



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

APPEAL NO.9 OF 2018

TRANSAFRIC TIMBER LIMITED.....APPELLANT

VERSUS

EUNICE KERUBO MOMANYI.....RESPONDENT

[Being an appeal from the judgement and decree of Resident Magistrate,

F Muguongo delivered on 18th April, 2016 in Nakuru CMCC No.1174 of 2014]

JUDGEMENT

The appellant filed the Memorandum of Appeal following judgement and decree delivered on 18th April, 2016 in CMCC No.1174 of 2016.

The facts leading to the appeal are that the respondent, Eunice Kerubo Momanyi filed a plaint before the trial court on the grounds that while in the employment of the appellant as a general worker and on 3rd November, 2014 in the course of work while working at the breakdown machine in the factory sustained injuries to the right hand. The respondent filed suit on the grounds that the appellant had been negligent and failed to ensure a safe work environment causing injuries and amputation of the right index finger, fracture of the distal phalanx of the right middle finger and deep cut wound of the right thumb.

In defence the appellant denied the respondent was not an employee with them and therefore there was no obligation or duty towards her or to prevent exposure to injury and liability for the injuries were denied. Without prejudice the appellant's case was also that where the respondent suffered any injuries such resulted from negligence and failure to attend duty with care on her part.

The trial court heard the parties and delivered judgement with findings that the respondent was injured while on duty with the appellant and such resulted from negligence on the part of the appellant and liability held at 100%. Quantum and general damages were assessed at ksh.700, 000.00.

Aggrieved, the appellant filed the appeal on five (5) grounds which can be summarised into three (3) with regard the findings on liability; findings on the assessment on damages at ksh.700, 000.00; and the principles of law applied in arriving at the findings of the court.

The appeal is on the findings on liability to be set aside, reviewed or revised or be substituted with a judgement of the court and for the payment of costs.

Both parties filed written submissions.

The appellant submits that the trial court erred by holding the appellant 100% liable when the respondent had not proved her case on a balance of probability especially on the issue of negligence as defined in the case of **Blyth versus Birmingham in Waterworks Co. (1956) 11 Ex.** Negligence means the omission to do something which a reasonable man, guided upon these considerations which ordinarily regulate the conduct of human affairs would do or doing something which a prudent and reasonable man would not do. In this case the respondent testified that her right hand slipped and was caught by the machine hence injuring her. The supervisor had demonstrated to her how to put timber into the machine and how to operate the machine and was in control of the timber while pushing it into the machine. The injury thus occurred due to the carelessness of the respondent as she remained in control of the machine and the timber and ought not to have allowed her hand to slip and avoid injury.

The appellant also submits that In the case **Mumende versus Nyali Golf & Country Club (1991) KLR** it is an implied term of employment for an employer to provide a safe conditions of employment and not to expose employees to injury but will not be responsible for the employee's own negligence in the course of employment. An employer owes no absolute duty to the employee and only duty is that of reasonable care against risk as held in **Mwanyule versus Said t/a Jomvu Total Service Station [2004] 1 KLR**. There is nothing that connote negligence on the part of the respondent.

The assessment of damages awarded to the respondent were premised on the wrong principles and inordinately so high and should be set aside, reviewed or replaced with an award by the court. In the case **Simba Posho Mills Ltd versus Onguti [2005] eKLR** the court awarded ksh.180, 000.00 where the respondent had suffered amputation and fractures to the right hand finger and hand. In **Karita versus Muthua [1987]** the award was ksh.110, 000.00 for amputation of thumb, amputation of index finger, serious injury to middle finger and 60% disability. The trial court awarded special damages whereas such costs had been paid through the NHIF and there was a waiver as well.

The respondent submits that the findings by the trial court were based on the evidence, the applicable law and the principles upon which there was liability at 100% and the assessment of damages was on the foundation of the injuries suffered and analysed cases. The trial magistrate awarded damages that were commensurate with the gravity of the injuries sustained. The court should not disturb judgement property arrived at by the trial court as held in the case of **Butt versus Khan [1978] eKLR** and **William J Butler versus Maura Kathleen Butler [1984] eKLR**.

