



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**APPEAL NO.25 OF 2018**

[formerly Nakuru High Court Civil Appeal No.117 of 2016]

**LOMOLO (1962) LIMITED.....APPELLANT**

**VERSUS**

**ANAM KWANGULEI.....RESPONDENT**

[being an appeal from the judgement and Magistrate Eldama Ravine delivered on 27<sup>th</sup> PMCC No.16 of 2014] decree of Hon. M. Kasera Principal September, 2016 in Eldama Ravine

**JUDGEMENT**

The appeal herein was first filed at the Nakuru High Court under Civil Appeal No.117 of 2016 and on 27<sup>th</sup> September, 2018 the matter was transferred to this court.

On 30<sup>th</sup> January, 2019 parties attended for hearing directions and both agreed to address the appeal by way of written submissions and a date was allocated to attend and confirm. On 28<sup>th</sup> February, 2019 only the appellant had filed written submissions, the respondent had not complied and opted to be absent.

**Judgement herein relates to the appeal.**

The facts leading to the appeal herein are that the respondent was an employee of the appellant's farm at Lomolo in Mogotio as a casual labourer. On 1<sup>st</sup> January, 2013 while the respondent was engaged in his duties of carrying sisal he fell in a hole which had been covered by grass thereby causing him serious injury.

The respondent filed suit in Eldama Ravine PMCC No.16 of 2016 on the basis that the appellant failed to provide a safe work environment or provide protective gear so as to ensure the safety of the respondent while working in the farm. The claim was also that the injuries caused to the respondent of soft tissue injury to the back he incurred medical expenses and is seeking general damages, special damages and costs of his suit.

In defence, the appellant's case was that the respondent was not an employee and where there was any employment which was denied, the respondent did not fall into a hole on the farm on 25<sup>th</sup> January, 2013 as alleged or at all. There was no accident reported to the appellant on such date. Where the respondent got injured such arose out of his own negligence by failing to give due regard to his own safety and when engaging on a frolic of his own. The claims made are without basis.

The trial court heard the parties and in judgement and made a finding the respondent was injured while at work on 25<sup>th</sup> January, 2013 and received treatment as a result of the soft tissue injuries sustained and when assessed by the doctor, the injuries were found to be harm and he had healed well. Special damages were assessed and awarded at ksh.60,000.00 plus special damages as pleaded.

Aggrieved by the judgement and decree therefrom, the appellant lodged the appeal on six (6) grounds as follows;

- 1. The leaned trial magistrate erred in law and in fact in making finding on liability against the appellant which was not supported by evidence on record,*
- 2. The leaned trial magistrate erred in law and in fact in in holding the respondent has a successful claim of negligence against the appellant despite no claim of negligence being pleaded or particularised in the respondent's pleadings,*
- 3. The leaned trial magistrate erred in law and in fact in failing to appreciate and find that the respondent was not the appellant's employee*

at the alleged time of injury,

4. The leaned trial magistrate erred in law and in fact in failing to appreciate and find that the respondent's claim against the appellant was not founded and was replete with fraud, deception and illegalities,

5. The leaned trial magistrate erred in law and in fact in failing to appreciate and apply the principles applicable in a claim of negligence, and

6. The leaned trial magistrate erred in finding the appellant liable at all on the face of all the available evidence.

The appellant is seeking that the appeal be allowed and the judgement of the trial court be reviewed and or set aside with costs.

That the respondent had a successful claim of negligence against the appellant despite there being no claim of negligence being pleaded or particularised.

As noted above, the parties agreed to file written submissions. The respondent opted not to address the court in this regard. The appellant's written submissions shall be addressed on the merits and the applicable law.

The appellant submits that there was no liability established on the part of the appellant. The trial court erred in law and in fact by failing to address this principle and by awarding general damages without making a finding on liability the appeal is justified.

The respondent had a duty to prove his case on a balance of probabilities which he failed to do. There was challenge by the appellant that there was no employment relationship between the parties so as to confirm a legal duty of care. By application of Section 9 of the Work Injury Benefits Act, 2007 the appellant kept a muster roll and the respondent is not registered as an employee. Without establishing an employer and employee relationship, the claims made are lost as held in the case of **Timsales Limited versus Noel Agina Okello [2014] eKLR**.

Before the trial court the respondent only produced a treatment chit and Dr Omuyoma medical report. This only show there was injury but not related to the appellant. This does not connote liability as held in **Nandi Tea Estate Limited versus Eunice Jackson Were [2006] eKLR**.

