



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

APPEAL NO.E2 OF 2021

(FORMERLY HIGH COURT APPEAL NO. 74 OF 2014)

MENENGAI OIL REFINERIES LIMITED.....APPELLANT

VERSUS

MICHAEL WOKABA WAMALWA.....RESPONDENT

JUDGEMENT

1. The Appellant herein being dissatisfied with the judgment of Hon. M. A Otindo delivered on 27th May, 2014 in Nakuru Chief Magistrates Court Civil Case Number 286 of 2013 preferred this Appeal by way of Memorandum of Appeal dated 10th June, 2014 and filed through the firm of E.M Juma and Ombui Advocates. The appeal is based on the following grounds;

- 1) That the learned trial magistrate erred in law and in fact in failing to consider the Appellants submissions.**
- 2) That, the learned trial magistrate erred in law and in fact in holding the defendant 80% liable against the evidence adduced.**
- 3) That learned trial magistrate erred in law and in fact in failing to dismiss the Plaintiff's Claim.**
- 4) That the learned trial magistrate erred in law and in fact in failing to apply the principles applicable in award of damages and ended up awarding damages that are excessive and are not commensurate with the respondent's injuries and not in accordance with decided authorities.**

It prays for Orders That;

- a) The appeal be allowed and the decree against the appellant be set aside and do proceed to revise and or review the award in its favour and or dismiss the suit with costs.**
- b) That the costs of the appeal and the costs of the subordinate court be granted to the appellant.**
- c) Any other order this honourable Court may deem fit to grant.**

Brief facts

2. The lower court matter was by filed by the Respondent/Plaintiff in suit number Nakuru CMCC No. 286 of 2013 seeking for compensation for injuries sustained while on duty. The Respondent was employed by the Appellant sometimes in the year 2009 as a lab technician whose main work was to sample and analyze crude palm oil. That on 29th September, 2012 while he was on duty sampling crude oils while on the 10th Lorry, he opened the lid of the said lorry which oil gushed through the lid and splashed on his face and body injuring his eyes and burning his face. The Respondent blamed the appellant for providing him with unsafe working environment which led to him sustaining the injuries aforementioned. the Appellant on the other denied liability and testified during hearing that the respondent had been provided with all safety equipment including: dust coats, gumboots, helmets and goggles but he choose not to wear them thereby sustaining the said injuries therefore he was to blame entirely for not taking the necessary precaution against the said injuries. The matter proceeded for hearing and the trial Court found the appellant herein 80% liable while the Respondent was apportioned 20% liability. In the end the Respondent was ordered to pay decretal sum of Kshs 245,000/-. Aggrieved by the said decision the Appellant preferred this Appeal.

3. This appeal proceeded by way of written submissions with the Appellant filling on 16th February, 2020 while the Respondent filed on 20TH February, 2020.

Appellant's submissions.

4. The appellant's Counsel submitted that the Respondent as per the testimony of the Appellant's witness had been provided with all the safety gear required to perform his work however the Respondent negligently failed to wear the same which resulted to the injuries sustained. He argued that had the respondent followed the precautionary measures and wore the protective gear, he would not have sustained the injuries therefore the appellant blames the Respondents for negligence. He cited the case of **Wood -v- Durable Suites Limited [1953] ALL ER 391**.
5. It was submitted that the respondent failed to discharge his duty of proving his case on a balance of probability as the respondent did not at any point demonstrate the alleged negligence on the part of the Appellant as is envisaged under Section 107 of the Evidence Act and reinforced this argument by citing the case of **Muthuku -v- Kenya cargo services [1991] KLE 468** where the court held that the burden of proving a case is on the claimant.
6. On damages awarded to the respondent, it was submitted that the trial court misdirected itself and awarded the respondents damages that are not commensurate with the injuries sustained, in that the damages awarded are excessive in the circumstances. He argued that the court ignored the authorities cited by the parties and came up with damages of Kshs.300,000/- which figure was not substantiated or backed up with any authority, he thus submitted that general damages of Kshs.100,000/- was sufficient in the circumstances and cited the case of **Kanyenyani Tea Factory Co. Limited -v Stanley Muhia Gichure [2008] eklr**.

