



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT NAKURU
APPEAL NO.5 OF 2019

[Formerly Nakuru High Civil Appeal No.195 of 2018]

PALMAC AGRICULTURE SERVICES LIMITED.....APPELLANT

VERSUS

BENARD ONDIEKI GETIRO.....RESPONDENT

[Being an appeal from the judgement and decree of Hon. B Mararo, Principal Magistrate,

and Nakuru delivered on 21st November, 2018 in Nakuru CMCC No.33 of 2016]

JUDGEMENT

The facts of the leading to the appeal are that the respondent (plaintiff before the trial court) was the employee of the appellant and on 4th July, 2015 while at work he suffered an accident for which he blamed the appellant for being negligent, reckless and in breach of statutory duty of care. That while the respondent was offloading waste from green house on board a tractor, he slipped and fell and got injured. That such injury arose because he had no protective gear to prevent injury.

The appellant denied the claims made and that there was no accident to the respondent and where such accident happened it was solely out of his own mistake and negligence.

The trial court in judgement held the appellant liable but apportioned the same at 10:90 against the appellant; assessed general and special damages at ksh.400, 000 and Ksh.8, 000 respectively together with costs.

The appeal herein follows judgement in Nakuru CMCC No.33 of 2016 delivered on 21st November, 2018 and the appellant who was the respondent therein aggrieved filed the appeal on 6 grounds that;

1. The learned magistrate erred in law and fact by failing to take cognisance that the jurisdiction of the court had been ousted by the provisions of the Work Injury Benefits Act, 2007 specifically section 16 as read together with section 58(2) and further the magistrate failed to follow the principles of

“stare decisis” as set by the decision of the Court of Appeal in Attorney General versus Law Society & another [2017] eKLR which declared the provisions of the Work Injury Benefits Act, 2007 to be consistent with the current constitution.

2. The learned magistrate erred in law and fact by apportioning liability at the ratio of 10:90 against the appellant (defendant) without making a specific finding to attribute negligence to the appellant (defendant) in respect of the accident.

3. The learned magistrate erred in law and fact by failing to appreciate that the respondent (plaintiff) had not proved the particulars of negligence pleaded against the appellant (defendant).

4. The learned magistrate erred in law and fact by failing to realise that the respondent (plaintiff) was 100% liable and or contributed immensely to the accident and injuries occasioned on the material date and further the magistrate erred by shifting the burden to prove the aspects of negligence upon the appellant (defendant).

5. The learned magistrate misdirected himself in law and in fact when he assessed general damages of ksh.400, 000/- which was manifestly excessive and not within the limits set out by previous, recent and comparable cases within the confines of the Kenyan

Economy.

6. The learned magistrate misdirected himself in law when he made an erroneous estimate of the injuries suffered and more so by failing to take *cognisance that the previous ex-parte judgement of 17th February, 2017 had awarded general damages of Ksh.250,000/- and by the time of inter- parties judgement on 21st November, 2018 inflationary trends were insignificant.*

Both parties agreed to address the appeal by way of written submissions.

The appellant submitted that the trial court lacked jurisdiction to hear and determine the matter before it under the provisions of section 16 and 58(2) of the Work Injury

Benefits Act, 20077 (WIBA) as held by the Court of Appeal in **Hon. Attorney General versus law Society of Kenya & another Civil Appeal No.133 of 2011** which decision declare these provisions of the law to be constitutional. The respondent's work injury claims ought to have been addressed by the Director of Occupational Safety and Health Services (the Director) and any dispute therefrom be addressed on appeal to the Employment and Labour Relations Court under the provisions of section 51 and 52 of WIBA.

The respondent alleged to have been injured while at work on 4th July, 2015 and he ought to have filed his claim under the provisions of WIBA with the director. By filing his claim with the Magistrates court, such court lacked jurisdiction.

The appellant also submitted that the trial magistrate erred in apportioning liability whereas the respondent had not proved his case to the required standard. The respondent testified that he slipped and fell while working on the trailer of a tractor but did not give explanations as to why he slipped and fell. He did not suggest that the tractor and trailer had a slippery base or that the supervisor or appellant was negligent in its duty to provide protective gear. Without making any conclusion on the basis of the accident, to apportion liability and filed the appellant liable was in error as held in **Muthuku versus Kenya Cargo Services Limited [1991] KLR** and **Salim & another versus Kikava (1989) KLR**. In the case of **Timsales Limited versus Stephen Gachie 92005) eKLR** the court held that;

.....not every industrial injury is caused by negligence of an employer and unless a relevant statute imputes strict liability on the part of an employer, claimants must know that they must plead their cases properly and prove negligence and/or breach of statutory duty on the part of the employer sufficiently. A court of law will not just award damages to a litigant because it was sympathetic to him due to an injury which he may have received in his place of work and in the course of duty if he was under an obligation to prove negligence and/or breach of statutory duty and he failed to do so.

