



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**  
**AT NAKURU**  
**APPEAL NO.30 OF 2018**

[formerly High Court Civil Appeal No.120 of 2016(Nakuru)]

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

**VERSUS**

**ALEXANDER MZEE KOMEN.....RESPONDENT**

**(Being appeal from the judgement and decree of Hon. Kasera Principal**

**Magistrate Eldama Ravine delivered on 27<sup>th</sup> September 2016 in PMCC No.15 of 2014)**

**JUDGEMENT**

The appeal herein relates to the judgement of Hon. Kasera delivered in PMCC No.15 of 2016 at Eldama Ravine and delivered on 27th September, 2016 and the appellant being dissatisfied with the same lodged the appeal on seven (7) grounds that the trial magistrate erred in law and in fact for making a finding on liability against the appellant without evidence, making a finding there was negligence despite their being no claim or particularised particulars, failing to take into account the respondent was not an employee of the appellant when the alleged accident took place, there was no proof of the claims made and what existed were fraudulent allegations and awarding in damages in the circumstances.

The facts leading to the judgement are that the respondent who was the plaintiff before the trial court was an employee of the appellant and who failed to ensure the safety and security of the employee and exposed him to harm and danger which resulted in injury. That the respondent was not provided with any protective gear while at work, no gumboots, helmet to ensure his safety.

On 24<sup>th</sup> December, 2012 while the respondent was undertaking his duties of cutting sisal, he was pieced on his right lower foot (sole) by a poisonous sisal thorn which appeared on the upper side as a result he had serious injury. Such injury was particularised as soft tissue injury to the right foot and incurred treatment costs of 3,080.00.

In defence, the appellant denied the claims made by the respondent before the trial court and on the basis that there was no employment contract between the parties and that there was no accident to the respondent as alleged and the injuries he alleges have no proof. Where he was injured such arose out of his own negligence by exposure to risk and refusing to adhere to safety precautions given to him and as such his claims should be dismissed.

In the judgement, the trial court made a finding that the appellant was liable to pay general and special damages at Ksh.60, 000.00 and 3,080.00 respectively.

Both parties addressed the appeal by way of written submissions.

The appellant submitted that in the respondent's evidence he testified that from 18<sup>th</sup> June, 2011 he had left the employment of the appellant since he was a casual employee and therefore on the alleged date of injury he was not in the service of the appellant any more. There was no evidence that after the date of 18<sup>th</sup> June, 2011 the respondent resumed duty so as to be placed at the appellant sisal firm. In defence that appellant produced the muster roll a daily record of attendance of all employees for the year 2012 and the respondent was not registered. Such removes the respondent from the alleged scene of the accident. Without the employer and employee relationship the finding of liability was in error as held in **Timsales Limited versus Noel Agina kello [2014] eKLR** and in the case of **Nyamache Tea Factory Co. Ltd versus Convas Ontomwa Buge [2010] eKLR**.

The appellant also submitted that save for the production of the medical report the respondent failed to produce any other record of evidence. The medical report only served to show there was treatment and nothing more. The occurrence of the alleged accident within the appellant's firm is not made. No independent witness was called to confirm the assertions made as held in **Kebirigo Tea Factory Co. Ltd versus Richard Ochiegi Obare [2010] eKLR**.

The allegations that there was negligence was not particularised as held in **Statpack Industries versus James Mbithi Munyao, HCCA No.152 of 2003**. Without proof of negligence to award in liability is in error and the appeal should be allowed and the judgement of the trial court set aside.

In response the respondent submitted that there was an employment relationship between the respondent and the appellant. He was employed as a casual employee and issued with staff identification card on 1<sup>st</sup> January, 2012 though this was not produced. The trial court thus evaluated the evidence and made a proper finding that there was negligence and awarded damages. The respondent did not call any witness as the appellant confirmed he was a casual employee and was paid in cash. Such evidence was not challenged by the appellant.

The muster roll produced by the appellant has several names erased raising doubts as to its authenticity and should not be taken into account.

Being a first appeal, this Court is enjoined to revisit the evidence presented before the court below afresh, analyse it in order to arrive at our own independent conclusion but bearing in mind that we did not see or hear the witnesses as they testified. See also **Seascope Ltd V Development Finance Company of Kenya Ltd, (2009) KLR 384** and **J. S. M. versus E. N. B. [2015] eKLR** aptly put as follows:-

*... bear in mind that this Court will not lightly differ with the trial court on findings of fact because that court had the distinct advantage of hearing and seeing the witnesses as they testified and was therefore in a better position to assess the extent to which their evidence was credible and believable. Should we however, be satisfied that the conclusions of the trial judge are based on no evidence or on a misapprehension of the evidence on record or that the learned judge demonstrably acted on wrong principles, we are enjoined to interfere with those conclusions.*

With regard to the grounds of appeal and the written submissions, the issues which emerge for the court determination is whether the respondent, based on the evidence presented before the Trial Court proved his case.

