appeal is hereby allowed only to the extent that the sum that was awarded by the Learned Trial Magistrate as damages is hereby reduced to KShs.120,000/-. Each party shall bear its own costs.

READ, SIGNED, AND DELIVERED THIS 18TH DAY OF SEPTEMBER, 2023.

.....

OCHARO KEBIRA

JUDGE

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.

Ocharo Kebira

Judge