The evidence by the respondent was full of contradictions where he pleaded that he was injured on 1<sup>st</sup> January, 2013 and then testified that the accident occurred on 25<sup>th</sup> January, 2013. The medical report bearing different dates is of no value as held in **Timsales Ltd versus Wilson Libuywa [2008] eKLR**. Without pleading negligence, the award of general damages is not justified and the appeal should be allowed.

As a first appeal the court is required to re-evaluate the evidence on record and ensure that the trial court acted within the settled principles of law as held in **Selle & Another versus Associated Motor Boat Co. Ltd & Others [1968] EA**.

Therefore this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties

In this appeal, the issues which emerge for determination is whether the trial court applied the correct principles of law in making a finding for payment of general damages and whether the court should review and or set aside the judgement.

From the pleadings, it is clear that the respondent alleged that he was injured while at work with the appellant on 1<sup>st</sup> January, 2013. When the respondent testified before the trial court on the 17<sup>th</sup> of May, 2015 he stated under oath that he was injured and treated on 25<sup>th</sup> January, 2013. The treatment notes from Dr Omuyoma dated 9<sup>th</sup> May, 2015 are based on his assessment of the respondent and a history of injury which occurred on 25<sup>th</sup> January, 2013.

In his witness statement attached to the Plaintiff, the respondent asserts that he was injured while working for the appellant on 1<sup>st</sup> January, 2013.

The obvious contradictions apparent, had the trial court given a keen consideration to the defence by the appellant this would have been an obvious lapse.

On the findings that the appellant should pay general damages assessed at Ksh.60,000.00 to the respondent, such findings are not supported by any findings of the trial court with regard to liability. Without making a finding as to whether the appellant was liable, to proceed and assess general damages is without justification. The rationale is as stated in **Charles worth & Peray on Negligence, 7th Edition** as follows;

*Evidence of causation must be given on behalf of plaintiff. Before a case can be considered, either direct or circumstantial evidence must be called on behalf of the plaintiff. Whatever evidence is so called, it must tend to show how the accident happened and how, as a result, he sustained his personal injuries or suffered his damage. Such evidence also must show that on a balance of probabilities, the most likely cause of the damage was the negligence or breach of duty of the defendant, his servant or agent and not solely the negligence of some other person. If he fails to establish that the defendant caused the harm, of which he complains, or some part of it, then his action will fail. Such a failure will result whether this happens to be expressed in terms of lack of result or for reasons of remoteness.*

*It is a question of law, whether the evidence adduced allows a reasonable finding of causation, but it is a question of fact, whether any particular head of damages is so caused by a defendant's negligence or breach of duty.*

In the case of **Dare versus Pulham (1982) 148, C.L.R. 658** the court which described the functions of pleadings as follows;

*Pleadings and particulars have a number of functions; they furnish a statement of the case sufficiently clear to allow the other party a fair opportunity to meet, they define the issues for decision in the litigation and thereby enable the relevance and admissibility of evidence to be determined at the trial and they give a defendant an understanding of a plaintiff's claim in aid of the defendant's right to make a payment into court ...*

Particulars of negligence must be pleaded. Otherwise the respondent faced with a claim such as the one filed by the respondent before the trial court, the only matter which stood out for determination is whether the special damages claimed should be paid. There remained no matter for the court to address on liability or payment of general damages.

Even in the best effort to make a finding for the respondent, without the contradictory evidence with regard to the date the alleged injury occurred, the medical reports and the evidence by Dr Omuyoma only served to further sway the case to the appellant's advantage as held in **Timsales Ltd versus Wilson Libuywa**, cited above. When the respondent was served with the defence and note the apparent error, contradiction or mistake in the alleged dates of the accident, reason demanded that the Plaint be amended. This was not done.

The court is left with contradictory evidence and a matter where negligence was not pleaded so as to have the trial court assess the special damages and the general damages awarded. There was no basis at all. Had these matters been taken into account, the respondent's case ought to have been dismissed instantly.

The findings of the trial court are not premised on the correct principles of law.

**Accordingly and for the reasons set out I find the respondent failed to prove his case on the required threshold and on a balance of probabilities. Consequently, I allow the appeal and set aside the judgement and decree in Eldama Ravine PMCC No.16 of 2014 with costs to the appellant.**

**Delivered at Nakuru this 21<sup>st</sup> day of March, 2019.**

**M. MBARU**

**JUDGE**

In the presence of: .....