Section 107(1) of the Evidence Act, Cap 80 Laws of Kenya provides that;

*Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

This is called the legal burden of proof. There is however evidential burden of proof which is captured in sections 109 and 112 of the same Act as follows;

*109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.*

*112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.*

The two provisions were dealt with in the case of **Anne Wambui Ndiritu versus Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, in which the Court of Appeal held that:

*As a general proposition under section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act.*

In this case, the respondent's pleaded that on 24<sup>th</sup> December, 2012 while at work he was injured on his right foot by a poisonous sisal thorn. That such injury arose due to the negligence of the appellant who failed to ensure safety while at work and failed to issue gloves, gumboots, helmet as safety apparel.

In his evidence before the trial court on 17<sup>th</sup> September, 2015 the respondent testified that he was at the appellant's firm in the year 1987 and had duties of cutting sisal with a knife and where *kinyira [akala shoes]* and that;

*... that day at 7:00am I went on duty. At 12:00noon I was pricked on my leg.*

*My colleagues called the supervisor who came it is Kaburgei.*

*They took me to hospital.*

*Their Hospital Lomolo Dispensary. I was referred to Mogotio. I was given treatment note. ... I went back on duty and I was sent away. ... 2<sup>nd</sup> toe cut from top. ...*

Upon cross-examination, the respondent testified that;

*I started working in 1987. I was injured on 2013. Supervisor was Erick. Kaburgeti used to commute take the amount of work that we had done. I was pricked by a sisal thorn 2<sup>nd</sup> toe. I was taken to the hospital at Mogotio thorn was removed at Mogotio my toe swell.  
...*

The treatment note was not produced. A medical report made by Dr Omuyoma on 9<sup>th</sup> May, 2013 gave a history that on 24<sup>th</sup> January, 2013 the respondent was pricked by a sisal thorn while working for the appellant and he sustained injury to the right foot. The particular part of the foot is not stated.

In the judgement of the trial court, the claim by the appellant and the facts leading to the same is not properly analysed. The pleadings that injury was on 24<sup>th</sup> December, 2012 and the evidence that injury was in the year 2013 and the medical report that injury occurred 24<sup>th</sup> January, 2013 and the obvious contradictions are not taken into account.

The particulars of negligence and the part of the right foot injured as pleaded to be *soft tissue injury to the right foot* and where the respondent alleged to have been injured with a *piece on the right lower foot (sole) by a poisonous sisal thorn* is not analysed as against the evidence by the claimant that he was injured *to the 2<sup>nd</sup> toe cut on top*.

In **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.*

With the statutory duty of the employer to ensure the safety of the employee while at work thus stated and the respondent as the employee claiming that he was injured while at work, the dates of the alleged injury and the nature of injuries as above outlined create a clear contradiction and thus shift the burden on the respondent to prove that indeed what was pleaded and the appellant responded to occurred as alleged. **Subati Flowers Limited versus John Kariuki Githae ELRC Appeal No.31 of 2018** and **Lomolo (1962) Limited versus Anam Kwangulei ELRA No.25 of 2018**. Where the contradictions in the pleadings and the evidence go to the heart of the matter and without clarifications and an analysis by the trial court, to make a finding on negligence is in error.

The material date when the alleged accident occurred on the face of the defence that the respondent was not an employee of the appellant registered in the muster register was a material fact. The nature of injury whether to the right foot lower sole or 2<sup>nd</sup> toe was also material as without the determination of the date of the accident and the particular part of the body injured, to process and assess damages in a general version and without taking into account the medical report done in support of the claim was in error.

The court finds there was no proof of the claims made to the required threshold, on a balance of probabilities. This is captured in the case of **Kiema Muthuku versus Kenya Cargo Handling Services Ltd [1991] 2 KLR**;

*It is for the appellant [claimant] to prove, of course on a balance of probability, one of the forms of negligence as was alleged in the complaint, and our law has not yet reached the state of liability without fault. The appellant cleared failed to prove any sort of negligence against the respondent and in my respectful view his claim ought to be dismissed. ...*

**Accordingly, for the reasons above, the appeal is found with merit and is hereby allowed and the trial magistrate's court award in PMCC No.15 of 2014, Eldama Ravine delivered on 27<sup>th</sup> September, 2016 is hereby set aside.**

**Noting parties have been before the High Court and now this court, it is only fair that each party bears own costs.**

**Delivered at Nakuru this 26<sup>th</sup> day of September, 2019.**

**M. MBARU JUDGE**

**In the presence of: .....**