



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL NO. 13 OF 2019

KIPKEBE LIMITED

APPELLANT

v

JAMES NYABUTI TAI

RESPONDENT

(Appeal from the judgment and decree of Hon. M. O. Wambani (Chief Magistrate) dated 4th June 2019 in Nyamira CMCC No. 28 of 2013)

JUDGMENT

1. In this Appeal, Kipkebe Ltd (Appellant) contends

1. THAT the learned trial Magistrate erred both in law and fact by not holding that the claim as instituted by the Respondent was statutorily time-barred and that the same was contrary to section 90 of the Employment Act.
2. THAT the learned trial Magistrate erred both in law and fact by holding that the Appellant was 100% liable.
3. THAT the trial Magistrate acted in error when the same failed to properly evaluate evidence on record thus reaching an erroneous decision.

2. The Court gave directions on 4 November 2020 on the filing and exchange of submissions. The Deputy Registrar was directed to notify the parties of the directions.

3. Nevertheless, none of the parties filed submissions.

4. The Court has considered the record.

Role of this Court on the first appeal

5. The Court of Appeal in *Selle and Another v Associated Motor Boat Co. Ltd & Ors (1968) EA 123* stated on the role of Court on the first appeal thus

This Court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.

However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had 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.

6. This Court will bear in mind the interdict on its role.

Limitation

7. The background to the Appeal is that James Nyabuti Tai (the Respondent) instituted legal proceedings against the Appellant on 25 January 2013 alleging breach of statutory duty/negligence/contract for an accident pleaded to have happened on 27 July 2006.

8. Prior to the filing of the action, the Respondent had sought and got leave to sue through Misc. Application No. 4 of 2013. Although the order granting leave was not filed as part of the Record of Appeal, the Court will assume it was filed as the trial Court's judgment alluded to

it having been produced.

Liability

9. The Respondent testified that he was an employee of the Respondent as of 27 July 2006 when he was involved in an accident in the workplace. He stated that while picking tea, he slipped and fell into a hole.

10. On why he attributed negligence to the Appellant, the Respondent stated that he was not issued with gloves and gumboots and that the area he was picking tea leaves in was slippery and bushy.

11. Cross-examined, the Respondent stated that he would not have sustained the injuries if he had been furnished with gumboots.

12. The Appellant produced 2 witnesses, a clinical officer and a clerk. They denied having records of the accident involving the Respondent but acknowledged a Form LD 104 was issued and had the Appellant's stamp.

13. However, apart from denying that the Respondent did report any accident on 27 July 2006, the witnesses did not testify as to the question of liability or on whether the Respondent had been issued with gumboots, or the state of the weather on the material day.

14. On the state of the record, the Court is satisfied that the trial Court had sufficient facts to find that the Appellant was liable.

Erroneous decision

15. The Respondent pleaded that he sustained a fracture of the right leg and sprain of the right hand on the joint but his own medical doctor produced a report discounting any fractures. The doctor opined that the Respondent had sustained soft tissue injuries.

16. Although the trial Court noted that the case law placed before him involved more serious injuries, he appeared not to have directed his mind to the evidence from the doctor on the nature of injuries sustained by the Respondent.

17. In the event, the Court finds that the award of general damages of Kshs 250,000/- was excessive in the circumstances (soft tissue injuries).

Conclusion and Orders

18. From the foregoing, the Court sets aside and vacates the award of general damages and substitutes, thereof, the sum of Kshs 125,000/-.

19. If the decretal sum was deposited into an interest-earning account, the interest to accrue on the sum of Kshs 125,000/- from the date of deposit.

20. The Appellant issued Form LD104. The parties did not disclose why they did not follow up with the Director of Occupational Health and Safety. Such a course should have been considered.

21. Consequently, the Court orders each party to bear own costs.

Delivered through Microsoft teams, dated and signed in Kisumu on this 20th day of January 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Appellant O.M. Otieno & Co. Advocates

For Respondent S.N. Nyachae & Co. Advocates

Court Assistant Chrispo Aura