The appellant also submitted that the award for general damages was excessively high without a basis and contrary to recent and similar cases where an award of ksh.100, 000 have been awarded. The judgement of the trial court should therefore be set aside and or reviewed accordingly.

The respondent in response submitted that the trial magistrate had jurisdiction to render judgement in the matter as judgement by the Court of Appeal in **Hon. Attorney General versus law Society of Kenya & another Civil Appeal No.133 of 2011** was after the judgement herein. Under section 9(b) of the Magistrate's Curt Act there was jurisdiction.

The matter of jurisdiction was never an issue addressed before the trial court and cannot be addressed herein as held in the case **Mohamed Athman Kombo versus Maua Mohamed [2019] eKLR**. Without pleading or filing objections on the issue of jurisdiction, the same cannot be addressed upon appeal as held in **John Ndachu Ng'ang'a versus Republic [2017] eKLR**.

The respondent also submitted that there existed **Mombasa High Court Constitutional Petition No.196 of 2018 Juma Nyamawi Ndungo & 5 others versus Attorney General & another** with interim orders that the trial court had jurisdiction of hear WIBA claims.

The respondent also submitted that there was no error on the part of the trial court in apportioning liability in favour of the respondent as there was proof of negligence to the required standard. The respondent explained that he slipped and fell when he was loading and offloading plants from a tractor and thus blamed the appellant as he had not been given protective gear. He was not wearing gumboots as the store had not been opened. He was rushed before getting these protective gears.

The appellant was properly found liable for failing to provide the employee with protective gear while at work as held in **Kreative Roses Limited versus Olpher Kerubo Osumo [2014] eKLR**. The failure to also provide the employee with induction and orientation in his duties and hurrying up the employee creates an environment which is not conducive for work as held in **Timesales (K) Limited versus makhoka Murefu [2011] eKLR**.

The general damages therefore assessed were proper and based on the evidence before court. The appeal should be dismissed with costs.

I have considered the submissions of the parties in this appeal. This being a first appeal, this court is under a duty to re-evaluate the evidence summarized above and arrive at own decision one way or another. See **Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212**, with a caveat however that the court did not see or hear the witnesses as they testified. See also **Seascape Ltd versus Development Finance Company of Kenya Ltd (2009) KLR 384**.

It is trite that all matters in dispute must be pleaded for the court to address and where there are question of law which are likely to be addressed and once addressed there is possibility of dealing the entire suit such should be addressed the earliest possible opportunity to save of time.

The appellant has based the current appeal with regard to application of WIBA and the decision in **Civil Appeal No.133 of 2011 – Hon. Attorney General versus Law Society of Kenya & another [2017] eKLR** which are new matters not addressed before the trial court. See **Olive Mwhaki Mugenda & another versus Okiya Omtata Okiiti & 4 Others [2016] eKLR**.

However, in view of the Supreme Court judgement addressing the matter in **Law Society of Kenya versus Hon. Attorney General & another Petition No.4 of 2019** it will be important for the court to address the same herein.

On the question of jurisdiction, in **Civil Appeal No.133 of 2011 – Hon. Attorney General versus Law Society of Kenya & another [2017] eKLR** judgement was delivered on 17th November, 2017 and where the court held that all work injury claims should be heard by the director and appeals emanating from the decision thereof be filed with the court.

For good order, the Court of Appeal held that;

With respect, we agree that claimants in those pending case have legitimate expectations that upon the passage of the Act their cases would be concluded under the judicial process which they had invoked. Indeed as a result of this concern, the learned Judge in a ruling on an interlocutory application directed that;

“On the foregoing grounds, I will order that, pending the hearing and determination of the main cause, all pending litigation which had been commenced on the basis of either the Workmen’s

Compensation Act or of the common law, or of a combination of both regimes of law, shall continue to be prosecuted and, in a proper case, finalized on the basis of the operative law prior to the entry into force of the Work Injury Benefits Act, 2007....”

The legislative practice where a new judicial forum is created to replace an existing system is to finalize all proceedings pending in the previous system before that forum where they were commenced. For instance upon the establishment of the Employment and Labour Relations Court, **section 33** of the Employment and Labour Relations Act provided for what would happen to pending claims as follows; ...

Thus guided, the cause of action herein arose on 4th July, 2015 with the alleged work injury of the respondent. he filed the Complaint with the trial court on 18th December, 2015. Such is time before the judgement by the Court of Appeal, above cited and as guided, the trial court had the requisite jurisdiction standing at the time to hear work injury claims.

