



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

APPEAL NO. 1 OF 2017

MOMBASA MAIZE MILLERS LIMITED.....APPELLANT

VERSUS

JOSEPH M. KASYOKI.....RESPONDENT

JUDGMENT

Introduction

1. The Respondent was employed by the Appellant as a Turn boy when he suffered injury in the course of his employment. The facts of the case is that on 11.4.2007 metallic particles fell into his right eye while trying to close the rusty rear door of the trailer of the truck he was assigned to work on. As a result of the said accident, he suffered injury to the eyeball, which lead to trauma to the conjunctive and later granuloma formation. He blamed the employer for negligence for exposing him to the risk of injury and failing to provide him with protective gear. The appellant denied liability for the alleged negligence and blamed the claimant for negligence performance of his duty.

2. After hearing the parties the learned trial Magistrate found the appellant liable for negligence at 100% and awarded the claimant Kshs.110,000 as general damages for pain and suffering. The appellant was dissatisfied and brought this appeal based on 8 grounds which I have collapsed them into the following

(a) The learned trial Magistrate erred in law and fact by finding that the accident occurred and that appellant was liable for the accident 100%.

(b) The learned trial Magistrate erred in law and facts by awarding the respondent Kshs.110,000 as general damages which was disproportionate and was excessive considering the injuries sustained by the respondent.

(c) The learned trial erred in law and facts by failing to consider the defence evidence and submission by her counsel and as a result he failed to reach proper finding on contributory negligence.

Appellant's Case

3. The appellant submitted that the trial Magistrate failed to appreciate the material contradictions in the respondent evidence. According to her the said contradiction ranged from the day of the alleged accident to the particular eye which got injured. It is the appellant's case that the respondent alleged that he suffered injury on the left eye while all other medical evidence adduced talked of injury on the right eye. In addition, the respondent alleged that accident occurred on 11.4.2007 while treatment notes from Lions Eye Centre and Light House Centre referred to 5 days and 3 months earlier than the said 11.4.2007. The appellant further contended that the respondent had a pre-existing eye condition, namely Glycona which was undergoing treatment even before the alleged accident on 11.4.2007. She therefore urged the Court to find that the respondent did not prove the occurrence of the accident.

4. On the quantum of damages awarded, the appellant submitted that, the medical Report prepared by Dr. S. K. Ndegwa (Exh. P1) indicated that the respondent suffered soft tissue injuries without any permanent disability. She therefore submitted that the award of Kshs.110,000 was excessive and urged the court to reduce it to Kshs.60,000. She cited *Njage Mwamata Vs KPA HCCC No. 388 of 1986* among other where the Court awarded between Kshs.10,000 and Kshs.50,000 for an eye injury. She therefore prayed for the appeal to be allowed with costs on ground of such contradiction in the plaintiffs evidence.

Respondent's Case

5. The respondent opposed the appeal and prayed for the same to be dismissed with costs. He denied the alleged contradiction in his evidence

and submitted that his evidence was lucid, unequivocal and coherent on when and how he was injured while in the course of his duty. He contended that his evidence was consistent that he was injured on the right eye and it became swollen. He referred the Court to his oral testimony as Pw2, the treatment notes and the medical Report by Pw1 to prove the said consistency regarding the day of the accident and the eye that was injured. He urged the Court to find that Dw1 did investigations and confirmed that the Respondent got injured on the eye while on duty and was treated at the Light House Centre and the Lions Eye Clinic. He further urged the Court to find that the trial Court was right by failing of apportion liability because the appellant did not adduce any evidence to prove negligence on the part of the plaintiff.

6. As regards the quantum of damages, the respondent submitted that the trial court considered the authorities cited by both parties and the injuries suffered as confirmed by the medical report by Dr. S.K. Ndegwa and assessed the quantum at Kshs.110,000. The appellant further submitted that the trial magistrate did not apply wrong principles while assessing general damages. He therefore urged the court to find that the award of general damages assessed by the trial court was not excessive and exorbitantly high in the circumstances. He cited. ***Steven Mureithi Wahome Vs Peter Njoroge Gathuri & Others HCC No. 3579 of 1995***, which is on all fours with this suit.

7. Finally, the respondent submitted that the trial magistrate considered the evidence and submissions presented by the appellant but found no merits and dismissed it in favour of the claimant's case.

Analysis and determination

8. The issues for determination are:

- (a) Whether the appellant has proved the grounds of the appeal.
- (b) Whether orders sought should be granted.

Grounds of Appeal

9. The first ground of the appeal is whether the plaintiff's case had material contradiction which rendered it incapable of proving that any accident occurred on 11.4.2007 while the respondent was on duty. The alleged contradictions in the evidence were allegedly in relation to the eye and the date of the accident. According to appellant the claimant's treatment notes from Light House Centre indicated that he was injured 5 days before 11.4.2007 while the treatment notes from Lions Eye Centre indicated that the claimant had been treated there of Claucoma 3 months before the alleged accident.

10. However, after careful consideration of the typed proceedings and the medical Report, treatment notes and from LD.04/1 I have found no material contradiction on the injury to the Respondent's right eye side due to foreign bodies falling into it. There is also no contradiction on fact that the accident occurred on 11.4.2007. I therefore find that the first ground of appeal, which alleges that there were material contradictions on the claimants evidence to be incorrect and it must fail.

11. As regards the quantum damages, the Court appreciates that an award of general damages is discretionary relief and the appellate Court does not ordinarily interfere with the same unless it is demonstrated that the quantum is manifestly excessive and that it was awarded after considering the wrong principles or matter, or after failing to consider the right principle or matter. In this case the appellant has not demonstrate either of the above reasons. I therefore find that the trial Court considered the correct principles and materials before arriving at the award of Kshs.110,000 general damages. He considered the oral testimony of the plaintiff, his medical report, treatment notes and the judicial precedents cited, before arriving at the said quantum of damages. This second ground of the appeal must therefore also fail.

12. Finally, the third ground of the appeal must also fail because the appellant did not submit on the alleged failure by the trial court to consider the defence evidence and the submissions by her counsel.

Deposition

13. In the upshot, all the grounds of the appeal have failed and the appeal is dismissed with costs.

Signed and dated and at Nairobi this 15th day of March, 2018.

ONESMUS N. MAKAU

JUDGE

Delivered at Mombasa this 26th day of April, 2018.

LINNET NDOLO

JUDGE