



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CIVIL APPEAL NO 9 OF 2016

KIBWANA SALIM MWAIJUMA.....APPELLANT

VS

PANAL FREIGHTERS LIMITED.....RESPONDENT

(Appeal from the judgment of Hon. L.T Lewa, RM dated and delivered on 26th August 2016 in Mombasa CMCC No 1787 of 2013)

JUDGMENT

1. On 26th August 2016, **Hon L.T Lewa, RM** dismissed the Appellant's claim against the Respondent for want of proof.
2. Being dissatisfied with the judgment of the trial court, the Appellant filed the present appeal.
3. In his Memorandum of Appeal dated 8th September 2016, the Appellant raises the following grounds of appeal:
 - a) The learned Magistrate erred in law by not holding the Respondent vicariously liable for negligence of its employee against the evidence on record;
 - b) The learned Magistrate erred in law and in fact in failing to consider the Appellant's written submissions filed on 3rd March 2016;
 - c) The learned Magistrate erred in law in failing to consider relevant facts in that the Appellant sought relief under the Work Injury Benefits Act for compensation for an occupational accident arising out of and in the course of the Appellant's employment with the Respondent;
 - d) The learned Magistrate erred in law in failing to fully consider the alternate cause of action for compensation for work injury and only making a partial determination of the claim.
4. This being a first appeal, I am required to reconsider and re-evaluate the evidence on record, in order to form my own opinion thereon, making allowance for the fact that I have had no chance to see and hear the witnesses.
5. In his final submissions, the Appellant referred to the decision in ***Selle v Associated Motor Boat Company Ltd [1968] EA*** where this basic principle was stated.
6. The Appellant raises four (4) grounds of appeal, all on the issue of liability.
7. In his Complaint filed in the trial court, the Appellant cites the following particulars of negligence on the part of the Respondent, its authorised driver, servant and/or agent:
 - a) Driving at an excessive speed in the circumstances;
 - b) Driving without due care;
 - c) Failing to have any regard or any sufficient regard to safety of other road users;
 - d) Causing the accident;
 - e) Failing to stop, slow down, swerve, brake or in any other way manage and/or control the said motor vehicle so as to avoid the

said accident.

8. At paragraph 5 of its Statement of Defence, the Respondent states the following:

“The Defendant denies any vicarious liability on its part or at all and shall invite the Plaintiff to strictly prove the same. The particulars of negligence set out in (a) – (c) are totally denied and the Plaintiff shall be invited to strictly prove (sic) thereof.”

9. In his testimony before the trial court, the Appellant stated as follows:

“I did not see the accident happening as I was fast asleep. Also, immediately after the accident I lost consciousness and I only regained my consciousness when I was at Voi Hospital.....”

The accident was reported at Mtito Andei police station. The traffic officer later informed me that the driver of the other motor vehicle was charged because he was at fault. From the police abstract, the police intimated that they were to prosecute KAU 644Z trailer number ZC 1056 and the driver’s name was James Wainaina Njau.”

10. Further, the Appellant admitted in cross examination that:

“Yes it was James Wainaina Njau who was charged and not my driver. Yes, the accident was not caused by my driver. It was caused by James W. Njau. Yes, my court case has not involved Mr. James Njau though he was the one at fault. Yes, I agree that the motor vehicle (our motor vehicle) was okay before the accident. It was not defective.”

11. In his judgment delivered on 26th August 2016, the learned trial Magistrate rendered himself as follows:

“In my view, the fact that a person is injured and has suffered damage does not in itself give rise to a cause of action. The court expects the plaintiff to place liability at the door of the defendant.”

12. By this statement, the trial court was addressing itself to the issue of causation.

13. In dealing with the issue of causation in *Statpack Industries v James Mbithi Munyao [2005] eKLR Visram J* (as he then was) stated:

“It is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone’s negligence and his injury. The Plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily a result of someone’s negligence. An injury per se is not sufficient to hold someone liable for the same.”

14. Granted that the Appellant was injured in an accident involving the Respondent’s motor vehicle in which he worked as a turn boy, he himself confirmed in his testimony, that the accident was not caused by the Respondent or its agents or employees.

15. In the final submissions filed on behalf of the Appellant, a suggestion was made that the Respondent was liable because the Appellant was injured while at work. In pursuing this proposition, the Appellant relied on Section 10 of the Work Injury Benefits Act.

16. However, in its decision in *Attorney General v Law Society of Kenya & another [2017] eKLR* the Court of Appeal found the assignment of strict liability on employers as introduced by Section 10(4) of the Work Injury Benefits Act, unconstitutional. The decision by the Court of Appeal was confirmed by the Supreme Court in *Law Society of Kenya v Attorney General & another [2019] eKLR*.

17. It follows therefore that an employee seeking relief for an injury at the work place must prove direct liability on the part of the employer.

18. According to the evidence on record, the Appellant did not prove any of the particulars of negligence pleaded against the Respondent. In fact, the Appellant himself testified that the accident was caused by some other party.

19. In the circumstances I agree with the learned trial Magistrate that liability against the Respondent was not established.

20. The Appellant did not raise any issue on the quantum of damages as assessed by the trial court.

21. As held by the Court of Appeal in *Mbogo v Shah [1968] EA 93* and *William J Butler v Maura Kathleen Butler [1984] eKLR* an appellate court should not interfere with an assessment of damages by a trial court except in cases of clear misdirection or application of wrong principles, thus arriving at a wrong or unjust decision.

22. Applying this basic principle, I find no reason to interfere with the projected award of Kshs. 800,000 in general damages and Kshs. 2,000 in special damages made by the trial court.

23. In the ultimate, the Appellant’s appeal fails and is disallowed.

24. In light of the past employment relationship between the parties, I direct that each party will bear their own costs.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 1ST DAY OF OCTOBER 2020

LINNET NDOLO

JUDG

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Mr. Kariuki for the Appellant

Mr. Timamy for the Respondent