



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
APPEAL NO. 14 OF 2018

(Originally Kisii High Court Civil Appeal No. 111 of 2007)

KIPKEBE LIMITED.....APPELLANT

v

EVANS K. ASUGA.....RESPONDENT

(An Appeal from the judgment and decree of the Senior Resident Magistrate

Hon L. Komingoi, Nyamira in Civil Suit No. 47 of 2006 delivered on the 30 May 2007)

JUDGMENT

1. In a judgment delivered on 30 May 2007, the trial Magistrate found Kipkebe Ltd (the Appellant) 50% liable for breach of duty of care/negligence and awarded Evans K. Asuga (the Respondent) general damages of Kshs 70,000/- (before apportionment of liability) and special damages of Kshs 2,000/-.
2. The Appellant was aggrieved, and it filed a Memorandum of Appeal before the High Court, Kisii contending that:
 - (i) The Learned trial Magistrate grossly misdirected herself in treating the evidence and submissions on liability before her superficially and consequently coming to a wrong conclusion on the same.
 - (ii) The Learned trial Magistrate grossly misdirected herself in treating the evidence and submissions on quantum before her superficially and consequently coming to a wrong conclusion on the same.
 - (iii) The Learned trial Magistrate misdirected herself in ignoring the principles applicable and the relevant authorities cited in the written submissions presented and filed by the Appellant.
 - (iv) The Learned trial Magistrate erred in not sufficiently taking into account all the evidence presented before her in totality.
 - (v) The Learned trial Magistrate erred in failing to hold that the Respondent had failed to prove negligence on the part of the Appellant while the onus of proof lay with the Respondent.
 - (vi) The Learned trial Magistrate misdirected herself in not taking into consideration the nature of the Respondents injuries (if at all) at the time of assessing damages.
 - (vii) The Learned trial Magistrate proceeded on wrong principles when assessing the damages to be awarded to the Respondent (if any) and failed to apply precedents and tenets of law applicable.
 - (viii) The Learned trial Magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstances that it represented an entirely erroneous estimate vis-à-vis the Respondent's injuries (if at all) and consequences arising therefrom.
 - (ix) The Learned trial Magistrate failed to appreciate the fact that the Respondent was in total and complete control of the slasher in question and was undertaking a manual task over which the Appellant had no control whatsoever and therefore the Appellant cannot be culpable for the Respondent's self-inflicted injury.

(x) The Learned trial Magistrate wholly ignored the fact that no evidence was proffered to indicate that the manual task being undertaken by the Respondent at the material time required any protective clothing or that the same was provided as a matter of routine elsewhere in respect to similar tasks.

(xi) The Learned trial Magistrate failed to consider that the particulars of negligence and the particulars of breach of statutory duty tabulated in paragraph 6 of the Plaintiff were neither established nor proven.

(xii) The Learned trial Magistrate erred in law by failing to apply precedents of the Superior Court, which precedents were binding on her Court.

3. The Appellant filed its submissions on 2 December 2014 while the Appeal was still before the High Court.

4. On 13 June 2018, the High Court, citing lack of jurisdiction, transferred the Appeal to this Court.

5. When the Appeal was mentioned before this Court on 14 December 2020, it directed the Respondent to file and serve his submissions on or before 29 January 2021 ahead of judgment today. The submissions were not on record as directed.

6. The Court has considered the record and the submissions on record.

Role of the 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.

Proof of Liability

9. While testifying on 9 July 2003, the Respondent had stated that while cutting grass, he hit a stone that rose and hit me on the left index finger.... I blame the Defendant for this accident. They failed to provide me with protective equipment like gloves. I was not given the said gloves. The handle to the said slasher was not steady. It was loose. I told the supervisor, but he did not give me another.

10. The Appellant opted not to lead evidence and indicated that it would put in written submissions.

11. In finding the Appellant partly liable for breach of duty of care/negligence, the trial Court relied on the fact that the Respondent's testimony had not been controverted and that the Appellant had not demonstrated that it had provided the Respondent with protective gear.

12. The Court also considered the testimony that the slasher was not in good condition.

13. It is true that the Appellant did not lead any evidence to controvert the testimony of the Respondent.

14. However, the trial Court needed to consider any causal link between the Respondent's accident/injuries and the Appellant's failure to fulfil its duty of care to the Respondent.

15. This Court does not see how the provision of gloves would have mitigated the accident, resulting from the Respondent hitting a stone when he did not explain whether he lost his grip of the slasher.

16. The accident was self-involving and was not foreseeable by the Appellant and/or the Respondent.

17. In the respectful view of the Court, the accident and injuries sustained by the Respondent was the type contemplated by the Workmen's Compensation Act (since repealed).

18. The parties did not disclose what became of the notification to the Director of Occupational Safety and Health under the Act. If a report was made, the Respondent should pursue compensation under the Act if that avenue is still open.

19. This Court finds that the trial Court fell in error in finding the Appellant partly liable.

20. The circumstances of the case did not warrant such a finding.

Conclusion and Orders

21. Considering the above, the Court sets aside the judgment dated 30 May 2007 and substitutes thereof, an order dismissing the suit.

22. If security was deposited into a bank account as consented by the parties on 11 July 2007, the same should be released to the Appellant's advocate on record.

23. Each party to bear own costs of the Appeal and before the trial Court.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN NAIROBI ON THIS 31ST DAY OF MARCH 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Appellant L.G. Menezes & Co. Advocates

For Respondent E.M. Orina & Co. Advocates

Court Assistant Chrispo Aura