Reference is made with regard to **Mombasa High Court Constitutional Petition No.196 of 2018 Juma Nyamawi Ndungo & 5 others versus Attorney General & another** in my view is bad law in all fronts. This should never have arisen the respondent well aware of the Supreme Court judgement over the same and findings in **Law Society of Kenya versus Hon. Attorney General & another Petition No.4 of 2019** that;

[90] The present Appeal was straight-forward and we have settled the questions placed before us for determination. However, before we conclude we must take note of a matter that was brought to our attention at the hearing of this Appeal. While this matter was before us awaiting determination, E.K. Ogola J, on 10th June 2019, in the High Court of Kenya at Mombasa, rendered a decision in the case of **Juma Nyamawi Ndungo & 5 others v Attorney General; Mombasa Law Society (Interested Party)**, Constitutional Petition No. 196 of 2018 [2019] eKLR. Broadly, some of the issues for determination in that matter included whether the WIBA was unconstitutional in light of the Constitution 2010.

[91] We are greatly dismayed that the learned Judge did not take judicial notice of the pendency of this Appeal although he was aware of it. As a matter of fact, he stated so in his judgment that an appeal had been preferred to us against the decision of the Court of Appeal to the apex court on matters whose determination may well have been binding on him. The learned judge ought to have held his horses and acknowledge the hierarchy of the courts and await for this court to pronounce itself before rendering himself, if at all. As we perceive it, his judgment has created unnecessary confusion in the application of WIBA and cannot be allowed to stand as it may [may or is]? also be contrary to this Judgement. The findings and Orders expressed in that judgment must therefore be read in the context of the decision of the Court of Appeal and our finding and Orders in this appeal. That is all there is to say on that matter. [underline added].

The correct position now confirmed by the Supreme Court being the decision of the Court of Appeal and for good order allowing all suits filed as of the date of judgement to be addressed by the court holding such matters, parties were guided.

With regard to the question of liability, the respondent’s evidence before the trial court was that on 4th July, 2015 while at work offloading garbage from a tractor he slipped, got injured and blames the company as he was not given gumboots and gloves which would have protected him from falling. The sore reason for imputing negligence is the alleged failure to be issued with protective gear.

Upon cross-examination of the respondent testified that;

.. I had gumboots, gloves and a hay folk. I was not wearing them gumboots as the storekeeper had not opened. I did not get them on that day. We would sign daily. ...

not all work injuries result in the employer being held liable. The rationale is that as held in **Amalgamated Saw Mills vs. David K. Kariuki [2016] eKLR** where the court in dismissing the appeal held that;

An employer cannot babysit an employee especially in manual tasks that need no special training or supervision. He must work and at the same time take precautions on his own security and safety.

Where the respondent was issued with protective gear and was aware that he was required to wear such gear while at work, he cannot feign ignorance or that the store was not opened and therefore proceeded to expose himself to danger while at work.

The respondent testified before the trial court that;

....I was not wearing gumboots as the storekeeper had not opened. I did not get them that day and I was rushed and I did not have protective gear. ... we would collect gumboots on a daily basis. On the material day, the supervisor told us to work without gumboots. We were later told to work out of station. The tractor had no hydraulic. One could not remove waste from the grounds.

The duty of the employer is to ensure a safe work place and to exercise all reasonable skill and care that would

Be permissible in each case. The duty is therefore to make the employees while at work to take reasonable steps to avoid harm arising to themselves and to others on the shop floor. The provision of protective gear to the respondent by the appellant in this case was a reasonable step in ensuring its duty of care which the court finds to be reasonable and to the required standard. Where the respondent opted to proceed to work without his protective apparel, he cannot turn around and blame the employer, the appellant.

In **Makala Mailu Mumende versus Nyali Golf County Club [1991] KLR 13** the court held that;

No employer in the position of the defendant would warrant the total continuous security of an employee engaged in the kind of work the plaintiff was engaged in, but inherently, dangerous. An employer is expected to reasonably take steps in respect of the employment, to lessen danger or injury to the employee. It is the employer's responsibility to ensure a safe working place for its employees.

There being no dispute that the respondent got injured while at work, in the circumstances the trial court sole reason for apportioning liability at 10:90 against the appellant was on the grounds that there was no negligence on the part of the respondent as the tractor he was using there was no evidence to show it had hydraulic. Liability was thus 50:50 on each party.

The trial court having properly considered decided cases, the injuries suffered assessed the same and took into account the time factor to arrive at ksh.400,000 in general damages. The court finds no matter to review or set aside these findings save liability is hereby reviewed to 50:50 on each party on the basis that unless the award is found erroneous, the court on appeal shall not disturb the award as held in **Butt versus Khan (1982-1988) KAR 1**, the Court of Appeal stated that:

an appellate court will not disturb an award of 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.

Accordingly, the appeal is hereby allowed only to the extent that liability is hereby reviewed and apportioned at 50:50%. The award of general damages in Nakuru CMCC No.33 of 2016 at ksh.400,000 is hereby reviewed. Each party to bear own costs of the appeal.

Delivered at Nakuru this 20th day of February, 2020.

M. MBARU

JUDGE

In the presence of: