



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

APPEAL NO. 2 OF 2019

P.J. DAVE FLOWERS LTD..... APPELLANT

VERSUS

KENNEDY SANANE MABONGA.....RESPONDENT

(Being an appeal from the judgment of the Honourable Magistrate M. Chesang delivered on the 28th September 2018 at the Chief Magistrate's Court at Kajiado)

JUDGMENT

1. In a judgment delivered on 29 September 2018, the trial Court found P. J. Dave (Appellant) fully liable for injuries sustained by Kennedy Sanane Mabonga (Respondent) in the workplace on 27 April 2015. The Respondent was awarded general damages of Kshs 150,000/-.
2. The Appellant was dissatisfied and on 2 February 2019, it filed a Memorandum of Appeal contending that
 1. The Learned Magistrate erred in law and in fact in finding that the Defendant was 100% liable for the Plaintiff's injury in view of the fact that negligence and breach of contract was not proved in evidence.
 2. THAT the Learned Magistrate misdirected himself in law and in fact in failing to note that the Plaintiff failed to prove particulars of contract and negligence pleaded in the plaint and failing to appreciate the fact that the Plaintiff contributed to the occurrence of the accident.
 3. THAT the Learned Magistrate erred in law and fact in holding that the Defendant was 100% to blame for the occurrence of the suit accident contrary to trite rule of evidence that allegations of negligence, breach of contract and statutory duty must be proved strictly which the Plaintiff didn't.
 4. THAT the Learned Magistrate erred in law and fact in holding that the Plaintiff had strictly proved his allegations of injury, negligence and breach yet the factual evidential materials and testimonies before him did not amount to the same nor support and justify such holding.
 5. THAT the Learned Magistrate erred and misdirected himself in law and in fact in failing to apportion liability taking into account the totality of evidence both oral and documentary before him.
 6. THAT the Learned Magistrate erred in fact and ended up misdirecting himself in awarding exorbitant quantum of damages of Kshs 150,000/- by failing to appreciate the nature of injuries which were not commensurate with the award.
 7. THAT the Learned Magistrate erred in law in making such a high award on damages as to show that the Magistrate acted on a wrong principle of law.
 8. THAT the Learned Magistrate's award on damages was as high as to be entirely erroneous.
 9. THAT the Learned Magistrate's award was made without considering the medical evidence before the Court and failed to appreciate the nature of injuries sustained by the Plaintiff and failed to be guided by authorities on comparable awards and hence ended up making an excessive award.
 10. THAT the whole judgment on quantum and liability was against the weight of evidence before the Court.

3. When the Appeal was mentioned for directions on 3 February 2020, the Court directed the parties to file and exchange submissions.
4. The Appellant filed its submissions on 18 February 2020 while the Respondent's submissions were not on file by this morning (should have been filed/served by 13 March 2020).
5. The Court has considered the Record of Appeal and the submissions.

Role of this Court on first Appeal

6. The role of an Appellate Court on a first appeal has been the subject of discussion in many cases. In *Kamau v Mungai* (2006) 1 KLR 150, the role was stated thus 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. The Court will bear in mind the interdict on its role as a first appellate Court.
8. The Appellant condensed the grounds of the appeal into 2, to wit, *proof of liability* and *quantum*.

Liability

9. The Appellant contended that the Respondent did not prove to the required standard that it (Appellant) was fully liable for the accident which occasioned him (the Respondent) injuries in the workplace.
10. The Respondent's testimony before the trial Court was that he sustained injuries after falling from a height while removing a *hanging net* from a greenhouse ventilation, and he blamed the Appellant for not providing a ladder.
11. The Appellant's witness, who was the Respondent's supervisor testified that he was not present at the moment the Respondent fell and got injured as he had gone elsewhere on supervisory duties.
12. Apart from stating that the Respondent had been issued with safety equipment, the witness did not confirm or deny that a ladder had been provided.
13. Considering that the Respondent was working from a height, it was only logical that apart from other safety equipment, a ladder should have been provided to enable him to ascend and descend safely.
14. On the state of the evidence before the trial Court, there was no error of fact or law in the finding that the Appellant was fully liable. It had not provided a ladder.

Quantum

15. According to a medical report produced in Court, the Respondent had sustained lacerations on the arm, loin and a blunt injury to the back. By the time of trial, the doctor opined that he had fully recovered.
16. Although the parties cited authorities before the trial Court, none of the authorities was mentioned in the judgment. It is a most desirable practice in this type of cases that a trial Court sets out the relevant case law informing the award of general damages.
17. The Court has relooked at the authorities which were relied on by the parties.
18. The Respondent cited (Civil Case No 5719 of 2015, *Calisto Ogaya Ogolla v Express Connection Ltd & Ar*. (this being a case from a Magistrates Court was of no relevance as an authority); Civil Appeal No. 9 of 2011, *Patrick Mwiti M'Imanene & Ar v Kelvin Mugambi Nkunja* where the Plaintiff had suffered swollen scalp, tender swollen and bruised left shoulder, bruised right knee, tender neck and back and where Kshs 170,000/- damages were made and HCCC No. 320 of 1998, *Catherine Wanjiku Kingori & Ar v Gibson Theuri Gichubi*.
19. The Appellant on its part relied *Cyrus Gachanja Muya & 4 Ors v Abbas Mohammed & Ar* (1999) eKLR where the Plaintiff had suffered a concussion head injury, a laceration on the left side of the chest, cut over the elbow, deep cut right palm and deep cut left thigh posterior and Kshs 70,000/- was awarded, and *Simon Muchemi Atako & Ar v Gordon Osore* (2013) eKLR where the Plaintiff had sustained blunt chest injury, cut wound on the left leg, bruise wound on the right knee, blunt injury to the left shoulder, cut wound above the right elbow, cut wound over the occipital part of the head and cut wound on the palmas aspect of the left thumb and general damages of Kshs 120,000/- was made.
20. It is clear to the Court that the authorities cited by the parties were not comparable to the case before the trial Court and now the subject of this Appeal.
21. The parties were not diligent in prosecuting their cases by bringing to the attention of the trial Court relevant, comparable and material authorities, for in an adversarial system and particularly in negligence disputes, it is not the obligation of the Court to research for the parties.
22. Even before this Court, the Appellant did not discharge the burden of demonstrating that the award of the trial Court was erroneous or was manifestly excessive. No case law was cited.

23. In the circumstances, the Court will not interfere with the award made by the trial Court.

24. The Appeal is dismissed with costs.

Delivered through Microsoft teams/email, signed and dated in Nairobi on this 29th day of May 2020.

Radido Stephen

Judge

Appearances

For Appellant Wangari Muchemi & Co. Advocates

For Respondent Musili Mbiti & Co. Advocates

Court Assistant Judy Maina