



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

APPEAL NO.35 OF 2017

JAMES GICHANA ONDEU AND JOSEPHINE KERUBO

(suing as the legal administrators of the Estate of the late

EZEKIEL KAGWIMI GICHANA (DECEASED) APPELLANT

VERSUS

KENYA SHIELD SECURITY LIMITED RESPONDENT

(An appeal from the judgement and decree of Hon. R. Amwayi Resident Magistrate delivered on 12th February, 2014 in CMCC No.1256 of 2003, Nakuru)

JUDGEMENT

1. On 12th February, 2014 the trial court delivered judgement in which the appellant's case was dismissed. The appellants, James Gichana Ondeu and Josephine and suing on behalf of the estate of the late Ezekiel Kagwimi Gichana in CMCC No.1256 of 2003 Nakuru filed this appeal before High Court, Nakuru HCCC No.30 of 2014.

2. The appellants aggrieved filed the Memorandum of Appeal seeking for judgement against the respondent as per the plaint and costs of the appeal and those at the trial court.

3. The grounds of appeal are that;

- 1) The learned trial magistrate erred in law and in fact by failing to consider and apply the totality of the appellant's evidence*
- 2) The learned trial magistrate erred in law and in fact by finding that the appellant had not proved his case on a balance of probability contrary to the evidence adduced before the court*
- 3) The learned trial magistrate erred in law and in fact by failing to find that in the premises the respondent was negligent of its duties towards the deceased herein hence is liable for the loss occasioned by the death of the deceased.*
- 4) The learned trial magistrate erred in law and in fact by failing to apportion any liability on the respondent.*
- 5) The learned trial magistrate erred in law and in fact by failing to find that failure by the respondent to provide the deceased herein with any or better protective devices wholly or partially contributed to the death of the deceased.*
- 6) The learned trial magistrate erred in law and in fact by failing to note the glaring contradictions in the respondent's evidence that ultimately left the appellant's case uncontroverted.*

4. From the record, the High Court, Nakuru mentioned the appeal on 30th March, 2016 but was not admitted as the records of appeal had not been availed. On 2nd March, 2017 the matter was before the High Court and directions issued that this is a matter arising from employment and thus transferred the same to this court.

5. The appeal was admitted by the court on 20th June, 2017 and hearing directions taken and parties agreed to address the same by way of written submissions.

6. The appellant has addressed all the grounds of appeal. Such grounds can be collapsed into three (3) and questions whether the trial court

erred in failing to apply the totality of the appellants evidence and made a finding the case had not been proved on a balance of probability; whether the trial court erred by finding the respondent was not negligent of its duties to the deceased and hence not liable for loss occasioned by death of the deceased; whether the trial court erred in failing to apportion any liability on the respondent or make a finding that by failing to provide the deceased with better protective devices wholly or partially contributed to the death of the deceased; and costs

7. The duty of a first appellate court is established in various decisions and well captured in **Selle versus Associated Motor Boat Co. Ltd (1968) EA 123** and the finding that the duty is to re-evaluate the evidence tendered before the trial court and come to own independent conclusion taking into account the fact that at appeal there is no advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled articulate as follows;

This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (see Abdul Hammad Sarif v Ali Mohammed Solan (1955, 22 EACA 270)).

8. Also, this court's role is to re-evaluate, re-examine and reassess the extract on record and then determine the appeal on whether the conclusions reached by the trial court are to stand or not and give reasons either way. The cases of **Abok James Odera Versus John Patrick Machira CA 161 of 1999**; and **KPA Versus Kuston (K) Ltd [2009] 2 EA** are also relevant. In the latter case the Court of Appeal held that;

On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in the respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties I the evidence.

9. On the first issue, the appellants urged the court that the trial court failed to consider the totality of the evidence submitted during trial and that the deceased, an employee of the respondent had not been provided with safety apparel including a helmet to prevent the risk of injury to the head and that the respondent's witness had testified that they did not provide the deceased with a helmet and that liability ought to have been apportioned.

10. The respondent' testimony was that the appellants failed to discharge the requisite burden of proving negligence on a balance of probability. That the appellant was the father of the deceased and was only informed the father had died on 31st October, 2000 after a robbery and attack while at work at Nakuru Golf Club.

11. Before the trial court was a Plaint setting out that the appellants being the legal representatives of the deceased Ezekiel Kagwana Gichana who was the employee of the respondent company as a security guard was not provided with all the necessary working tools and apparel or care so as not to be at any risk or danger and on 31st October, 2000 he was killed while at his place of work at Nakuru Golf Club due to negligence and breach of contract by the respondent. the defence by the respondent was that there was no negligence or breach of contract as the deceased Ezekiel Kagwima had been provided with the necessary protective apparatus such as helmet and rungu while providing security services at the premises and where he was murdered by unknown persons whom the respondent could not anticipate the attack and hence cannot be blamed.

12. In evidence, the appellants called James Gichana Andrew, father to the deceased, Ezekiel Kagwana and who is one of the deceased's legal representatives. He testified that;

.....he died on 31/10/2000. I have the death certificate which is wish to produce. ... on this date I was at Kisii... on 31/10/2000 he was on duty at Golf Club an Nakuru under supervision of Kenya Shield. When they were attacked by armed robbers. ... I received information from the company that my son had been killed at night while on duty ...

