



**Africa Apparels Limited v Wanjala (Appeal 218 of 2022)
[2023] KEELRC 3006 (KLR) (27 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3006 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL 218 OF 2022
B ONGAYA, J
NOVEMBER 27, 2023
FORMERLY HCCA NO. 390 OF 2018**

BETWEEN

AFRICA APPARELS LIMITED APPELLANT

AND

FERDINAND WAMALWA WANJALA RESPONDENT

*(Being an appeal from the Judgment delivered on 01.08.2018 by Hon
Peter Muholi, Senior Resident Magistrate, at Nairobi, Milimani)*

JUDGMENT

1. The appellant filed a Memorandum of Appeal on August 22, 2018 through Wangari Muchemi & Company Advocates. The appellant appeals against the trial Court's judgment delivered on August 1, 2018 (by hon P Muholi, learned senior resident magistrate) and upon the grounds that:
 - a. The learned magistrate erred in fact and in law in finding that the defendant was 100% liable for the plaintiff's injury in view of the fact that the employment, negligence and breach of contract was not proved in evidence.
 - b. The learned magistrate erred in law and in fact in failing to note that no existence of contract of employment was proved while arriving at her judgment.
 - c. The learned magistrate misdirected himself in law and in fact in failing to note that the plaintiff failed to proof particulars of negligence pleaded in the plaint.
 - d. The learned magistrate erred in law and in fact in holding that the defendant was 100% to blame for the occurrence of the suit accident contrary to trite rule of evidence that allegations of negligence, breach of contract and statutory duty must be proved strictly which the plaintiff didn't.



- e. The learned magistrate erred in law and in fact in holding that the plaintiff had strictly proved his allegations of negligence and breach yet the actual evidential material and testimonies before him did not amount to the same nor support and justify such a holding.
 - f. The learned magistrate erred and misdirected himself in law and in fact in finding the appellant liable taking into account the totality of evidence both oral and documentary before her.
 - g. The learned magistrate erred in fact and ended up misdirecting herself in awarding exorbitant quantum of Kshs 140,000/- by failing to appreciate and be guided by the fact that the injury did not occur at the defendant's premises and in the course of employment.
 - h. The whole judgment on quantum and liability was against the weight of evidence before the Court and amounted to miscarriage of justice.
2. The appellant prayed for setting aside of the judgment of the lower Court judgment on quantum and liability.
 3. The court has considered the record of appeal and the parties' Submissions. The background to the appeal is as follows. The respondent herein filed a suit vide the plaint dated February 24, 2017 claiming general damages for pain and suffering, special damages, costs and interest for injuries sustained on August 10, 2016 while in the course of lawful duties at the appellant's premises.
 4. In his Complaint, the respondent states that he was employed by the respondent and was assigned duties as a general worker and was assigned duties such as cutting sponges using knives. He further stated that on the date of the accident August 10, 2016 he was injured while cutting sponges when a fellow employee's knife fell on him that caused a deep cut wound on his hand. He pleaded that he suffered severe injuries, pain, loss and damages as a result of the accident which he blamed the appellant for negligence and breach of statutory duty of care and breach of contract. She claimed compensation in terms of general damages for pain and suffering, special damages, costs of the suit and interest.
 5. The appellant filed a defence dated May 24, 2017 through Wangari Muchemi & Company Advocates. The appellant denied employing the respondent and the occurrence of the alleged accident subject of the dispute. The appellant urged the trial Court to dismiss the plaint in its entirety with costs.
 6. The suit proceeded for hearing with the respondent calling two witnesses and the appellant closed its case without calling any witnesses.
 7. That on August 1, 2018 judgment was delivered by the trial Court in favour of the respondent who was awarded Kshs 140,000/- in general damages, Kshs 3,000/- special damages and a doctor's fee of Kshs 5,000/- bringing the total amount to Kshs 148,000/-.
 8. Being dissatisfied with the trial court's decision the appellant filed the appeal. Parties agreed to canvass the appeal by way of Written Submissions. The Court has considered the grounds of appeal and the all material on record and makes findings as follows.
 9. The 1st issue in dispute is whether the parties were in a contract of service. The trial court found that the parties were in a contract of service because the respondent's testimony that he was an employee of the appellant had not been challenged and the respondent had produced the staff ID card as exhibit 2. The Court finds that the indeed the appellant provided no material evidence to rebut the respondent's evidence. The parties were indeed in a contract of service.
 10. To answer the 2nd issue, the Court returns that the trial court did not err in finding that the appellant was 100% liable for the accident that occurred. The trial court stated, "The plaintiff blamed the



defendant for failing to issue protective gear. The duty to ensure that the employees have protective gear lies with the defendant/employer; they also have duty to ensure that employees are working in a safe environment and once the plaintiff ...” The Court has considered the testimony by the respondent and indeed it was that protective gear had not been provided. The appellant offered no evidence to show the alleged contributory negligence on the part of the respondent. The respondent identified a supervisor known as Kioko as being on duty on the night of the accident. While the respondent testified that he was injured by bad luck, that in no way made him liable in contributory negligence. The material relevant was that the appellant had failed to provide protective gear and without which, the injuries in the accident could not be avoided or mitigated. The appellant failed to provide evidence of contributory negligence.

11. The 3rd issue is whether the award of Kshs. 140,000.00 was excessive in the circumstances. It is submitted for the appellant that the injuries were soft tissue and had since fully healed and with no permanent incapacitation. The appellant had submitted for an award of Kshs.80,000.00. For the respondent it was submitted that the injuries were sustained per the medical records duly produced by the doctor, PW1. The evidence was that the respondent suffered a deep cut on the right hand which had healed and there was a lacerated scar on the right hand. It was submitted for the respondent that in *Butt -versus- Khan* [1982-88] KAR 1 the Court held that an appellate court will not disturb an award of damages unless it’s inordinately high or low as to represent an entirely erroneous estimate, “It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.” The appellant laments that it submitted for award of kshs 80,000.00 but the trial Court awarded kshs 140,000.00 without an explanation. In making the award the trial Court stated that it had considered the appellant’s submission on award of Kshs 80,000.00 and also considered the injuries as pleaded, the authorities cited especially those by the appellant and considered the time that had lapsed since the cases cited had been made and awarded kshs 140,000.00 as adequate compensation. In particular, in *African Highlands Produce Co Ltd -versus- Wilfred Othiemo Odhiambo* [2011]eKLR, the High Court (Wendoh J) on October 7, 2011 upheld the award by the Magistrate’s Court of Kshs 80,000.00 given on April 18, 2007 for injuries that were sustained on July 6, 2001. The injuries entailed the conveyor gripping a finger which was severely cut as there was an attempt to free it and the employee also slipped and fell on the slippery floor and hit his tooth against the machine as a result of which the tooth broke. In that case, the injuries were permanent unlike in the instant case. Even with time lapse, it would appear that the trial Court’s award was excessive considering the scope of injuries for which Kshs 80,000 had been awarded. The Court returns that an award of Kshs 80,000.00 as was submitted for the appellant would be just. The trial Court’s award will be substituted accordingly. The appeal will partially succeed to that extent and bearing into account the margins of success, each party to bear own costs of the appeal.

In conclusion, the appeal is hereby determined with orders:

1. The trial Court’s judgment and decree is hereby varied to the extent of setting aside the Kshs 140,000.00 awarded and substituting thereof Kshs 80,000.00.
2. Each party to bear own costs of the appeal.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS MONDAY 27TH NOVEMBER, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

