



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

ELRC APPEAL NO. 20 OF 2018

(Before Hon. Justice Mathews N. Nduma)

OGEMBO TEA FACTORY CO. LTD.....APPELLANT

VERSUS

ROBERT MOSETI NYARANGO..... RESPONDENT

JUDGMENT

1. The Appeal is from judgment of the Principal Magistrate, Ogembo Hon. Naomi Wairimu delivered on 20th December 2017.

2. The grounds of Appeal may be summarized as follows:

- (a) The trial magistrate erred in law and fact by not holding that the respondent did not prove his case on a balance of probabilities.
- (b) The trial magistrate erred in fact and law by failing to hold that the respondent was not injured while on duty and that he was not on duty on the material day.
- (c) The trial magistrate adopted wrong principles in arriving at the determination on the damages payable.
- (d) The trial magistrate erred in law and fact in awarding damages that were manifestly excessive.

3. Following the decision in ***Selle vs. Associated Motor Boat Company Ltd (1968) EA 123 and Peter vs Sunday Post Ltd (1958) EA 424***, this being a first appeal, on facts and law, the duty of the appeal court is to analyze and re-evaluate all the evidence adduced before the lower court and draw its own independent conclusions.

4. From the Appeal record, the facts of the case may be summarized as follows:

5. The plaintiff (PW1) told the trial court that on 1st May 2008, he was stationed at the gate of the Appellant's premises and was opening and closing the gate for company vehicles to come in and go out of the premises. That on the said day, while opening the gate for a motor vehicle to exit, the motor vehicle hit his right hand against the gate. That he got injured on the lower right arm by sustaining a deep cut. That he reported the accident to the Manager. PW1 could not recall the name of the manager. PW1 was taken to Kisii level 5 hospital. PW1 produced treatment records from the hospital. He also produced a medical report from Mr. Ezekiel Ogendo to whom he paid Kshs. 6,500 medical report fee. He produced the receipts. PW1 testified that he was now healed but he blamed the driver for the accident.

6. PW1 said the motor vehicle was defective but he was unaware and also he had not been given gloves to prevent occurrence of such injury to his arm. He claimed compensation and costs. Under cross examination, PW1 stated he worked for the Appellant from 2006 to 2008. That he could not remember the number plate of the motor vehicle. That the driver of the motor vehicle had told him that the centre bolt of the vehicle was defective. PW1 admitted that DMFI- 3 show that he got injured on 8th July 2008 and was signed by the manager and the back of it was signed on 8th July 2008 by Ministry of Health. PW1 however insisted that he was injured on 1st July 2008. PW1 said the motor vehicle that injured him belonged to the company and he was injured in the course of duty.

7. PW2 was Dr. Ogando Zoga who testified that he examined PW1 who had sustained a contusion on his right arm while on duty at Ogembo Tea Factory and was treated at Gucha District Hospital and Kisii District Hospital. That at the time he examined PW1, the soft tissue injury had healed well with no anticipated permanent disability. PW2 produced a medical report produced as exhibit 4. The treatment sheets were before court and he stated a Clinical Officer known as Okombo who had treated PW1 was well known to him. The treatment was by one Mr. Nyangosi who was not available to testify in court.

8. The defence called DW1 Hezekiah Kenana, Senior Production Supervisor at Ogembo Tea Factory. He told the court he had worked for the Appellant for 9 years. DW1 testified that he knew PW1 as a permanent general worker at the Ogembo Tea Factory. That in 2000, he was in the security section. That PW1 was no longer employed by the Appellant. That on 1st May 2008, DW1 was at work but records show that it was a public holiday and PW1 was not at work. That employees work during public holidays upon request and are paid double salary. DW1 had master roll and allocation book for security guards. The master roll shows that PW1 was last on duty on 30th April 2008.

9. DW1 further stated that PW1 was sick from 2nd to 4th May 2008 and from 5th onwards he was on casual leave for 3 days. That he resumed work on 22nd May 2008. DW1 testified that a report of injury suffered by PW1 was not indicated in the accident registration book. DW1 said that PW1 was not working on 1st May 2008 and was probably injured at home.

10. Under cross examination, DW1 stated that he was a Senior Supervisor and was not the immediate Supervisor of PW1. That from the records, PW1 was on paid sick off on 2nd, 3rd and 4th May 2008. DW1 did not know what PW1's sickness was and where he was treated.

11. DW1 admitted that 1st May 2008 was working day for some people at the factory. That it was the duty of the supervisor to make accident entries in the accident register and the management endorses.

12. The court has considered the evidence before the trial court and is of the considered finding that the learned trial magistrate properly analyzed the evidence by PW1, PW2 and DW2 and arrived at a proper decision that PW1 had proved on a balance of probabilities that he was injured by a company motor vehicle while opening the gate at the Appellant's premises.

13. That even though the Appellant was vicariously liable for the injury sustained by the respondent in the cause of duty, the respondent was partly to blame for the accident since he did not keep a proper distance from the motor vehicle entering the gate. The learned magistrate considered the law applicable to the facts appropriately and apportioned liability at 20:80 percent. The trial magistrate found correctly that the Appellant owed a duty of care to the respondent and other workers to keep a safe work environment by making sure the driver it employed and who passed at the gate manned by the respondent were careful not to cause injury to persons opening the gate for them.

14. The trial court considered the case of *Kisii HCA NO. 72 of 2007 Kenya Power and Lighting Company Ltd vs May Akinyi* in which the High Court had awarded general damages in the sum of Kshs. 350,000 in respect of similar injury to those sustained by the respondent. The trial magistrate however found that injury suffered by the respondent herein were less severe than those suffered by the plaintiff in the cited authority and awarded the respondent Kshs. 250,000 in general damages. The trial magistrate further awarded the respondent special damages in the sum of Kshs. 6,500 and costs of the suit.

15. It is the court's finding that the trial magistrate guided herself properly on the facts of the case and the law applicable to the facts.

16. The court therefore finds no justification to interfere with the substantive finding by the court on liability and the discretionary finding by the court on damages.

17. Accordingly, the court dismisses the Appeal in its entirety and makes the following final orders:

(a) The Appeal is dismissed in its entirety.

(b) The Appellant to pay the costs of the proceedings before the trial court and the Appeal court.

Judgment Dated, Signed and delivered this 9th day of July, 2019

Mathews N. Nduma

Judge

Appearances

M/S. Onyinkwa for the Appellant.

M/S T.O. Nyangosi for the Respondent

Chrispo – Court Clerk