



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
CIVIL APPEAL NO. 40 OF 2018

(Originally Kakamega High Court Civil Appeal No. 14 of 2017)

WEST KENYA SUGAR CO LTD.....APPELLANT

V

DANIEL MWANJE AKATU.....RESPONDENT

(Being an Appeal from the judgment and decree of Hon J. Ong'ondo PM

Kakamega Law Courts in Kakamega CMCC No. 201 of 2015

delivered on 24/1/2017)

JUDGMENT

1. Daniel Mwanje Akatu (the Respondent) sued West Kenya Sugar Co Ltd (the Appellant) before the Chief Magistrates Court (the trial Court) in Kakamega alleging breach of duty of care/negligence.
2. In a Judgment delivered on 24 January 2017, the trial Court awarded the Respondent general damages of Kshs 250,000/-, special damages of Kshs 10,650/- (less 30%) contributory negligence.
3. The Appellant was dissatisfied, and it filed a Memorandum of Appeal before the High Court in Kakamega contending that
 - i. The learned trial Magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same.
 - ii. The learned trial Magistrate misdirected himself in ignoring the principles applicable in awarding quantum of damages and the relevant authorities on the quantum of damages and the relevant authorities on quantum cited in the written submissions presented and filed by the Appellant.
 - iii. The learned trial Magistrate award of damages was inordinately too high and manifestly excessive for the injuries sustained by the Respondent.
 - iv. The learned trial Magistrate erred in failing to evaluate the evidence tendered judiciously.
4. On 29 November 2018, the High Court transferred the Appeal to this Court because of jurisdictional concerns.
5. When the Appeal came up for a Notice to Show Cause why the Appeal should not be dismissed for want of prosecution on 17 November 2020, it directed the parties to file and exchange submissions.
6. The Appellant's submissions should have been filed and served on or before 4 December 2020. The same is not on record.
7. The Respondent's submissions which should have been filed and served on or before 25 January 2021 were equally not on record.
8. In the view of this Court, the failure to file submissions as agreed and ordered is tantamount to failure to prosecute a suit, or an Appeal, as the case may be.

9. It is also a failure to comply with a Court order.

10. Considering the above and that the Court had earlier issued a Notice to Show Cause and that it is the Notice that woke up the Appellant, the Court has come to the conclusion that the Appeal be dismissed.

11. On the assumption that it is wrong in dismissing the Appeal as concluded hereinabove, the Court will proceed to examine the Appeal on the merits.

12. The Appeal is purely on the question of quantum.

13. The Respondent had suffered mainly soft tissue injuries to the leg and sprain of the back (lumbago), and the Appellant had proposed general damages of Kshs 50,000/- relying on *Morris Makau Mutua v Josphat Tipangu Kovulo* (2015) eKLR.

14. In the case, the Plaintiff had suffered back pain, right side headache and chest pain and was awarded Kshs 50,000/-.

15. Although the trial Court indicated that the Respondent had proposed Kshs 40,000/-, a copy of the Respondent's submissions before the trial Court was not included in the Record of Appeal.

16. Despite the failure, a comparison between the injuries sustained and the award allowed in the authority cited by the Appellant before the trial Court, this Court is satisfied that the award of Kshs 250,000/- general damages was excessive and the Court would have reduced it to Kshs 50,000/-.

Conclusion and Orders

17. From the foregoing, the Court dismisses the Appeal for the reasons already outlined hereinabove.

18. No order on costs.

Delivered through Microsoft teams, dated and signed in Kisumu on this 17th day of February 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Appellant Ogejo, Olendo & Co. Advocates

For Respondent Abok Odhiambo & Co. Advocates

Court Assistant Chrispo Aura