**Alpharama Limited v Omoi (Appeal 1 of 2018)**
**[2021] KEELRC 2422 (KLR) (24 September 2021) (Judgment)**

Neutral citation: [2021] KEELRC 2422 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS**

**APPEAL 1 OF 2018**

**MA ONYANGO, J**

**SEPTEMBER 24, 2021**

**BETWEEN**

**ALPHARAMA LIMITED ..... APPELLANT**

**AND**

**FELIX OSORO OMOI ..... RESPONDENT**

***(Being an appeal from the judgement of Hon. L. M. Mumassabba, Resident Magistrate in Mavoko SRMCC No. 111 of 2013 delivered on 27th November 2014) – Felix Osoro Omoi v Alpharama Limited)***

**JUDGMENT**

## Introduction

1. This appeal is against the judgment of Hon. L. M. Mumassabba, Resident Magistrate at Mavoko delivered on 27th November 2014. It was initially filed at the High Court at Machakos and subsequently transferred to this Court for determination. The Appellant filed its record of appeal on 30th March 2017. Pursuant to the court's directions parties dispensed with the appeal by way of written submissions.

2. In its Memorandum of Appeal filed on 8th December 2014, the Appellant challenges the impugned judgment on the following grounds:

    i. The Learned Magistrate misdirected herself and erred in law and in fact in failing to find that there were a lot of inconsistencies between the plaintiff's pleadings, his witness statement and the oral evidence given in court and thus arrived at an erroneous finding on liability.

    ii. The Learned Magistrate misdirected herself and erred in law and in fact by holding that the plaintiff had proved his case on liability on a balance of probabilities

iii. The Learned Magistrate misdirected herself and erred in law and fact in holding that the occurrence of the accident was proved and that the Appellant was 100% liable for the same.

iv. The Learned Magistrate erred in law and in fact in failing to consider and rule on the evidence of the defendant to the effect that the plaintiff's claim as a workman was misconceived.

v. The Trial Magistrate misdirected herself in failing to dismiss the plaintiff's suit in the lower court in view of the evidence tendered before her.

vi. The Trial Magistrate erred in law in failing to consider the Appellant's witness evidence which showed that the Respondent was not involved in the alleged accident as claimed.

vii. The Trial Magistrate misdirected herself and erred in law by awarding damages that are manifestly excessive in comparison with the injuries allegedly sustained by the plaintiff.

viii. The Trial Magistrate erred by failing to consider the medical report hence arriving at a wrong assessment of damages

ix. The Trial Magistrate erred by failing to properly consider the evidence on record, the Appellant's submissions and authorities and hence did not write a considered judgment

x. The Trial Magistrate misdirected herself and erred in law and in fact by failing to uphold precedent and the doctrine of stare decisis.

3. Consequently, the Appellant seeks the following orders:

i. The appeal be allowed

ii. The whole of the judgment delivered on 27th November 2014 both on liability and quantum be set aside.

iii. The Respondent's suit in the lower court be dismissed with costs to Appellant

iv. Costs of the appeal and the lower court suit be awarded to the Respondent in any event

v. Such other or further relief as this court may deem just to grant

**Brief Facts of the Case**

4. This appeal stems from a personal injury claim by the Respondent where he sued the Appellant for negligence, breach of statutory duty and failure to provide a safe system work of causing him to sustain injuries while in the course of his employment with the Appellant on 19th September 2010. The Respondent's case was that while engaged in manual work building a wall beside a borehole for water storage, the wooden ladder he was standing on while handing over stones to his colleague broke causing him to fall and sustain injuries on the left side of his face including a broken tooth. The Respondent faulted the Appellant for failing to provide him with protective gear that would have prevented or significantly lessened his injuries; and for failing to provide safe means of undertaking the said task.

5. After considering evidence presented by both parties, the trial court found the Appellant 100% liable and awarded the Respondent damages of Kshs.170,000.

**Appellant's Submissions**

6. The Appellant contends that the trial court erred in law and in fact in reaching the conclusion that it was 100% liable for the Respondent's accident yet the Respondent did not prove his case on a balance

of probabilities. It is submitted that the Respondent claimed he was at work on 19th September 2010. However, the Appellant gave evidence that the Respondent had sought permission to be away from work on that date as his wife was unwell. Further, the Appellant's treatment records produced as D. Ex1, revealed that there was no record of the Respondent having been treated at the Appellant's clinic.

7. The Appellant asserts that 19th September 2010 was also not a work day being a Sunday hence the Appellant's clinic was closed. In the event of injury on such a day, ordinarily the Respondent would have been treated the next day when the clinic opened. D.Ex 1 bore names of persons treated on the 18th and 20th of September 2010 in which record the Respondent's name was conspicuously missing. The Appellant reiterated that DW1 in his testimony confirmed that the Respondent worked on 19th September 2010 and was subsequently granted permission to take time off work so as to tend to his ailing wife. That the court's finding that the Respondent was injured on that date simply because the Appellant did not deny that he was at work on that date was erroneous as in itself it was not proof that the Respondent sustained injuries as claimed. Moreover, there was no corroborating evidence presented such as independent evidence from a co-worker. The Appellant concludes that the Respondent failed to discharge the burden of proof prescribed by section 107 of the *Evidence Act*. It prayed for the appeal to be allowed with costs.

**Respondent's Submissions**

8. The Respondent in its submissions consolidated issues for determination into one ground; namely whether the Learned Magistrate erred in law and in fact in finding the Appellant liable for injuries sustained by the Respondent in the course of his employment at the Appellant's premises.

9. It was submitted that the Respondent's employment relationship with the Appellant was not in issue having been confirmed by DW1 in his testimony. The only question for determination was whether the Respondent was injured while in the course of employment on the said date and if the Appellant was liable for the same. The Respondent submitted that the accident and resultant injuries were demonstrated by the treatment notes from Machakos Level 5 Hospital. He contended that the Appellant's assertion that he was not injured for the reason that his name did not appear in the accident register was corroborated by the evidence of DW1, the Appllant's own witness that there was no nurse on duty on the material date. Secondly, it was the Appellant's responsibility to take data from the Respondent for record purposes. He cites the case of Sokoro Saw Mills v Grace Nduta Ndung'u (2006) eKLR in which the court held as follows:

> " The evidence of the master roll and the accident book which were produced as exhibits by the Appellant were documents which were prepared by the Appellant itself with no input from the Respondent. The evidence of the said records therefore cannot be considered to be factual in the face of the evidence which was adduced by the Respondent and her witness. I therefore dismiss the Appellant's appeal on liability"

10. The Respondent submits further that the Appellant's witness confirmed that he was a supervisor of a total of 50 workers making it impossible for him to be at every work station at the same time. That it is clear from the record that the plaintiff was injured in the Appellant's premises while under the supervision of its employee. In light of his oral and documentary evidence, the Respondent opines that he proved that he sustained injuries in the course of his employment for which the Appellant as

his employer ought to be held liable in accordance with the holding in the case of Nickson Muthoka Mutavi v Kenya Agricultural Research Institute (2016) eKLR:

> " It therefore follows that as a general rule the employer is liable for any injury or loss that occurs to his employees while at the work place as a result of the employer's failure to ensure their safety"

11. The Respondent concluded that the appeal lacks merit and should be dismissed with costs.

**Analysis and Determination**

12. This being a first appeal, it behoves this Court to consider the case in its entirety on matters of both fact and law; notwithstanding that the court does not have a similar opportunity as the court of first instance to engage in intricacies such as the demeanour and delivery of the witnesses. The court is guided by principles set in the case of Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123 for Appellate Courts such as this one in the determination of such appeals. In the said case it was held that:

> " Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial. Judge's findings of fact appear earlier that he has clearly failed on some part to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

13. In as much as the Appellant in its memorandum of appeal challenged the trial court judgment on both liability and quantum, the parties only submitted on liability. As stated by the Respondent, the only issue arising for determination is whether the Learned Magistrate erred in law and in fact for finding the Appellant wholly liable for the Respondent's injury.

14. It is trite law that he who alleges must prove. From the court record, the Respondent testified that he was employed by the Appellant as a casual worker in the building section. He attributes his accident to a faulty wooden ladder that broke while he was undertaking the assigned task of passing stones to the mason for the construction of a wall around a borehole. The Respondent fell as a result of which he sustained injuries to his face and his tooth broke necessitating its removal at Athi River Medical Centre. He produced treatment notes from Machakos Level 5 Hospital as P.Ex3. The Respondent's testimony that he was injured on a Sunday while the clinic was not in operation is in tandem with the Appellant's. DW2, a medical practitioner confirmed the same injuries as captured in his medical report which was produced as P.Ex 1a.

15. DW1, Daniel Kyalo Munyao, a supervisor working for the Appellant on the other hand stated that he remembers the event of Sunday, 19th September 2010. He confirmed that the Respondent was present at work. He however sought permission to go home as his wife was unwell which permission was issued for the next two days. DW1 denied that the plaintiff was injured on the alleged date as he did not receive any report of such an injury. He produced an accident register as D.Ex 1 to demonstrate the same. On cross-examination, DW1 admitted that the nurse was not on duty on the material day hence no record could have been made. Normally the record would have been entered the next day but the Respondent was not at work on that day.

16. On the issue of the Appellant's liability for the Respondent's injury, I opine that the same was sufficiently proved. The Appellant failed to abide by its statutory obligation to provide a safe system of work consequently compromising the Respondent's safety. The Respondent fell from a faulty wooden ladder. As observed by the trial court, had he been issued with a strong well maintained ladder, the accident would not have occurred. The Appellant was therefore in contravention of Section 101(1) of the *Occupational Safety and Health Act*, 2007 which provides as follows–

> Every employer shall provide and maintain for the use of employees in any workplace where employees are employed in any process involving exposure to wet or to any injurious or offensive substance, adequate, effective and suitable protective clothing and appliances, including, where necessary, suitable gloves, footwear, goggles and head coverings.

17. Lastly, the Appellant is of the opinion that damages of Kshs.170,000 was exorbitant for the Respondent's injuries being loss of his upper left incisor and facial swelling and bruises. As pointed out earlier in this judgment, neither of the parties submitted under this head. Be that as it may, in considering this ground as stipulated in the memorandum of appeal, the court is guided by the case of Butt v Khan (1981) KLR 349 which set the following tenets:

> " An Appellate Court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

18. As stated by the trial court, the Respondent proposed an award of Kshs.220,000 in reliance on the case of Douglas Mwirigi Francis & 2 Others v Andrew Miriti (2008) eKLR while the Appellant's authorities ranged from Kshs.40,000 – 80,000 for similar injuries. The award of Kshs.170,000 is reasonable and within an acceptable range with a slight variation attributed to inflation as correctly stipulated by the trial court. I see no reason to interfere with the same.

**Conclusion**

19. From the totality of evidence, pleadings and legal arguments advanced by the parties, I find that the appeal lacks merit and is dismissed with costs.

20. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS ON THIS 24TH DAY OF SEPTEMBER 2021**

**MAUREEN ONYANGO**

**JUDGE**

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this Court the duty

of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**