



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MACHAKOS

APPEAL NO. 1 OF 2020

(Formally Machakos HCCA No. 127 of 2019)

Before Hon. Lady Justice Maureen Onyango

SELENITE CONTRACTORS LIMITED.....APPELLANT

VERSUS

JOHN MUTHAMA MULONZI.....RESPONDENT

(Being an appeal of the judgement of Hon. E. Michieka, Principal

Magistrate delivered on 19th September 2019 at Mavoko in Civil Case

No. 1393 of 2017 – John Muthama Mulonzi v Selente Contractors Limited)

JUDGMENT

1. This is an appeal and cross appeal against the judgment of the Principal Magistrate at Mavoko in Civil Suit No. 1393 of 2017. In that suit the Respondent in his Plaint filed on 6th November, 2017 contended that on 15th September, 2016 while in the course of his employment at the Appellant's premises he was injured when a plywood fell on his left foot leaving him with serious injuries as captured in his Plaint.

2. In its defence the Appellant denied the allegations in the plaint. More specifically, it denied that the Plaintiff was its employee or that he was injured while under the Appellant's employment. The Appellant also denied any negligence on its part and contended that the injury suffered by the Respondent was solely be attributable to his own negligence as particularized in paragraph 8(a) to (g) of its Statement of Defence.

3. The Appellant prayed that the suit be dismissed with costs.

4. At the hearing of the suit on 5th September, 2018 with the Respondent testified on his behalf called two witnesses ANTHONY MURIITHI, DW1 and NICODEMUS MBUVI, DW2.

5. Upon consideration of the evidence, the learned Trial Magistrate in its Judgment delivered on 19th September, 2019 found the Appellant 100% liable for the injuries sustained by the Respondent and awarded the Respondent Kshs.330,000 as General damages, Kshs.3,000 as special damages and costs of the suit plus interest.

6. The Appellant being dissatisfied by the judgment of the Trial Magistrate seeks to set it aside on the following grounds raised in its Memorandum of Appeal:

(i) The Learned Magistrate erred in law in failing to properly identify, synthesize and analyze the issues for determination from the evidence arising from the pleadings and the testimony of the witnesses.

(ii) The Learned Magistrate erred in law by failing to give any legal justification for the general damages awarded to the Respondent and/or tabulation as to how the said figure was arrived at.

(iii) The Learned Magistrate erred in law in awarding the Respondent the sum of Kshs.330,000/- for general damages without proof of the same to the standard prescribed by law.

(iv) *The Learned Magistrate erred in law in awarding special damages of Kshs.3,000/- which were not specifically proven as required in law.*

(v) *The Learned Magistrate misdirected himself in failing to consider the purpose served by the Certificate of Payment whose validity was never challenged by the Respondent at the trial stage.*

(vi) *The Learned Magistrate solely decided the case on the basis of the evidence tendered by the Respondent while ignoring the documents and testimony tendered by the*

Appellant.

(vii) *The Learned Magistrate erred in law and fact in disregarding the Defendant's Defence.*

(viii) *The Learned Magistrate erred in failing to give proper analysis of the evidence before him.*

(ix) *The Learned Magistrate erred in law in finding for the Respondent in the above-mentioned Judgment.*

7. The Appellant prays that the judgment of the Trial Court be set aside and substituted with an order dismissing the Respondent's Plaint dated 9th October, 2017 with costs.

8. Through his Notice of Cross Appeal filed in Court on 17th October, 2019, the Respondent sought to have the Trial Magistrate's Judgment varied on the following grounds:-

(i) *The Learned Magistrate erred in law and fact by awarding the Respondent general damages of Kshs.300,000/- which were inordinately low and which did not have any legal justification.*

(ii) *The Learned Magistrate erred in law and fact by failing to*

consider or appreciate the Respondent's pleading and submissions on quantum.

9. The parties agreed to canvass the appeal by way of written submissions and each party filed its respective submissions.

Appellant's Submissions

10. In its Submissions the Appellant maintained that the Trial Magistrate erred in law and fact by finding it culpable for the injuries suffered by the Respondent on 15th September, 2016 and insisted that the Respondent was not injured while under its employment.

11. It further maintained that the Respondent failed to call key witnesses to corroborate his evidence on how the accident occurred. It relied on the evidence of its two witnesses Mr. Anthony Muriithi and Mr. Nicholas Mbuvi who testified that the accident did not occur as alleged by the Respondent. The Appellant submitted that the Respondent was injured while on a frolic of his own and therefore it cannot be held liable for such injuries. For emphasis the Appellant cited and relied on the case of **Statpack Industries v James Mbithi Munyao (2005) eKLR**.

