



**REPUBLIC OF KENYA**

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

**NAKURU**

**APPEAL NO.20 OF 2018**

(Formerly Nakuru High Court Civil Appeal No.119 of 2016)

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

**VERSUS**

**JUMA ODUOR ..... RESPONDENT**

[being an appeal from the judgement and decree of Hon. Kisera Principal Magistrate Eldama Ravine delivered on 27<sup>th</sup> September, 2016 in Eldama Ravine PMCC No.15 of 2014]

**JUDGEMENT**

The respondent herein had filed Plaintiff before the lower court in Eldama Ravine PMCC No.15 of 2013 on the grounds that he was employed by the respondent s a casual labourer and it was a term of the contract for the respondent to ensure his safety while at work but on 25<sup>th</sup> January, 2013 while engaged in his duties of carrying sisal he fell into a hole dug in the farm and which had been covered by grass and as a result he sustained serious injuries. He suffered blunt injury to the lumber-sacral region of the back. He claimed for general damages, special damages and costs.

The appellant denied the claims made by the respondent on the grounds that there was no employment between the parties and denied that the respondent was injured while at work for the appellant on 25<sup>th</sup> January, 2013 and where such accident occurred and the appellant got injured, he was to blame for the same for being negligent and failing to take into account his own safety.

The trial court heard the evidence and in judgement delivered on 27<sup>th</sup> September, 2016 made a finding that the respondent was employed by the appellant, he was injured while at work and the appellant was liable in negligence and damages were assessed at ksh.80,000.00 together with special damages.

Aggrieved by the findings and award of the trial court, the appellant lodged the appeal on seven grounds which can be summarised as being that the trial court erred in making a finding on liability without any supporting evidence and also making a finding that the appellant was negligent despite such claim not being pleaded or particularised in the pleadings. That the court erred in failing to appreciate that there was no employment between the parties and that the respondent had not proved his case to the required degree and he had contradictions in his evidence and the appeal should be allowed and the judgement be reviewed and or set aside in its entirety.

Notice issued to the parties to attend for hearing directions before the High Court at Nakuru on 4<sup>th</sup> July, 2018 but the respondent, despite being served was absent.

The matter was transferred to this court.

On 29<sup>th</sup> January, 2019 there was attendance in court for taking hearing directions, the respondent as served and returns filed but opted to remain absent. Hearing directions were issued and mention date allocated for the 25<sup>th</sup> February, 2019.

On the due date, the respondent was in court having been served by the appellant with the written submissions, he applied for time to file written submissions and the court extended time by 21 days to give the respondent a fair chance to rely to the appeal. A mention date was allocated to 18th March, 2019.

There was no compliance by the respondent. no written submissions were filed.

The appeal stands unopposed.

The same shall be considered on its merits and based on the submissions filed by the appellant.

The appellant submitted that the trial court in Eldama Ravine in PMCC No.15 of 2014 erred with regard to the issue of liability as it failed to appreciate that the respondent was not an employee of the appellant on 25<sup>th</sup> January, 2013 when he alleged to have been at work and got injured. There was no evidence called to support the allegations of employment. The muster roll produced in defence as required under section 9 of the Work Injury Benefits Act, 2007 as kept and maintained by the appellant had a record of all employees at the farm on the subject date and the respondent was not one such employee. Such evidence was not challenged.

Without establishing an employer and employee relationship, the findings on liability were not justified as held in the case of **Timsales Limited versus Noel Agina Okello [2014] eKLR**.

The occurrence of the accident was also challenged, there was no material evidence submitted by the respondent as to how he got injured and the circumstances of the same so as to link the appellant to the same. The findings on negligence were not particularised and without these being pleaded, the court could not infer the same and assess quantum. As a principle of the law, such matter had to be pleaded as held in the case of Statpack Industries versus James Munyao, Nairobi HCCA No.192 of 2003.

As noted above, the appeal was not challenged.

However, in re-evaluating the judgement of the lower court as required of this court being the court of first appeal, the grounds of appeal collapsed together the issues which emerge are the issues of finding on liability and the findings on negligence and the subsequent assessment of damages payable to the respondent.

It is trite that in a claim such as the one filed by the respondent before the lower court, where the same was premised on claim for the payment of damages for injuries suffered at work, the breaches impugned on the appellant had to be particularised for the court to make a finding and proceed to assess quantum and the payment of damages. Where there was negligence or breach of a statutory duty, these had to be pleaded as set out 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 ...*

There must be proof of the facts pleaded where there is a duty established on the part of the other party as held in the case of **John Gachanja Mundi versus Francis Muriira & Another [2017] eKLR**. the rationale is that, In order to prove negligence, the respondent had to prove that the appellant owed a duty of care and that the duty was breached and that he suffered loss and damage as a result of such breach(es). see **Brite Print (K) Ltd & George Maina Kingori versus Barclays Bank (K) Ltd NRB HCCC No. 657 of 2006 [2014] eKLR**) and the case of **Eric Omuodo Ounga versus Kenya Commercial Bank Limited [2017] eKLR**.

In his evidence, the respondent testified that he used to cut sisal at the appellant's farm in Lomolo then carry it to the road and a tractor would pick and carry them. he carried 100 pieces of sisal and then fell down and got injured. He went to Mogotio and was treated on his back on 21<sup>st</sup> January, 2013.

Such testimony ended without the respondent setting out how the appellant was negligent or in breach of any duty. This must be the case as such matter was not pleaded.

Not every case of injury that take place at work is as a result of the negligence or statutory breach by the employer. This case stand as one such case.

The measure of damages must be adjudged from the effect of breach of the employer's duty of care on the employee while at work. The respondent did not plead or prove any negligence or breach of a statutory duty on the part of the appellant. I therefore hold that the Plaintiff failed to prove his loss.

The findings of the lower court that the appellant was liable in negligence and thus assessed quantum and damages payable to the respondent has no legal foundation based on the evidence before this court. these findings on liability and the damages assessed are erroneous

**Proof of damages is an essential element of the tort of negligence. As the respondent failed to prove damages, this appeal must succeed and it is accordingly allowed. The orders of the lower court in Eldama Ravine PMCC No.15 of 2014 are hereby set aside and the costs of the appeal awarded to the appellant.**

**Delivered at Nakuru this 25<sup>th</sup> day of April, 2019.**

**M. MBARU JUDGE**

In the presence of: .....