From the medical reports and evidence the respondent's injuries were to the right hand which is the dominant hand and has been incapacitated to the extent of 20%. The damages awarded were appropriate and should not be disturbed.

On the appeal this court is called upon to analyse and re-evaluate the material on record afresh and reach its own conclusion(s) bearing in mind that it is the trial court that had the advantage of calling the evidence and taking the primary evidence. In **Kiruga versus Kiruga & Another [1988] KLR 348**, the Court of Appeal held that;

An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.

In his case, the respondent testified before the trial court that on 3rd November, 2014 while at work with the appellant and during her 2nd week after being employed to move timber from one point to another within the company she was directed by the supervisor to operate machine a cross cutter. The respondent told the supervisor that she had no experience operating the machine and the reply was that no experience was required to operate the same. She was shown how to put the timber into the machine and how to control it with her hand and she started doing as was demonstrated and in the process was told to hurry up the process and her right hand and index finger got chopped off.

The injuries sustained by the respondent were assessed by Dr Kiamba and a medical report filed. There was 20% disability from the injuries sustained.

In defence, the appellant called the supervisor to the respondent and who testified that she worked with the respondent after explaining to her how to use a cross-cutter, and demonstrated to her how to turn off the machine and how to place the timber properly on the machine and operate it. That the person who operates the machine also controls its speed.

Not every industrial injury is the fault of the employer. There must be negligence proved and also there must exist a statutory duty on the part of the employer as held in the case of **Timsales Limited versus Stephen Gachie [2005] eKLR**. However in a proper case where an employee has demonstrated that while in the course of duty there was injury due to the fault of the employer by failure to ensure a safe work environment, by being allocated work duties which required training, regulation and control by the employer so as to ensure the employee was out of harm's way, then any resulting injury must be borne by the employer.

It is not sufficient that an employee is taken and in two weeks is shown how to operate a cutting machine and taken to be up and conversant with the operations and control of the same and then left on her own by the supervisor. Duty calls that before the respondent was left on her own to operate a machine that required skill, control and regulation to remain under supervision and direction of the supervisor until satisfied that indeed she could be left on her own to operate the machine. Without any prior work knowledge on the machine, prudence and duty fell upon the respondent to ensure proper direction on the respondent.

In the case of **Samson Emuru versus Ol Suswa Farm Ltd Nakuru HCCA No. 6 of 2003** that:

The duty of the employers to provide the servant with a safe place of work not merely to warn against unusual dangers known to them, ... but also to make the place of employment...as safe as the exercise of reasonable skill and care would permit...The duty thus described is a higher... the master is under a duty to make his servants to take reasonable steps to avoid harm arise.

And the case of **Efil Enterprises Limited versus Dickson Mathambyo Kilonzo [2018] eKLR**

If a worker is injured just because no one has taken the trouble to provide him an obviously necessary safety device, it is sufficient and in general, satisfactory to say that the employer has not fulfilled its duty ... In this regard, it is expected that the appellant employer when assigning its employees to work in an environment where there is potential risk of injury...then it is prudent for them to provide proper appliances to safeguard the workers. The primary duty rests with the employer to prove that there were precautions put in place and brought to the attention of the employee but the employee failed to adhere and deliberately put himself in harm's way. ...

In this case the trial court properly addressed the matter before court, applied the correct principles and arrived at a well-reasoned judgement. The finding on liability is proper and the court finds no material to disturb the findings.

On this basis the findings on liability being well founded, the trial court went ahead to assess the damages due to the respondent, assessed the

medical evidence and case law. The challenge to the amount of damages awarded as being high, the counter assessment by the appellant is based on case law way old and cannot be applied to justify injury which occurred in the year 2014.

Accordingly, there is no material, ground or matter before the court to justify a disturbance of the judgement of the trial court. The net effect of these findings is that the appeal is found without merit and is hereby dismissed and the appellant shall pay costs due to the respondent for the appeal.

Delivered at Nakuru this 14th day of March, 2019.

M. MBARU JUDGE

In the presence of: