



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

APPEAL NO. 3 OF 2020

(ORIGINALLY KAKAMEGA HIGH COURT CIVIL APPEAL NO. 127 OF 2014)

WEST KENYA SUGAR CO LTD.....APPELLANT

VERSUS

TOM MUZEE MUKHWANA.....RESPONDENT

(Being an Appeal from the Judgment and decree of Hon J. Ongondo dated and

delivered on the 6 October 2014 in Kakamega CMCC No. 438 of 2011)

JUDGMENT

1. In a judgment delivered on 6 October 2014, the Magistrates Court found West Kenya Sugar Co Ltd (the Appellant) fully liable in negligence to Tom Muzee Mukhwana (the Respondent) and awarded him Kshs 300,000/- general damages and Kshs 7,000/- special damages.
2. The Appellant was dissatisfied, and it lodged a Memorandum of Appeal with the High Court, Kakamega on 6 November 2014, contending that:
 - (1) The learned trial Magistrate erred in both fact and law in awarding the sum of Kshs 300,000/- as general damages for pain and suffering in the circumstances which amount is inordinately high and excessive and thus constitutes an erroneous estimate of the alleged damages suffered.
 - (2) The Learned trial Magistrate thereby used his discretion wrongly in awarding excessive damages in the circumstances and in failing to consider the variation in evidence tendered relating to the injuries suffered.
 - (3) The Learned trial Magistrate erred in fact and law when he found liability at 100% against the Appellant for the alleged accident against overwhelming evidence presented by the Appellant's witnesses.
 - (4) The Learned trial Magistrate erred in fact and law when he failed in his duty as a trial Court to evaluate the evidence, consider the pleadings and make his own findings in his Judgment from the evidence led at the trial and to note the material discrepancies and departure in pleadings and in the evidence which the Respondent led at the trial in relation to the accident.
 - (5) The Learned trial Magistrate erred in law and fact in his Judgment when he ignored and failed to take into consideration the evidence tendered on behalf of the Appellant before him and failed to evaluate such evidence, consider the pleadings and the fact that no evidence was rendered on behalf of the Respondent to warrant such an award and instead embarked on the process of deciding the case basically on presumption.
 - (6) The Learned trial Magistrate erred in both law and fact when he failed in his duty to evaluate and consider the Appellant's written submissions and the authorities cited therein.
3. On 14 February 2020, the High Court declined jurisdiction and transferred the Appeal to this Court.
4. When the Appeal was mentioned before this Court on 18 May 2021, it directed the parties to file and exchange submissions.

5. The Appellant filed its submissions on 23 June 2021, while the Respondent had filed his submissions on 18 July 2021.

Role on the Court first appeal

6. The role of a first appellate Court on appeal was discussed in *Kamau v Mungai* (2006) 1 KLR 150, where it was held that: this being a first appeal, it was the duty of the Court.... To re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard the witnesses and hence making due allowance for that.

7. This Court will bear in mind the interdict on its role.

Liability and burden of proof

8. The Appellant had denied that it was liable for any injuries sustained by the Respondent because the Respondent had not reported any such accident to his supervisors as required by the policies in place, there were no records that the Respondent was attended to at the first instance in its in-house clinic and that in any case the Respondent had been provided with protective gear.

9. To demonstrate that the Appellant was liable, the Respondent had relied on the doctrine of *res ipsa loquitur* and stated in his witness statement that he was injured in the normal course of work:

while positioning a trailer to be connected to a tractor when due to the defendant's negligence, the hydraulic jack slipped and hit me on my left leg, and I suffered severe bodily injuries....

10. During examination-in-chief, the Respondent testified:

When I went to link the trailer to the tractor, I was standing holding in the stud of the fitted trailer. The isling hit me on the knee. I was injured. I fell unconscious and was taken to West Kenya clinic. I was treated and went home. The leg was swelling. I went to Kakunga medical and was treated..... the idling hand was loose and therefore un-serviced. That's why it hit me. It was the defendant's obligation to service the tractor.... I was not given any protective gear.

