



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CASE NO. 88 OF 2015

(Before Hon. Justice Mathews N. Nduma)

KIPKEBE LIMITED.....APPELLANT

VERSUS

CLINTON MONGARE LABOSO.....RESPONDENT

JUDGMENT

1. This is an appeal from a decision of Learned Magistrate Hon. Were, delivered on 15th December 2010. The facts of this case presented before the lower court are that the plaintiff/respondent was a tea picker. He worked as a casual worker. The respondent testified that he was injured at Kericho Tea factory on 13th January 2009. That he joined the respondent, Kipkebe Limited in 2008 and worked till December 2009. That his check roll number was 3928. He relied on a pay slip as evidence of employment since he had no letter of employment.

2. On the 13th January 2009, the respondent testified that he reported to duty at 7.00 am. He was allocated work (Tea Picking) by the foreman. Whilst picking tea, the respondent testified that he fell into a hole in the tea plantation. He was not aware there were holes in the plantation. That he dislocated his knee and was scratched by a stick on the right knee. That he was taken to Keritos hospital and was treated.

3. The fact of being at work on 13th January 2009 and production of a copy of treatment card from Keritos hospital was contested. Notice to produce had been given to the respondent since the original card was said to be with the hospital. The court also allowed the production of the card.

4. The respondent blamed the injury on the appellant for failure to give him protective wear like gumboots. He said if he had gumboots, he would not have been injured. That the Appellant also had a duty to warn the tea pickers of the holes in the plantation which were not visible.

5. The respondent relied on a medical report of Dr. Ajuoga for which he had paid Kshs 6,500. Under cross examination the respondent stated that on the day of the injury he was with many other people who he did not recall by name but his supervisor was Martin Nyarangi. He denied that his contract had expired on 8th January 2009. He had signed a one year contract but produced pay slips for December 2008 and January 2009. He said if he had not worked in January 2009, he would not have gotten the pay slip which was given to him at the end of January 2009. He insisted he was at work on 13th January 2009.

6. Dr. A. Ajuoga testified that he examined the claimant on 29th September 2009. On examination he observed healed scars and residual pains in the knee. That the respondent had suffered S.T.I but had healed with permanent disability. The Doctor relied on treatment notes from Kipkebe Health Centre. He produced a medical report for which he has paid Kshs. 6,500 and had charged Kshs. 5,000 court attendance. The testimony by the Doctor was not dented during cross-examination from the record.

7. The respondent called DW1 one Josiah Nyakundi Momanyi a clerk at Kipkebe Limited in Keritos Estate. DW1 testified that the respondent was an employee of the Appellant but it is not true that he was injured on 13th January 2009. DW1 testified that the respondent was not on duty on the said date. That he was an employee up to 8th January 2009. That his contract had expired on that day. That his employment number as seen in the roll is 3928. DW1 testified that from the records, the respondent was not on duty on 31st January 2009. That his contract had expired.

8. DW1 said that they did not allow casuals. He however stated that from the records, the respondent worked for six (6) days from 2nd to 8th January 2009. That the claimant did not work on 1st January 2009 as it was public holiday.

9. Under cross examination, DW1 admitted that 13th January 2009 was a working day although he did not produce their records for the day. He admitted that casuals work on a daily basis. DW1 did not produce the respondent's contract in court. DW1 did not contest the pay slip for January 2009 produced by the respondent and that it was given to workers at the end of the month.

10. DW2 David Kipchircir Koech testified that he was a clerical officer at Kipkebe Limited. That on 31st January 2009, he attended to 36 patients and the claimant was not one of them. He produced a record of patients attended to. DW2 admitted that he is not the one who kept the patients records on the day. That the entries were made by one Evans Momanyi who was not called to testify.

11. The lower court upon analyzing the testimony before court found that the evidence that there was a hole in the plantation was not disputed at all.

12. The learned magistrate further found that the plaintiff had proved that he fell into the hole, and without any protective gear as testified. The court however found that the claimant contributed to the fall and should have been more watchful. The court distributed liability between the claimant/respondent and respondent/appellant at 30:70%

13. The lower court further accepted the medical evidence that plaintiff sustained a dislocation of the right knee, bruises on right knee and that he had been treated at Kipkebe dispensary where analgesics and anti-tetanus was administered.

14. The learned magistrate disregarded the testimony by DW1 to the effect that the claimant was not one of the patients attended to at Kipkebe hospital on 13th January 2009.

15. The court has noted this omission and analyzed the evidence of DW1 on record and has come to the conclusion that the testimony by DW1 was discredited because he admitted that he was not the one who made the patients records on the material day and one Mr. Evans Momanyi who was said to have made the entries for the day was not called to testify. This court is satisfied that the claimant was attended to at the said hospital as per his testimony.

16. The court upon a careful analysis of the facts and case law relied upon by the learned magistrate being Nairobi HCC NO. 1514 OF 1991 Dorcas Anyango vs Charles A. Akello in which general damages were awarded at Kshs. 250,000 and the case of Sokoro Saw Mill Ltd vs Grace Nduta Ndungu NKR HCC NO. 99 OF 2003 wherein General damages were awarded at Kshs. 40,000 and an award of Kshs 120,000 on the basis that the plaintiff's injury had reasonably healed and he was not expected to have permanent disability finds that the learned magistrate did not err or misdirect himself on the matter.

17. The lower court further awarded special damage pleaded in the sum of Kshs 6,500. It was not clear however whether the award of Kshs. 120,000 general damages was the 70% portion to be borne by the respondent or was the 100% to be shared at 30-70%.

18. This court finds no misdirection of law or fact that would warrant the court to interfere with the awards of the court except that the award of general damages at Kshs 120,000 is to be shared at 30:70% by the claimant/respondent and respondent/appellant respectively.

19. In the final analysis, the decision by the court *aquo* is upheld and judgment entered as follows as against the respondent/appellant.

(a) Kshs. 84,000 being 70% of Kshs. 120,000.

(b) Kshs. 6,500 special damages.

(c) Costs before this court and court below.

Judgment Dated, Signed and delivered this 20th day of May, 2019

Mathews N. Nduma

Judge

Appearances

M/S O.M Otieno for Appellant

M/S Obaga Advocate for Respondent.

Chrispo – Court Clerk