Respondent's Submissions

7. The respondent on the other hand submitted the trial court's decision is sound in apportionment of liability upon the parties. He argued that the respondent sustained injuries while on duty a fact that the Appellant's witness affirmed but only alleged that the accident occurred due to failure of the respondent to wear protective gear issued, however the Respondent denied ever being issued with any protective apparel save for a dust coat. He argued that the cause of the accident was a result of the fault valve at the lorry that cause crude oil to gush out injuring the Respondent's eyes. It is the respondents submissions that the appellant denial of liability was not backed up with any evidence such as service of the lorry certificate and issuance of the protective gear sheet therefore the appellant ought to be held 100% liable for failing to provide a safe working environment for its employees as was held in **African Highlands and Produce Co. Ltd -v- Collins Moseti Ontweka, Kericho HCCA No. 38 of 2002**.
8. With regard to damages awarded, the Respondent distinguished between the case of **Ngala shedi -v- Jackson Nyanbu** where the plaintiff had sustained similar injuries with his and was awarded Kshs. 250,000/- in the year 1992 while in the case of **Wellington Miema -v- Nairobi City Commission** where the plaintiff had sustained deep cut wounds of his eye and awarded Kshs.80,000/- and submitted that the trial court rightfully awarded him Kshs. 300,000/ considering his specific injuries and the current economic times.
9. He concluded by citing the cases of **Savco stores Ltd -v- David Mwangi Kimotho [2008] eklr** and **Timesales limited -v Penina Achined Omondi [2011] eklr** and urged the court not to interfere with the trial Court's Decision.
10. I have examined the averments and submissions of the parties herein. This being the court determining the 1st appeal of this matter, is obliged to re-evaluate the evidence on the record afresh.
11. From the record of appeal the plaintiff testified that he was an employee of the respondent. He produced his appointment letter, gate pass, payslip and evidence of injuries as his evidence in court. He also testified that he was not given protective gear as expected and that he was only issued with a dust coat and not goggles. He testified that the value of the lorry he was sampling was faulty and that is why he was injured.
12. The doctor who examined the plaintiff gave evidence as PW2 and testified that the plaintiff suffered chemical burns on the eyes and 1st degree burns on the face which were classified as previous harm.
13. The defendant called 1 witness who confirmed that he worked with the plaintiff. He averred that he was also a lab assistant and had been issued with safety clothing, gumboots, helmet, gloves and goggles. He however indicated that he signed nowhere on being issued with the item. He confirmed that the plaintiff was injured on the material day on his eyes as oil spilled on him.
14. From this evidence, the fact that the plaintiff was injured was proved and admitted by the plaintiff and respondent. The plaintiff pleaded lack of being issued with protective gear which the respondent insist they issued him.
15. The respondent however failed to submit any evidence that they had issued the plaintiff with any protective gear. The plaintiff was indeed injured at work as proved and he suffered burns on his eyes and face.
16. In his Judgment, the trial magistrate found the plaintiff 30% negligent for embarking on his work without any protective gear which in my view I find reasonable even if he had not been supplied with the protective gear.
17. In arriving at the quantum of damages awarded to the plaintiff, the trial magistrate considered authorities submitted before her and awarded the plaintiff general damages of 300,000/=. I have re-evaluated the evidence and submissions and the Judgment of the lower court. I find the Judgment was based on the current facts and submissions before court.
18. I find no merit in upsetting the lower court Judgment. I find the appeal not merited and I dismiss it accordingly with costs to the respondent.

Dated and delivered in open Court this **21st day of JULY, 2021**.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ngetich holding brief for Githiru for respondents

No appearance for appellants

Court Assistants – Fred and Wanyoike