



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
APPEAL NO. 221 OF 2019

(Originally Nairobi High Court Civil Appeal No. 420 of 2017)

KINGS DEVELOPERS LIMITED.....APPELLANT

v

SAMUEL KAVAI.....1st RESPONDENT

SHAR KAMAL.....2nd RESPONDENT

(Being an Appeal from the Judgment and Decree of the Honourable Chief Magistrate P.N. Gesora

(Mr) delivered on 3rd day of August 2017 in Milimani Chief Magistrates Court Civil Case No. 724 of 2015)

JUDGMENT

1. Samuel Kawai (1st Respondent) instituted legal proceedings against Kings Developers Ltd (Appellant) and 2 others before the Chief Magistrates Court alleging breach of duty of care leading to injury in the workplace, unfair termination of employment and failure to pay terminal benefits.
2. The 1st Respondent filed an *Amended Memorandum of Claim* on 3 March 2016 to introduce ahead of a claim for special damages ahead of the hearing.
3. After hearing the parties, the Trial Court, in a judgment delivered on 31 July 2017 found the Appellant and Shar Kamal (2nd Respondent) fully liable for the injuries caused to the 1st Respondent and awarded him general damages of Kshs 1,500,000/-; future medical expenses of Kshs 100,000/- and special damages of Kshs 2,000/- all totalling Kshs 1,602,000/-together with costs and interest.
4. The Appellant was dissatisfied and it lodged a Memorandum of Appeal against the judgment before the High Court contending that
 1. The learned Magistrate erred in law and fact in holding the Appellant liable as a result of the negligence of a third party i.e. negligence of the 2nd Respondent's driver.
 2. The learned Magistrate erred in imputing vicarious liability for acts of a driver of the 3rd Defendant on the 1st Defendant.
 3. The learned Magistrate erred in failing to be bound by the law in Winfield & Jolowitz on Tort 15th Edition page 287 whereat it was stated:

The employer is not liable whenever his employee is injured at work as a result of the negligence of a third party: the employer is only responsible if it can be fairly said that he has delegated the performance of his duty of care to the third party. Thus, if a lorry driver delivering goods to a factory were to negligently run down a worker, the worker's employer would not be liable-the negligence of the lorry driver (and the vicarious liability of his employer) does not negative the exercise of care in the employer's personal duty for it is unrelated to any aspect of that duty, and the employer has delegated nothing to him.

4. The Learned Magistrate erred in law in failing to hold that the 1st Respondent had not specifically pleaded the particulars of the alleged breach of common law duty of care by the Appellant.

5. The Learned Magistrate erred in law and fact by failing to hold that the 1st Respondent did not tender sufficient evidence or any evidence at all to show that the Appellant owed him a duty of care at the material time.

6. The Learned Magistrate erred in law and fact in failing to hold that the 1st Respondent did not plead specific particulars of negligence against the Appellant in the Amended Plea.

7. The Learned Magistrate erred in finding the Appellant liable when there was no legal and evidentiary basis to support such a finding.

8. The Learned Trial Magistrate erred in both law and fact in making an award of general damages which was manifestly excessive in the circumstances of the case.

9. The Learned Trial Magistrate erred in both law and fact in making an award of future medical expenses which was manifestly excessive in the circumstances of the case.

10. The Learned Trial Magistrate erred in law in failing to consider the submissions filed by the Appellant and the relevant authorities cited therein.

11. The Learned Trial Magistrate erred in law in failing to disclose the authorities relied on in assessing general damages.

5. The High Court transferred the Appeal to this Court on 25 March 2019, and on 23 October 2019, the Court directed the parties to file and exchange submissions.

6. The Appellant filed its submissions on 24 December 2019 (should have been filed and served by 23 November 2019). The Respondents did not file his submissions.

Role of this Court on first appeal

7. The role of a first appellate Court has been the subject of discussion in numerous decisions from the High Court and the Court of Appeal.

8. In *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates (2013) eKLR*, the Court of Appeal stated as follows regarding the duty of a first appellate court:-

This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

9. **Similar sentiments were made in *Kenya Ports Authority versus Kusthon (Kenya) Limited (2009) 2 EA 212 wherein the Court of Appeal held, inter alia, that:-***

On a first appeal from the High court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.

10. This Court will, in essence, consider the pleadings and evidence tendered before the Trial Court, re-evaluate the same and make its conclusions bearing in mind that it did not observe the witnesses.

Liability of the Appellant

11. The 1st Respondent testified that he was an employee of the Appellant and was deployed to a project that the Appellant was constructing for Villa Care Ltd (was 2nd Respondent before the trial Court but not a party to this Appeal).

12. The 1st Respondent also testified that a truck owned by the Shar Kamal (present 2nd Respondent) and driven by his agent reversed into him as he carrying on his duties.

13. The Appellant urged before the trial Court that it could not be held liable for the negligence of a third party as the vehicle which caused the injuries to the 1st Respondent was admittedly owned by the current 2nd Respondent.

14. The Appellant also contended that it had no control over the driver of the third party vehicle. It submitted that in the circumstances, it did not owe the 1st Respondent a duty of care.

15. For the submission, the Appellant cited a passage in Winfield & Jolowitz (supra) and contended that it had not delegated the performance of any duty to the third party.

16. An employer's duty of care to its employees is a legal imperative. The employer should do everything reasonably practicable to ensure

the safety of its employees and any other persons/third parties present in the workplace on its invitation or license.

17. Under the duty of care, an employer is under an obligation to provide information, instruction and supervision to ensure the safety of its employees.

18. The evidence of the 1st Respondent as set out in the witness statement which was adopted was that the third party vehicle was at the site to deliver construction materials and therefore the third party was not a trespasser but was at the site with the Appellant's permission.

19. To the Court, it was incumbent upon the Appellant as the contractor on-site to ensure that vehicles which delivered construction materials for its use did not cause harm to the employees on site.

20. The Appellant was under a duty to ensure a safe work environment for its employees and third parties present at the site on its invitation. It had the responsibility and duty to ensure and control the activities of the third-party invitee/licensee within the construction site. It was in a sense a *respondeat superior*.

21. This was a case of joint tortfeasors.

22. It is noteworthy the Appellant never sought indemnity from the third party which was at the construction site on its invitation, and therefore the trial Court cannot be faulted for finding them severally and individually liable to the 1st Respondent.

23. Comparative jurisprudence indicates that an employer can sue and recover damages where the negligence of a third party causes harm to its employee (see *Barclay v Penberthy* (2012) HCA 40).

Standard of proof

24. The Appellant did not lead any evidence on liability but relied on the interrogation of the 1st Respondent's evidence and application of the law to demonstrate that the 1st Respondent had not met the threshold for the standard of proof.

25. The cross-examination of the 1st Respondent was at most clumsy and was captured in only 3 short paragraphs by the trial Court and on the basis of the material on record, the Court is of the view and finds that the 1st Respondent met the standard of proof expected him (balance of probabilities).

Pleadings of particulars of negligence

26. Closely related to the standard of proof was the contention by the Appellant that the 1st Respondent did not set out with clarity the particulars of negligence attributed to it.

27. The Court has looked at the Amended Pleat. Although not drafted with the technical precision expected of a trained legal practitioner, particulars of negligence were set out at paragraph 9, and they appear sufficient on the face of the pleadings to have put the Appellant on notice on what the 1st Respondent was alleging.

Quantum

28. In *Butler v Butler* (1984) KLR 225 it was held; the assessment of damages is more like an exercise of discretion by the trial judge and an appellate court should be slow to reverse the trial judge unless he has either acted on the wrong principles or awarded so excessive or so little damages that no reasonable court would; or he has taken into consideration matters he ought not to have considered and, in the result, arrived at a wrong decision.

29. The 1st Respondent sought general damages of Kshs 2,000,000/- before the trial Court. He did not cite any precedent.

30. The 1st Respondent, according to the medical report produced during the trial had suffered multiple wounds and bruises on the forehead, loss of 12 teeth, blunt injuries to the chest and facial fractures. The report indicated that some of the deformities sustained by the 1st Respondent would be lifelong.

31. The Appellant suggested general damages of Kshs 400,000/- and cited two cases, *Julius Kiprotich v Eliud Mwangi Kihohia* (2006) eKLR and *Anthony Mwangi v Martin Muiruri* (2008) eKLR.

32. In the *Kihohia case*, the Plaintiff had sustained a fracture of the pelvis, severe injury to the abdomen resulting in peritoneal haematoma and deep cut wound on right parietal region of the scalp and was awarded general damages of Kshs 450,000/- while in the *Muiruri case*, the Plaintiff had sustained blunt and deep cut injuries, fracture of the left leg in the thigh region, fracture of both arms, deep cuts in the right knee region, deep cuts in the chest and cuts on the tongue and parts of the mouth and general damages of Kshs 400,000/- was made.

33. The authorities cited by the Appellant had near similar injuries to those sustained by the 1st Respondent but were decided about 10 years before the judgment under challenge. Inflation is one of the factors a trial Court may consider in assessing general damages.

34. In *Alphonse Mwatsuma Mwangamchi v Joseph Mwanzia Mwanzu & Ar* (2005) eKLR, the Plaintiff lost 7 teeth among other injuries and

was awarded general damages of Kshs 1,200,000/-. The injuries were more serious.

35. Considering the decisions cited by the Appellant and inflation, this Court is of the view that the general damages awarded by the trial Court were manifestly excessive and that general damages of Kshs 500,000/- would have been appropriate.

Special damages

36. Both the Appellant and the 1st Respondent led medical evidence on the probable costs of future medical expenses. The Appellant's doctor gave a figure of Kshs 60,000/- as chargeable at Kenyatta National Hospital while the 1st Respondent's medical expert estimated the cost at Kshs 150,000/- but did not indicate any medical facility.

37. The trial Court decided to adopt the at large estimate by the 1st Respondent's medical expert instead of the estimated cost at a named hospital.

38. In the circumstances, the Court finds that the trial Court fell into error. It should have adopted the figure at the named medical facility and the Court will set aside that conclusion on that aspect of special damages.

Conclusion and Orders

39. From the revaluation and analysis of the record and the foregoing, this Court concludes that the Appeal has merit and sets aside the judgment of the trial Court and therefore, enters judgment as follows

(a) General damages Kshs 500,000/-

(b) Special damages Kshs 60,000/-

40. Each party has partly succeeded and the Court orders that each party bears own costs of the Appeal.

41. 1st Respondent to have costs before the trial Court.

Delivered, dated and signed in Nairobi on this 31st day of January 2020.

Radido Stephen

Judge

Appearances

For Appellant Majanja Luseno & Co. Advocates

For 1st Respondent Betty Rashid & Co. Advocates

Court Assistant Lindsey