



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL NO. 6 OF 2019

(Originally Kakamega High Court Civil Appeal No. 144 of 2018)

WEST KENYA SUGAR CO. LTD.....APPELLANT

v

ENOCK SHIUNDU BUSHURU.....RESPONDENT

(Being an Appeal against the entire Ruling of Hon. E.W. Muleka Senior Resident Magistrate in Butali Law Courts in CMCC No. 56 of 2017 delivered on 21st September 2018)

JUDGMENT

1. Enock Bushuru Shiundu (the Respondent) instituted legal proceedings against West Kenya Sugar Co. Ltd (the Appellant) before the Butali Magistrates Court on 10 April 2017 alleging breach of statutory duty of care/negligence leading to an accident/injuries in the workplace on 1 March 2015.
2. In a judgment delivered on 20 September 2018, the trial Court found the Appellant liable 70%. The Respondent was awarded Kshs 70,000/- general damages and Kshs 10,000/- special damages.
3. The Appellant was aggrieved and it filed a Memorandum of Appeal before the High Court in Kakamega contending that
 1. The Learned trial Magistrate erred in law and fact and grossly misdirected himself in treating the evidence and submissions on record more so the Appellant's superficially, consequently arriving at a wrong conclusion on liability.
 2. The Learned trial Magistrate disregarded the Appellant's evidence that the Respondent's case was fraudulent and hinged on forged documentary evidence.
 3. The Learned trial Magistrate erred in law and fact and grossly misdirected himself in treating the evidence and submissions on record, more so the Appellant's superficially, consequently making a wrong award in damages.
 4. The Learned trial Magistrate erred in law and fact, applied the wrong principles and misapprehended the evidence on record that he arrived at an award in damages that was so inordinately high and excessive in relation to the injuries sustained by the Respondent.
 5. The Learned trial Magistrate erred in law and fact in not evaluating the evidence tendered judiciously.
4. On 3 May 2019, the High Court, citing lack of jurisdiction transferred the Appeal to this Court.
5. This Court gave directions on 4 November 2020 leading to the Appellant filing its submissions on 20 November 2020. The Respondent's submissions were not on file by the agreed timeline of 11 December 2020).

Role of the Court on the first appeal

6. 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.

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

Forged documents

Employment relationship

8. The Appellant had denied in its Defence that it had employed the Respondent.

9. During testimony, the Respondent testified that he was initially employed by the Appellant as a trailer turn boy offloading goods and to prove the employment relationship he produced a copy of a gate pass allowing him access into the workplace (testified that the Appellant kept the original).

10. The Respondent named his supervisor at the material time as one Madioli.

11. Under cross-examination, the Respondent stated that he had worked with the Appellant for 17 years in the transport department. He also named the person who took him to Malava hospital as Idriss.

12. The Appellant called its Transport Superintendent to testify. He testified that he knew the Respondent and that he was never an employee of the Appellant but lived in the neighbourhood.

13. The witness disowned the gate pass produced by the Respondent because it was not signed and had a date of 16 March 2015 while the accident was said to have happened on 1 March 2015.

14. The witness also stated that no accident was reported to him on the material day and that the accident register had no records of an accident involving the Respondent.

15. While addressing the existence of an employment relationship, the trial Court was content to merely note from the evidence by both parties, it is clear that the Plaintiff was an employee of the Defendant who was on duty on the material day and for that reason, the Court will not belabour itself in establishing proof of employment.

16. The Court has re-evaluated the evidence on the employment relationship. Issue was joined on it, but the parties did not place much emphasis on it during examination-in-chief and cross-examination in unravelling the puzzle. The interrogation was casual at best.

17. Ordinarily, it is the employer who keeps and maintains employment records (see sections 9, 10(7) and 74 of the Employment Act, 2007).

18. In this type of cases, the employer while denying the existence of a contractual relationship should make candid and full disclosure. Muster-roll or attendance sheets for the week in question may be material. The duplicates of gate-passes for the week may also assist the Court. Copies of payrolls may also assist.

19. The trial Court, however, had to make a determination one way or the other.

20. Although this Court finds the reasoning of the trial Court on the existence of an employment relationship cryptic, it has reminded itself that it did not have the benefit of seeing the demeanour of the witness when testifying on the existence of a contractual relationship and therefore it would defer to the finding of the trial Court.

21. The Court also notes the obligation placed on employers by section 10(7) of the Employment Act, 2007 to produce contracts in legal proceedings.

22. The Court would therefore conclude that the Respondent demonstrated an evidential foundation for the finding that he was an employee of the Appellant.

Liability

23. The Respondent alleged that he was injured in the workplace on 1 March 2015. To demonstrate that he was in the workplace, he produced a gate pass for 16 March 2015. The gate pass lacked a signature.

24. When challenged why he did not have a gate pass for the day of the alleged accident, the Respondent stated that the gate pass had been taken by officials of the Appellant and that his supervisor called Madioli had given him copies.

25. According to the Appellant, the Respondent had not proved negligence on its part and without that causal nexus, it was erroneous of the trial Court to find it liable.

26. In finding that the Respondent was injured in the workplace, the trial Court relied on the medical records produced by the Respondent and the testimony of the attending Clinical Officer.

27. The Respondent named the person who was his supervisor at the time of the accident. The person was not called. The failure to call him

was not explained.

28. The Respondent also testified that the Appellant would retain originals of the gate-passes. The Appellant did not lead any contrary evidence or disclose the procedures on gate passes.

29. Again considering that it did not see the witnesses, this Court will defer to the findings of the trial Court.

Quantum

30. The Respondent sustained a cut wound to his right foot which left a small scar. The doctor opined that it was a moderate soft tissue injury which had healed.

31. The Appellant had proposed general damages of Kshs 50,000/- and it cited the authority of *Eastern Produce (K) Ltd (Savani Estate) v Gilbert Muhunzi Makotsi* (2013) eKLR, wherein general damages of Kshs 70,000/- was made.

32. The trial Court did not make any reference at all to the case(s) placed before it through the submissions on record and it is therefore difficult to appreciate the basis of the assessment and award of general damages.

33. Considering the nature of injuries sustained by the Respondent and the authority cited by the Appellant, the Court is of the view that the award of Kshs 100,000/- was excessive in the circumstances of the case and that Kshs 50,000/- would have been appropriate.

Conclusion and Orders

34. From the foregoing, the Court sets aside and vacates the award of Kshs 100,000/- as general damages. It is substituted with an award of Kshs 50,000/- general damages.

35. The sum of Kshs 50,000/- to attract interest from 21 September 2018.

36. The Respondent to have costs before the trial Court and each party to bear own costs of the Appeal.

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

Radido Stephen, MCI Arb

Judge

Appearances

For Appellant Olendo, Orare and Samba LLP Advocates

For Respondent Abok Odhiambo & Co. Advocates

Court Assistant Chrispo Aura