



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL NO. 36 OF 2018

Originally Kakamega High Court Civil Appeal No. 18 of 2016)

WEST KENYA SUGAR CO LTD.....APPELLANT

v

NICKSON MANYASA JUMA.....RESPONDENT

(Being an Appeal from the judgment and decree of Honourable J. Ongondo, Senior Resident Magistrate, Kakamega dated and delivered on 17th February 2016 in Kakamega CMCC No. 459 of 2012)

JUDGMENT

1. In a judgment delivered on 17 February 2016, the Magistrates Court awarded Nickson Manyasa Juma (the Respondent) general damages of Kshs 350,000/- and special damages of Kshs 7,000/- after finding West Kenya Sugar Co Ltd (the Appellant) liable in negligence.
2. The Appellant being aggrieved filed a Memorandum of Appeal before the High Court in Kakamega on 2 March 2016 contending that:
 - (i) The learned Magistrate erred in fact and in law when he made a finding that the Respondent had, on a balance of probability, proved negligence and/or breach of statutory duty against the Appellant.
 - (ii) The learned Magistrate erred in both fact and law when he found that the Respondent had been assigned a duty to carry a plate which ought to have been carried by 6 people and that this was the contributing factor to the accident, a fact which had not been pleaded in the Plaint.
 - (iii) The learned Magistrate erred in fact and in law when he failed to appreciate that there can never be liability without fault and therefore could only further err when he held that the Appellant was 100% liable in the accident under the circumstances.
 - (iv) The learned Magistrate erred in fact and in law when he failed to return a finding that the Respondent had failed to prove any of the particulars of negligence and or breach of statutory duty in the circumstances.
 - (v) The learned Magistrate in the circumstances erred when he failed to find that the Respondent was in full and total control of the circumstances surrounding his injuries and that he was the sole author of his misfortune, and in the process could only further err when he failed to apportion contributory negligence against the Respondent.
 - (vi) The learned Magistrate erred in fact and in law when under the circumstances he awarded to the Respondent the sum of Kshs 350,000/- as general damages, which amount was manifestly excessive in the circumstances.
 - (vii) The learned Magistrate exercised his discretion wrongly when he failed to take into account the nature and extent of the basically soft tissue injuries which the Respondent had suffered and the fact that he had healed, leaving him without any degree of incapacity.
 - (viii) The learned Magistrate erred in both law and in fact when he awarded damages based on injuries which had been suffered by the Claimant in CA 56 " B" of 2009, *Eldoret Steel Mills v George Ochieng Owino* and inflationary trends since 2011 and not on the basis of the injuries which the Respondent herein had allegedly suffered.
 - (ix) In awarding excessive damages under the circumstances, the learned Magistrate failed to take into account relevant factors, which primarily in the case were the injuries which the Respondent had suffered.

3. The Appellant did not take any action to progress the Appeal to hearing, and on 1 November 2018, the Respondent filed an application seeking an order dismissing the Appeal for lack of inaction on the part of the Appellant.
4. On 27 November 2018, the High Court transferred the Appeal to this Court because of jurisdictional concerns and through a letter dated 19 December 2018, the Deputy Registrar notified the parties that the file had been received and given a new number.
5. When the Appeal came up for directions before this Court on 2 November 2020, the Court directed that a Notice to Show Cause why the Appeal should not be dismissed be issued with a return date 17 November 2020.
6. On this latter date, the Appellant informed the Court that it had requested for proceedings to enable it to file a Record of Appeal and that it had not served its replying affidavit to the dismissal application.
7. On 24 November 2020, the Court gave the Appellant 45 days within which to file and serve a Record of Appeal.
8. When the Appeal came up on 3 February 2021, the Appellant told the Court that the Record of Appeal was incomplete because it had not yet secured certified copies of the proceedings.
9. The Court directed it to get the copies and file a Supplementary Record of Appeal within 30 days, and the same was filed on 31 March 2021.
10. Pursuant to further Court orders, the Appellant filed its submissions on 18 June 2021 (should have been filed and served before 29 May 2021), while the Respondent filed his submissions on 25 June 2021.
11. The Court has considered the record and submissions and noted that the Appellant condensed the Grounds of Appeal to 2, liability and quantum, while the Respondent raised one issue, the competency of the Appeal.

Competency of the Appeal

12. The Respondent challenged the competency of the Appeal on the grounds that the Appellant had not filed certified copies of the proceedings and judgment.
13. In support of the competency arguments, the Respondent drew the attention of the Court to Order 42 Rule 2 of the Civil Procedure Rules, which requires that in the absence of a certified copy of decree at the time of filing a Memorandum of Appeal, the Appellant should file one as soon as possible or within such time as allowed by the Court.
14. The Respondent also cited Order 42 Rule 13 of the Rules and Section 65(1)(b) of the Civil Procedure Act, which requires the Court to satisfy itself that certain documents are part of the record before allowing an appeal to proceed to hearing.
15. In terms of case law, the Respondent cited *Paul Karenyi Leshuel v Ephantus Kariithi Mwangi & Ar* (2015) eKLR, *Rachel Wambui Nganga & Ar v Rahab Wairimu Kamau* (2020) eKLR and *Chege v Suleiman* (1988) eKLR for the proposition that where there was a failure to comply, then the Appeal was incurably incompetent, defective and fatal.
16. The Appellant filed a Supplementary Record of Appeal on 31 March 2021, and the Court gave directions as to the hearing of Appeal on 29 April 2021.
17. The Court, therefore, finds the competency challenge overtaken by events.

Liability

18. Impugning the Magistrate's findings on liability, the Appellant urged that the finding was erroneous because the Respondent had not pleaded that the tractor plate which led to him sustaining injuries should have been carried by 6 persons.
19. The Appellant also challenged the finding on liability on the ground that the Respondent had not led any evidence of fault on its part.
20. The Appellant cited the decisions in *Elizabeth O. Odhiambo v South Nyanza Sugar Co Ltd* (2019) eKLR and *Joyce Wanjiku Kimani v Eunice Maina & 2 Ors* (2020) eKLR, amongst other authorities.
21. The Respondent did not respond to the submissions on liability.
22. The Court has reviewed the pleadings and, more so, the Pleint. In paragraph 5, it was pleaded:
 5. THAT on or about 4/4/2011, the Plaintiff was in the ordinary course of employment as a casual worker, and as he was carrying a heavy tractor plate when due to the Defendant's negligence, the heavy tractor plate fell on his right leg and in the process, the Plaintiff sustained severe bodily injuries which he holds the Defendant liable.
23. In the Court's view, the pleading was sufficient to put the Appellant on notice as to the case the Respondent was advancing and that the other details were to be the subject of evidence at trial.

24. While finding in favour of the Respondent on liability, the Magistrate considered that the Respondent had demonstrated a contractual nexus with the Appellant and that the Appellant owed the Respondent a statutory duty of care.
25. The Magistrate further considered the Respondent's testimony that the tractor plate should have been carried by 6 persons.
26. The second ground of challenge by the Appellant was that the Respondent had failed to discharge the burden of proof as to negligence.
27. The Respondent set out the particulars of negligence in paragraph 6 of the Plaintiff.
28. During the Respondent's oral testimony, he asserted that the Appellant was liable in negligence because while knowing that the tractor plate was supposed to be carried by crane or not less than 6 persons, he was asked to carry it alone.
29. The Appellant's only witness, a Clerk, testified that only welders were allowed to carry tractor plates but that despite being at work on the material day, he did not witness the accident and that the Respondent's supervisor did not inform him of the accident.
30. The Appellant's witness did not witness the accident, nor did he testify as to how many persons (or welders) could carry the tractor plate.
31. The Respondent's Supervisor, who was privy to the accident, was not called to testify. The failure to call him was not explained.
32. This Court is, therefore, unable to disturb the finding by the Magistrate on liability and standard of proof.

Quantum

33. The Appellant did not file any submissions to guide the Magistrate on the assessment of damages.
34. However, the Magistrate considered the authority of *Eldoret Steel Mills Ltd v George Ochieng Owino* (2011) eKLR cited by the Respondent wherein the employee had sustained soft tissue injuries with left skin pigmentation, and the High Court left undisturbed an award of general damages of Kshs 200,000/-.
35. In the present appeal, the Appellant squandered an opportunity to distinguish the authority relied on by the Respondent. The Appellant should not in the circumstances fault the Magistrate.

Conclusion and Orders

36. In light of the above, the Court finds the Appeal without merit, and it is dismissed with costs both before the Magistrates Court and this Court.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 8TH DAY OF OCTOBER 2021.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For Appellant Okongo, Wandago & Co. Advocates

For Respondent Abok Odhiambo & Co. Advocates

Court Assistant Chrispo Aura