12. The Appellant argued that the Respondent failed to adduce the necessary evidence to link his injuries to negligence on the part of the Appellant maintaining that his injuries were as a result of negligence on his part. To buttress this argument the Appellant cited and relied on the Court of Appeal decision in the case of **Purity Wambui Muriithi v Highlands Mineral Water Co. Ltd (2015) eKLR** where the Court held that it is not in all circumstances where an employer shall be held liable for accidents as some may happen due to an employee's own negligence and would therefore be unfair to hold the employer liable.

13. The Appellant contended that the Respondent had no claim as against it as was evidenced by the certificate of payment issued by the Labour Officer attached to the record of Appeal at page 50 and was therefore not eligible to any compensation by the Trial Magistrate.

14. It is further submitted that no damages are due to the Respondent given the circumstances surrounding the accident.

15. It is contended that in the event the Court is convinced on awarding damages then the award by the Trial Magistrate was manifestly excessive as the Trial Magistrate acted on the wrong principles of law and thus arrived at a wrong determination. For emphasis the Appellant cited and relied on the case of **Garton Limited v Nancy Njeri Nyoike (2016) eKLR** that gives this Court jurisdiction to interfere with the Trial Court's decision on quantum.

16. The Appellant maintained that the Trial Magistrate applied the wrong principles in its assessment of quantum as it relied on the medical report as produced by the Respondent, an incompetent person as the respondent failed to call the doctor to testify by dint of the provisions of Section 35 of the Evidence Act. To fortify this argument the Appellant cited and relied on the case of **Koran v Mariam Hamed (2004) eKLR**.

17. The Appellant urged this Court to be guided by the case of **Gerald Oyugi v Evans Okeyo Mochere (2019) eKLR** where the court quoted the cases of **National Cereals and Produce Board v Protas Wafula Wanyama (2018) eKLR** and **Peter Kioko & Another v Hellen Muthee Muema (2018)** where the Court of Appeal reduced the award for general damages to Kshs.200,000/- in both cases for

similar and more serious injuries as the Plaintiff in both cases as the Plaintiff suffered amputation of the toes and reduce the quantum awarded to Kshs.50,000/- which it termed as adequate compensation.

18. In conclusion the Appellant urged this Court to find merit in its Appeal and allow it as prayed.

Respondent's Submissions

19. The Respondent on the other hand submitted that he had proved his case at the Trial Court on a balance of probabilities on the occurrence of the accident which the Trial Magistrate rightfully found the Appellant 100% liable for.

20. He argued that the evidence tendered was enough to prove that he indeed suffered injuries while on lawful duties and that the Appellant is estopped from claiming that the injuries occurred outside the Respondent's work schedule.

21. On the issue of the suit being time barred by dint of the provisions of Section 26 (1) of the Work Injury Benefits Act, the Respondent maintained that the Appellant is estopped from raising the issue at this stage as it failed to do so at the Trial Court.

22. He further argued that his claim was not statute barred as the same was filed within the stipulated timelines as provided under Section 90 of the Employment Act, 2007 and relied on the findings in the case of **Nelion Trading Limited v David Okeno Onaya (2019) eKLR** where the Court held that duty of care as to the safety of employees at the work place is contractual and that timelines under Section 90 of the Employment Act, 2007 are applicable.

23. On the issue of the certificate of payment, the Respondent contended that the Trial Court was not invited to dismiss the suit on the basis of the issuance of the same and therefore the Appellant cannot purport to invite this Court sitting on Appeal to decide on the issue.

24. The Respondent argued that the medical report is properly on record as the Appellant never opposed its production at the trial and cannot object at this stage. He further submitted that the assertion that there was no list of documents filed is misleading as the record supports his case that the Respondent produced all documents on his list of documents filed alongside his plaint as exhibits in the matter.

25. On the issue of quantum, the Respondent maintained that the assessment made by the Trial Magistrate was inordinately low given the gravity of injuries he sustained. He urged this Court to be guided by the principles set out in the Court of Appeal decisions in the cases of **Premier Dairy Limited v Amarjit Singh Sagoo & Another (2013) eKLR** and **Kemfro Africa Limited T/A Meru Express Services & Another v Lubia & Another (No. 2) (1985) eKLR**.

26. He argued that the award of Kshs.300,000/- was unfair and that the same ought to be varied upwards given the extent of the injuries suffered by the Respondent. He opined that an award of Kshs.900,000/- shall be adequate compensation and relied on the case of **Rivatex Limited v Phillip Mochache Nyabayo (1999) eKLR**.

27. The Respondent in a bid to contrast the authorities cited by the Appellant on quantum maintained that his injuries were more severe than those exhibited in the cases as he suffered disability assessed at 2%.

28. He further argued that the authorities relied upon stem from the High Court and therefore this Court is not strictly bound by the same.

29. In conclusion the Respondent urged this Court to find the Appeal without merit and dismiss it. He further urged this Court to find merit in his cross appeal and allow it as prayed.

Appellant's Rejoinder

30. The Appellant in its brief rejoinder maintained that the Respondent does not have a substantive appeal in the absence of a Memorandum of Appeal. It relied on the provisions of Rule 8 of the Employment and Labour Relations Court (Procedure) Rules that clearly provides that an appeal is lodged by way of Memorandum of Appeal.

31. It further referred this Court to the provisions of Order 42 Rule 32 on cross appeals and maintained that the Respondent ought to have lodged a separate appeal by filing its Memorandum of Appeal and thereafter applying for consolidation. The Appellant placed reliance on the case of **George Kianda & Another v Judith Katumbi Kathenge & Another (2018) eKLR** where Odunga J. opined that *in absence of express provisions to deal with cross appeals each party is to file separate appeals for consolidation.*

32. The Appellant urged this Court to find merit in its appeal and allow it as prayed.

Determination

33. I have considered the grounds of appeal, and grounds of cross appeal, the record of appeal and the parties' submissions together with the authorities relied upon and find that the issues for determination are –

(i) *Whether the cross appeal is properly filed;*

(ii) *Whether the Learned Magistrate erred in law and in fact in finding that the Respondent was injured while under the Appellant's employment;*

(iii) Whether the Trial Magistrate erred in law and fact in finding the Appellant wholly liable for the Respondent's injury;

(iv) Whether the award of damages by the Trial Magistrate was inordinately high considering the nature of injury, comparable awards, evidence before the court and relevant principles of law;

(v) Whether the orders sought by the Appellant should be granted.

34. Being a first appeal, this Court has a singular duty to re-evaluate the entire case and come up with its findings in the matter this is as set out in the case of **Selle v Assorted Motor Boat Company 1968 EA Company 1968 EA 123-126** where the Court stated as follows:

“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.”

Whether the cross appeal is properly filed

35. **Order 42 Rule 32 of the Civil Procedure Rules** provides as follows:

The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross-appeal.

36. I find that the cross appeal as filed is properly before this Court.

Whether the Learned Magistrate erred in law and in fact in finding that the Respondent was injured while under the Appellant's employment

37. The Respondent in his pleadings, witness statement and testimony stated that he was injured on 15th September 2016 while in the course of his employment with the Appellant. He was carrying timber for construction of a ladder for a mason who was plastering a wall when a plywood fell from the first floor without his awareness and hit him on the left fourth and fifth toes. As a request, he sustained serious injuries on the toes.

38. He further stated that he reported the accident to his supervisor at about 12.50 pm who reported the case immediately and he was taken to Kitengela West Hospital Limited for first aid and treatment. His toes were last in plaster. He was further treated at Kajiado General Hospital.

39. The Respondent attributed the accident to negligence on the part of the Appellant insisting that it failed to provide him with a safe working environment and protective gear to enable him perform his duties.

40. The Appellant called two witnesses Anthony Muriithi and Nichodemus Mbuvi who both confirmed that the accident occurred on 15th September 2016 as alleged by the Respondent.

41. They both denied that the accident occurred at the Appellant's premises and maintained that the Respondent was injured during a frolic of his own and can therefore not blame the accident on the Appellant.

42. Both DW1 and DW2 averred that the Respondent was assigned different duties to perform and was at all times issued with protective gear to be used while on duty.

43. The treatment notes from Kitengela West Hospital Limited produced by the Plaintiff as Exhibit No 3 dated 15th September 2016 confirms that the Respondent suffered a fracture to his fourth and fifth toes of the left foot and soft tissue injuries.

44. Further, the Medical Report prepared by Dr. T. Ndeti following the Respondent's review also confirmed that he suffered injuries as particularised in his Plaintiff. The doctor in his report assessed the Respondent's permanent incapacity at 2%.

