



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL NO. 38 OF 2018

(Originally Kakamega High Court Civil Appeal No. 15 of 2014)

(Being an Appeal from the judgment and decree of Hon M.L. Nabiya,

Senior Resident Magistrate, Butali dated and delivered on the 13th

February 2014 in Butali SRMCC No. 58 of 2011)

WEST KENYA SUGAR COMPANY LTD.....APPELLANT

v

GODFREY MUKHANGAI SHADRACK.....RESPONDENT

JUDGMENT

1. West Kenya Sugar Co Ltd (the Appellant) appealed against the decision of the Senior Resident Magistrate, Butali before the High Court in Kakamega contending that:

(1) The Learned Trial Magistrate erred in both fact and law in awarding the sum of Kshs 300,000/- as general damages for pain and suffering in the circumstances which amount is inordinately high and excessive and thus constitutes an erroneous estimate of the alleged damages suffered.

(2) The Learned Trial Magistrate erred in both law and fact in awarding the sum of Kshs 6,000/- as special damages which amount was either pleaded (sic) or proved by way of evidence.

(3) The Learned Trial Magistrate thereby used his discretion wrongly in awarding excessive damages in the circumstances and in failing to consider the variation in evidence tendered relating to the injuries suffered.

(4) The Learned Trial Magistrate erred in fact and law when she failed in her duty as a trial Court to evaluate the evidence, consider the pleadings and to make her own findings in her judgment from the evidence led at trial and to note the material discrepancies and departure in pleadings and in the evidence which the Respondent led at the trial in relation to the accident.

(5) The Learned Trial Magistrate erred in law and fact in her judgment when she ignored and failed to take into consideration the evidence tendered on behalf of the Appellant before her and failed to evaluate such evidence, consider the pleadings and the fact that no evidence was rendered on behalf of the Respondent to warrant apportionment of liability at 100% and instead embarked on the process of deciding the case basically on presumption and circumstantial evidence.

(6) The Learned Trial Magistrate erred in law and fact when she failed to appreciate that there can never be liability without fault, as there was no evidence pointing out the Appellants fault and indeed how the same contributed to the Respondents unfortunate injuries.

(7) The Learned Trial Magistrate erred in both law and fact when she failed to analyse and evaluate the evidence before her tendered on behalf of the Appellant and embarked on the process of deciding in presumption and apportion liability at 100% against the Appellant herein in the absence of sufficient evidence.

(8) The Learned Trial Magistrate erred both in law and fact when she failed in her duty to evaluate and consider the Appellant's written submissions and authorities cited therein.

2. The Appellant filed its submissions on 29 January 2018, while the Respondent filed his submissions on 19 February 2018.
3. On 3 July 2018, the High Court indicated that it would deliver judgment on 16 October 2018.
4. However, on 3 December 2018, the High Court declined jurisdiction and directed that the Appeal be transferred to this Court.
5. When the parties appeared before this Court for directions on 7 October 2021, it reserved judgment to today.
6. The Court has considered the record and submissions.

Role of Court on the first appeal

7. The role of a first appellate Court was discussed in *Kamau v Mungai* (2006) 1 KLR 150 where it was held that:

this being a first appeal, it was the duty of the Court.... to re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard the witnesses and hence making due allowance for that.

8. This Court will abide by the interdict on its role as a first appellate Court.

Liability

9. Grounds 5, 6 and 7 broadly addressed the question of liability.
10. In finding the Appellant liable, the trial Court had found that the Appellant had not provided the Respondent with goggles (safety equipment) and also failed to maintain its machines.
11. To support the grounds challenging the findings on liability, the Appellant urged that there can be no liability without fault and made reference to the Respondent's testimony that the incident was an unexpected accident and the fact that it had not been alerted to the existence of a leaking caustic soda pipe.
12. During testimony before the trial Court, the Respondent narrated that he was observing the process of juice production when caustic soda from a leaking pipe dropped into his eyes causing him injuries.
13. On why he faulted the Appellant in negligence, the Respondent testified that it had failed to provide him with industrial goggles or keep its machines in a safe and working condition by failing to fix sensors to detect leaks.
14. The Appellant produced as a witness, the Respondent's colleague.
15. Although the witness had stated in his witness statement that the Respondent had been issued with goggles, during cross-examination, he admitted that goggles had not been issued to the employees.
16. The Appellant failed to rebut the Respondent's testimony before the trial Court that it had not issued him with goggles considering the duties he was carrying.
17. The Appellant's own witness admitted that the goggles were not provided.
18. Further, the Appellant was under a duty to maintain a safe and secure work environment. It did not produce any witness to testify as to how it serviced its machines to ensure a safe work environment.
19. This Court finds that the trial Court did not fall into an error of either fact or law in finding the Appellant fully liable in negligence and duty of care.

Quantum

Special damages

20. The Appellant contended that the special damages of Kshs 6,000/- was not pleaded or proved despite being awarded by the trial Court.
21. The Respondent pleaded special damages of Kshs 1,500/-.
22. During examination-in-chief, the Respondent produced and the Court admitted receipts showing he paid Kshs 6,000/- for spectacles.
23. The Appellant did not object to the production and/or admission of the receipts during the trial and this Court would therefore not interfere with the award, the Appellant having acquiesced in the production and admission of the receipts.

General damages

24. According to a medical report by Dr Aluda, the Respondent sustained chemical burns to the right eye with severe pains but the injuries had healed albeit with slight pains and that he had difficulty seeing clearly in bright light resulting in the use of eyeglasses.

25. The Appellant's doctor also made near similar findings except that he concluded that the Respondent had healed with resultant nil permanent incapacitation.

26. While awarding general damages, the trial Court considered the authorities cited by the parties and relied on Nairobi High Court Civil Case No. 3506 of 1985, *Clara Nyaruna Okectv Akamba Bus Service*, wherein the Court awarded general damages of Kshs 250,000/- for soft tissue injuries and perforation of the of the left eye.

27. The Court notes that the Appellant placed before the trial Court Kisumu Civil Appeal No. 26 of 2010, *Avtar Singh Bhamra & Ar v Joseph O. Ouko* to support its case for an award of Kshs 70,000/- as general damages.

28. This Court finds that authority was irrelevant for the injuries sustained therein were soft tissue injuries to the chest, right knee and cuts to the back.

29. The injuries in the *Nyaruma* case were more serious as there was a permanent eye injury.

30. However, considering that the instant case was determined in 2011, about a decade after the *Nyaruma* case, this Court will not disturb the award of general damages.

Conclusion and Orders

31. Arising from the above, the Court finds no merit in the Appeal and it is dismissed with costs of the Appeal and in the trial Court to the Respondent.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 26TH DAY OF JANUARY 2022.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Appellant Okongo, Wandago & Co. Advocates

For Respondent Alwanga & Co. Advocates

Court Assistant Chrispo Aura