



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

APPEAL NO. 3 OF 2019

(Previously Nyamira High Court Civil Appeal No. 8 of 2016)

KIPKEBE LIMITED.....APPELLANT

VERSUS

BENARD NYAMBANE NYANDEGA.....RESPONDENT

(Appeal from the Judgment and Decree of the Honourable J. Mwaniki, Principal Magistrate, Keroka in Civil Suit No. 103 2009 delivered on the 16/02/2016)

JUDGMENT

1. In a Judgment delivered on 16 February 2016, the learned trial Magistrate found Kipkebe Ltd (Appellant) in breach of duty of care/negligence in respect of an accident in the workplace which occasioned Benard Nyambane Nyandega (Respondent) injuries.
2. The trial Court awarded the Respondent general damages of Kshs 380,000/- and special damages of Kshs 6,500/-.
3. The Appellant was dissatisfied and it filed a Memorandum of Appeal before the High Court sitting in Nyamira contending that
 1. The learned trial Magistrate grossly misdirected himself in treating the evidence and submissions on liability before him superficially and consequently coming to a wrong conclusion on the same.
 2. The Learned trial Magistrate did not in the alternative consider or sufficiently consider the demand of contributory negligence based on the evidence adduced and the submissions filed by the Appellant.
 3. The Learned trial Magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same.
 4. The Learned trial Magistrate misdirected himself in ignoring the principles applicable and the relevant authorities cited in the written submissions presented and filed by the Appellant.
 5. The Learned trial Magistrate erred in not sufficiently taking into account all the evidence presented before him in totality and in particular the evidence presented on behalf of the Appellant.
 6. The Learned trial Magistrate erred in failing to hold that the Respondent had failed to prove negligence on the part of the Appellant while the onus of proof lay with the Respondent.
 7. The Learned trial Magistrate proceeded on wrong principles when assessing the damages to be awarded to the Respondent (if any) and failed to apply precedents and tenets of law applicable.
 8. The Learned trial Magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstances that it represented an entirely erroneous estimate vis-à-vis the Respondent's claim.
 9. The Learned trial Magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.

4. The High Court gave directions on 25 October 2018 and further directed that judgment would be delivered on 14 March 2019.
5. The Appellant filed its submissions on 28 November 2018 while the Respondent had filed his submissions on 19 November 2019.
6. On 14 March 2019, the High Court pushed the delivery of judgment to 29 March 2019.
7. However, on 29 March 2019, the High Court citing lack of jurisdiction ordered the transfer of the Appeal to this Court.
8. When the Appeal was mentioned before this Court on 2 November 2020, it set the delivery of judgment to today.

Role of first appellate Court

9. The role of a first appellate Court was discussed in *Kamau v Mungai* (2006) 1 KLR 150 where it was held that

this being the 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.

10. The Court will keep in mind the edict on its role.
11. In its submissions, the Appellant condensed the Grounds of Appeal into 2, Liability and Quantum.

Did an accident occur; Liability/contributory negligence

12. In challenging the findings on liability, the Appellant contended that the Respondent did not call any corroborating witness to demonstrate how the motor vehicle spring which fell from a shelf leading to his injuries came to be on the shelf and for how long it had been on the shelf.

13. Further, the Appellant asserted that since the muster roll showed the Respondent was on duty for 13 days in April 2006, it was inconceivable that he sustained any injuries in the workplace in the course of the month.

14. On the same issue, the Appellant contended that the Respondent's alleged accident/injuries were never recorded in the requisite register.

15. Rebutting the contentions by the Appellant, the Respondent countered that he produced treatment records from the Appellant's clinic to show he was injured and got treatment at the clinic on 28 April 2006, and a copy of Form LD 104, being a statutory notification of an accident in the workplace from an employer to the Director of Occupational Health and Safety.

16. As to how the accident occurred, the Respondent testified that a vehicle spring fell from a shelf on his leg while he was cleaning and injured him and that he reported to his supervisor called Ezekiel Omiti.

17. Although the Appellant presented witnesses who testified that the Respondent was not injured in the workplace on 28 April 2006, the parties consented to the production of a treatment card on the letterhead of the Appellant.

18. The treatment card indicates that the Respondent was treated at the Appellant's clinic on 28 April 2006 for a *very serious injury* and that he was transferred to the district hospital and was eventually found to have sustained a fracture.

19. A copy of Form LD 104 was also produced.

20. Based on the 2 primary documents, the Court is satisfied, despite the discrepancies on the typed proceedings, that the Respondent was injured in the workplace on 28 April 2006.

21. Regarding liability, it is clear from the record that the Respondent was sent to clean the store and that the store was not his daily work station. It would therefore be incredulous to expect him to disclose when and how the spring came to be in the store shelf.

22. Considering that the spring fell from the shelf, the Court is unable to agree with the Appellant that the Respondent contributed to the accident and/or injuries. The Appellant had an obligation to maintain and ensure a safe work environment for its employees.

Quantum

23. The Respondent sustained a fracture of the tibia, cut wound on the left leg and dislocation of the achilles tendon.

24. In awarding general damages of Kshs 380,000/-, the trial Court considered Kisii High Court Civil Appeal No. 781 of 2006, *South Nyanza Sugar Co. Ltd v Vincent Kiriama* where the Respondent had sustained a compound fracture of the left tibia and fibula bone, a compound fracture left ulna and cut wounds on the left leg and was awarded Kshs 350,000/-. The award was in 2013.

25. The injuries in the case relied on by the trial Magistrate appear to have been more serious than those sustained by the Respondent in the instant case. The awards were made about 3 years apart.

26. In light of the injuries sustained, the Court comes to the conclusion that the award was excessive and it is reduced to Kshs 275,000/-

Conclusion and Orders

27. From the foregoing, the Court partially allows the Appeal and sets aside the award of general damages of Kshs 380,000/- and substitutes it with an award of general damages of Kshs 275,000/-.

28. The Appellant has partially succeeded. Each party to bear own costs of the Appeal. The Respondent to have costs before the trial Court.

Delivered through Microsoft teams, dated and signed in Kisumu on this 27th day of November 2020.

Radido Stephen

Judge

Appearances

For Appellant L.G. Menezes & Co. Advocates

For Respondent T.O. Nyangosi & Co. Advocates

Court Assistant Chrispo Aura