



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL NO. 35 OF 2018

(Originally Kisii High Court Civil Appeal No. 122 of 2013)

AJIWA SHAMJI LIMITED.....APPELLANT

VERSUS

VINCENT BARONGO NYASANI.....RESPONDENT

(Being an Appeal from the judgment of the Chief Magistrates Court at Kisii by the Honourable Magistrate Mugendi Nyaga delivered on 25th July 2013 in Chief Magistrate Court Civil Case No. 256 of 2012)

JUDGMENT

1. Vincent Barongo Nyasani (the Respondent) sued Ajiwa Shamji Ltd (the Appellant) before the Magistrate's Court alleging breach of statutory duty of care/negligence.
2. In a Judgment delivered on 25 July 2013, the trial Court found the Appellant in breach of the duty and awarded the Respondent general damages of Kshs 200,000/- and special damages of Kshs 6,500/-.
3. The Appellant was aggrieved and in a Memorandum of Appeal lodged with the High Court in Kisii contended that
 - (i) The Learned Magistrate erred in law and fact in holding that the Defendant was 100% liable for the accident and/or at all when there was clear and overriding evidence to the contrary.
 - (ii) The Learned Magistrate erred in law and fact in failing to appreciate the impeccable evidence of the defence and thereby arriving at a wrong and erroneous conclusion condemning the Defendant to 100% liability and or at all.
 - (iii) The learned Magistrate erred in law and fact in awarding damages in favour of the Plaintiff without any legal and or evidential justification.
 - (iv) The Learned Magistrate erred in law and fact in failing to appreciate the long-established principle of stare decisis, bringing the law into confusion and thereby deriving an erroneous finding/conclusion.
 - (v) The learned Magistrate erred in law and fact in failing to appreciate as follows:
 - (a) That the evidence adduced in support of the Plaintiff's case was incongruous with the pleadings, composed of hearsays tendered by incompetent witnesses, contradictory and discreditable.
 - (b) That the Plaintiff's pleadings and the evidence tendered in support thereof was incapable of sustaining any award of damages.
 - (vi) The learned Magistrate erred in law and fact in entering judgment in favour of the Plaintiff against the Defendant in spite of the Plaintiff's miserable failure to establish his case on a balance of probability.
 - (vii) The Learned Magistrate erred in law and fact in failing to appreciate the legal position that there could be no liability without fault. The Court award is unsustainable and baseless in the circumstances.
 - (viii) The learned Magistrate erred in law and fact in entering judgment for the Plaintiff in total disregard of the exculpatory evidence by the Defence.

(ix) The learned Magistrate erred in law by awarding excessive damages beyond the scope of evidence and/or legal entitlement.

4. On 9 August 2018, the High Court dismissed the Appeal under Order 42 Rule 35(2) of the Civil Procedure Rules. However, the order was reversed, and the Court granted the Appellant leave to file and serve a supplementary Record of Appeal.
5. The order to file a supplementary Record of Appeal was extended on 1 October 2018, and on 1 November 2018, the High Court transferred the Appeal to this Court because of jurisdictional concerns.
6. On 2 November 2020, this Court issued a Notice to Show-Cause to the Appellant to explain why the Appeal should not be dismissed for want of prosecution.
7. Because there was no Record of Appeal by 4 December 2020, the Court dismissed the Appeal, but the dismissal order was vacated when the Appellant proved that one had been filed on 27 November 2020.
8. The Court thereafter directed the filing and exchange of submissions. The Appellant filed its submissions on 20 January 2021 (should have been filed by 30 December 2020) while the Respondent's submissions are not on record.
9. In its submissions, the Appellant reduced the Grounds of Appeal to two broad grounds, liability and quantum.

Role of the Court on the first appeal

10. In *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates (2013) eKLR*, the Court of Appeal stated as follows regarding the duty of a first appellate court:-

This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

11. The Court will keep the interdict in mind.

Proof of Liability

12. The Appellant challenged the Magistrates' findings on liability on the ground that the Respondent did not present any evidence of negligence against it. It was also urged that the Respondent had failed to avail an eye witness.
13. Taking the argument further, the Appellant submitted that the Respondent had not proved that he was on duty on the material day he alleged to have been injured in the workplace. According to the Appellant, the Respondent's evidence had been inconsistent as to how the accident occurred.
14. The Court has looked at the evidence taken by the Magistrates Court.

Was the Respondent on duty?

15. The Magistrate Court found that the Respondent was on duty because the Appellant's witness had admitted that he would prepare the appropriate attendance record after 2.00 pm and in the instance case, the Respondent had allegedly been injured at 10.00 am thus, it was probable he was not at work when the record was being prepared.
16. It is always the duty of the employer to keep employment records. Ordinarily, an employee would not have any record which would evidence that he or she was not at work.
17. This Court agrees with the finding of the Magistrate that it was more probable that the Respondent was at work.

Negligence

18. The Respondent's duties included breaking rocks using a hammer with a metal frame.
19. On why he was blaming the Appellant, the Respondent testified that it is a colleague he was working with who abruptly let go of the hammer they were using, and thus he fell due to the impact and got injured.
20. According to the Respondent, he would not have been injured if the Appellant had issued him safety gear such as gumboots and a helmet.
21. The Appellant had on its part contended that the Respondent had been issued with safety gear including gloves, shoes and a helmet on the day he was employed. However, an inventory to show the safety gear was issued was not produced.
22. The Respondent did not demonstrate how the safety gear he alleged were not provided to him could have mitigated the accident and/or injuries. According to the Respondent's own testimony, the cause of the accident and injuries was the failure of a colleague to maintain a grip

of the hammer they were using.

23. The question, therefore, arises whether the Appellant would be liable for the injuries caused to the Respondent by a co-worker.

24. Legally, the Appellant would be liable under the doctrine of *respondeat superior* if negligence was proved.

25. The Respondent herein did not disclose what led to his co-worker's grip on the hammer slipping. Without any evidence to suggest negligence on the part of the co-worker, this Court is of the view that the Respondent's remedy fell under the Work Injury Benefits Act, 2007.

26. The Magistrate, therefore, fell into error in finding that the Respondent had established negligence or liability on the part of the Appellant.

Conclusion and Orders

27. Flowing from the above, the Appeal is allowed, and the judgment of the Magistrate's Court is set aside and substituted with an order dismissing the suit which was lodged before that Court.

28. The Court orders each party to bear their own costs of the Appeal and before the Magistrate Court as the Appellant will access interest on the decretal sum deposited in bank.

Delivered through Microsoft teams, dated and signed in Kisumu on this 24th day of March 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Appellant Mose, Mose & Millimo Advocates

For Respondent Ben K. Gichana & Co. Advocates

Court Assistant Chrispo Aura