11. While addressing the question of liability, the Magistrate stated:

The Plaintiff stated he was injured when he had made 2 trips. He was treated at West Kenya clinic but was not issued with treatment documents. He then attended Kakunga medical clinic, for which he produced a treatment card. The treatment notes show he was injured on the material date. The defendant is arguing that because the plaintiff did not report the accident or get treatment from designated hospitals, then he was not injured on the material date. I have seen submission the defendant has stated that plaintiff even worked the following day well, which would not be possible if he had been injured on 3rd, the defendant did not bring evidence to that effect or even avail attendance register to prove the same.

The fact that the plaintiff did not report the accident to DW 1 really cannot be a ground to dismiss his suit against the defendant.....

12. The Court has re-evaluated the analysis by the Magistrate on liability.

13. The primary question the Court should have asked itself on negligence was, what should the Appellant have done, which it did not do to infer negligence or breach of statutory duty on its part.

14. The Magistrate did not address that primary question but relied on secondary evidence.

15. Despite the Respondent denying that he was supplied with protective gear, the Appellant produced evidence to show that the protective gear was issued.

16. The next question the Magistrate should have considered was whether the Respondent met the burden of evidence expected of him.

17. The Respondent made a reference to a loose idling hand of a hydraulic jack. He did not disclose who issued him with the jack or at what point he realised it was faulty.

18. The Respondent did also not disclose whether, as the user of the jack, he ever brought to the attention of the Appellant the fact that it was faulty.

19. The Respondent was not working alone. He did not name any of his colleagues who was present when he allegedly sustained the injuries or state why he never reported the accident to his supervisors on the material day or later.

20. In this Court's view, the Respondent did not meet the burden of proof expected of him.

21. If at all he was injured, any recompense lay within the Work Injury Benefits Act and not common law negligence or breach of statutory duty.

22. This was not a case of *res ipsa loquitor*.

Quantum

23. The Respondents medical report indicated that he had sustained multiple lacerations wounds and that at the time of examination, he had multiple small scars.

24. While awarding general damages, the Magistrate relied on the case of *Catherine Wanjiru & 3 Ors v Gibson Theuri* (2005) eKLR.

25. The first plaintiff in the case suffered an injury on the left ankle, injuries on the legs and injuries on the chest.

26. Those injuries do not compare to the injuries reported to have been sustained by the Respondent herein, and therefore that case was not a suitable comparator.

27. The Appellant had cited Kisumu Civil Appeal No. 26 of 2010, *Avtar Singh Bhamra & Ar v Joseph O. Ouko* where the High Court reduced to Kshs 60,000/- an award of general damages where the Respondent has sustained soft tissue injuries (scar on the right knee, tenderness on the chest and back).

28. The injuries sustained by the Respondent were more or less comparable to the injuries sustained in the authority cited by the Appellant, and the Court would have awarded general damages of Kshs 70,000/-, if the finding on liability was to the contrary.

Conclusion and Orders

29. From the foregoing, the Appeal succeeds, and the Court sets aside the Judgment delivered on 6 October 2014 by the Magistrates Court and substitutes thereof an order dismissing the Respondent's suit therein.

30. Any monies deposited as security are to be released to the Appellant.

31. The Appellant to have costs before this Court and the Magistrates Court.

32. The Court regrets that it could not deliver the Judgment as earlier scheduled on 10 November 2021 due to other official engagements.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 2ND DAY OF DECEMBER 2021.

RADIDO STEPHEN, MCIARB

JUDGE

APPEARANCES

FOR APPELLANT OKONG'O WANDANGO & CO. ADVOCATES

FOR RESPONDENT ABOK ODHIAMBO & CO. ADVOCATES

COURT ASSISTANT CHRISPO AURA