45. The Appellant maintained that the Trial Magistrate erred in law and in fact by relying on the said medical report as the doctor and author of the report did not produce it in court. In fact, the Appellant argues that the report was produced by an unauthorised person.

46. In response the Respondent maintained that the Appellant is estopped from raising the issue of admissibility of the medical report at this stage as it did not object to its production at the trial.

47. I have examined the proceedings of the hearing and note that indeed at the hearing and not that Onsare counsel on record for the Appellant did not object to the production of the medical reports from Kitengela West Hospital Limited dated 15th September 2016 and the medical report by Dr. T. Ndeti dated 29th September 2017 and therefore the Trial Magistrate was not wrong to rely on the same as prove of the accident having occurred.

48. Given that both Appellant witnesses confirm that the Respondent was on duty on the alleged date of the accident and that after injury it took him to hospital and paid all his medical bills in addition to his salary during the period of sick off. I find that the Respondent proved that he was injured while on lawful duties at the Appellant's premises.

Whether the Trial Magistrate erred in law and fact in finding the Appellant wholly liable for the Respondent's injury

49. The Respondent stated that the injury occurred while he was transferring timber for a ladder from one place which had been plastered to another place which had not been plastered as directed by the Appellant within the Appellant's premises when a plywood fell from the first floor and hit him occasioning him injuries on his left foot.

50. The Respondent attributed the accident to negligence on the part of the Appellant for failing to provide him with a safe and conducive working environment.

51. The Appellant has an obligation as stipulated under Section 101(1) of the Occupation and Safety Health Act, 2007 to provide and maintain a safe working environment its members of staff including providing suitable protective clothing and appliances where necessary.

52. It beats logic to blame the Respondent for negligence over an object that fell from the first floor, the fact that an object fell from the first floor and injured the Respondent on its own is proof of negligence on the part of the Appellant's and falls within the doctrine "*res ipsa loquitur*". The mere occurrence of the accident was sufficient proof that the workplace was not safe.

53. In light of the foregoing, I find that the Learned Magistrate's apportionment of liability was sound and proper in law and in fact, and the same cannot be faulted. Reference is made to the case of **Kenya Knit Garments (EPZ) Limited v Patrick Muomo Mwololo (2018) eKLR** the Court observed as follows-

"An employer is required by law to provide safe working conditions of work in the factory and if an accident occurs while the employee is handling machinery the employer is responsible and will be required to compensate the injured employee."

54. In this case, the Hon. Magistrate correctly found that the appellant failed to produce any evidence to support its assertion that it had availed protective gears to the Respondent to enable him work in a safe environment.

On the Issue of Quantum

55. The Court of Appeal in the case of **Bashir Ahmed Butt v Uwais Ahmed Khan (1982-88) KAR** held as follows: -

"An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the 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..."

56. The Trial Magistrate awarded Kshs.330,000.00 as general damages; the Appellant regarded the award as inordinately high while the Respondent in its cross appeal maintains that the same was too low considering the nature and extent of the injuries he suffered.

57. In **Simon Taveta v Mercy Mutitu Njeru (2014) eKLR** that: -

"The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past."

58. In awarding such damages the Court is not meant to enrich the victim but to compensate such a victim for the injuries sustained.

59. The Respondent herein sustained the following injuries-

- (1) Soft tissue injuries on the 4th and 5th toes.
- (2) Fractured middle metatarsal bone of the 4th toe
- (3) fractured middle metatarsal bone of the 5th toe

60. Dr. Ndeti on reviewing the Respondent confirmed the above injuries and assessed the degree of permanent disability at 2%.

61. The Respondent cited authorities to support an award of Kshs.900,000/- as damages while the Appellant maintained that the award ought not to exceed Kshs.50,000/- given that the Respondent's injuries were minor.

62. It is my view that the Trial Magistrate made a commensurate and fair award in view of the injuries sustained by the Respondent. An award of Kshs.300,000.00 in my view is fair compensation for pain and suffering. The Trial Court did not commit any error of principle or make an excessive award. I therefore find no merit in the appeal and in the cross appeal on quantum

63. In the upshot, I find that the appeal and the cross-appeal lack merit and are accordingly dismissed. Each party to bear their own costs of the appeal and cross-appeal.

DATED, SIGNED AND DELIVERED AT MACHAKOS ON THIS 26TH DAY OF NOVEMBER 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