13. In defence, the respondent called Obed Zacharia Simiyu, Security Officer with the respondent company and who testified that;

.....I know one Ezekiel Gicheha he was one of our employees. On the night of 31/10/2002 he was assigned duties at Golf Club. They were three security guards. On that night he was killed. The company supplied us with a uniform, rungu, touch a whistle and kanga which he used the one worn by police officers. We were not being given helmet as it is heavy so you cannot hear properly if you have a helmet. While at the show ground at 2.00am I heard some noise from people as the show ground is not far from the golf club. ...

14. The other witness for the respondent was Martin Ekahunyiti, operations manager and who testified that;

.....on that date [31/10/2000] the client at Kenya Golf Club had ordered to three night guards. We had given our guards uniform, helmet (Cap), whistle, and rungu. We don't give our guards helmet. We give people of backup. The helmet is heavy and cannot be put on at night as it blocks the ears so you cannot hear properly if you have the helmets are not given to security guards who operate at night. On the night of 31/10/00 we had three security guards and we had a phone call that one security guard had been killed on duty. I personally went to the scene at 6.30am ... we did not establish the cause of the killing. ... the company had provided the security guards with all it could for them to protect themselves.

15. The appellants had submitted a Certificate of Death stating that the cause of death of the deceased was due to haemorrhage head injury.

16. On this evidence, the trial court made an analysis and held that the appellants had failed to establish a case of negligence on the part of the respondent and that the alleged injury and death of the deceased, was not sufficient to hold someone liable.

17. From the record and evidence of both parties, employment of the deceased Ezekiel Kangwana Gichana by the respondent is not denied. It is also not in contest that he was a security guard and on the night of 31st October, 2000 he was attacked while on duty at Nakuru Golf Club and where he died. According to the appellants, the death occurred due to non-provision of the necessary tools at work and which should have included a helmet and thus the deceased was placed at risk and danger by the employer. The respondent on their part deny that such tools were not provided and in any case had such a helmet been provided it would have impeded the deceased in the performance of his duties by blocking his ear and the same was heavy to the head. Respondents witness Mr Obed Zacharia Simuyu and Martin Ekahunyiti confirmed that the deceased was not provided with such a tool, a helmet.

This evidence contradicted the statement of defence, paragraph 2 the respondent averred that;

...the defendant states that they took the reasonable precaution for the safety of the said EZEKIEL KAGWIMA by providing him with the necessary protective apparatus such as a helmet and rungus and providing several guards to guard the premises.

18. In reply to the defence, the appellants made a rejoinder and at paragraph 3 of the Reply to Defence avers that;

.....in further answer to paragraph 2 of the defence the plaintiffs denies that the deceased was provided with protective devices such as helmet and rungus and that they were many guards and strict proof is invited.

19. On this evidence and averments the trial court was thus invited to make a finding. On the claims that the deceased as a security guard was to be provided with tolls in the performance of his work and which the respondent as the employer failed to do and thus exposed him to risk and injury of death, the evidence of both parties in this regard became material. The defence that there was provision of helmet became a material of proof by the respondent. by its own witnesses, the respondent confirmed that such a work tool and helmet was not provided to the deceased, Ezekiel Kangwana.

20. The burden shifted on the respondent as the employer of the deceased to prove that the employee had not been placed at risk and thus the injury. That there was no negligence as alleged and resulted in injury and death. Further, there was no evidence tending to prove that the deceased could have been injured at any other place or premises other than while at the respondent's duty station as allocated at Nakuru Golf Club.

21. In the court humble view, the appellants did prove on a balance of probabilities that there was injured while at work and at the respondent's work station as assigned to the deceased. There is no justification placed before this court to warrant a finding to the contrary. On the contrary, the respondent's own evidence was supportive of this fact. Such should have been applied to the advantage of the appellants case and not to the its detriment.

22. The second issue then would be who was to blame for the material accident and resultant injury sustained by the deceased. As set out above with regard to first issue, with employment of the deceased confirmed and the circumstances leading to injury and death thus set out, the same having occurred through failure by the respondent as the employer to provide the necessary work tools and a helmet, this largely contributed to the cause of death as set out in the Certificate of death, haemorrhage and injury to the head. Where a helmet had been provided, such injury and leading to death would have been minimised.

23. In this case, therefore, the appellant's evidence that there was injury to the deceased because he worked without any protective helmet and was thus placed at risk of injury was not rebutted, and or challenged in any way. In **Halsbury's Laws of England 4th Edition paragraph 662 page 476**, it is stated that;

The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal convention must be established.

24. The rationale is aptly captured in the case of **Boniface Muthama Kavita Versus Carton Manufactures Ltd [2015] eKLR** on the findings that;

The relationship between the appellant and the respondent as employer and employee creates a duty of care. The employer is required to take all reasonable precautions for the safety of the employee, to provide an appropriate and safe system of work which does not expose the employee to an unreasonable risk. ...

In the instant case, the Appellant in his plaint pleaded that the Respondent breached his statutory duty of not providing the Appellant with safe and proper working system. DW1 during cross examination confirmed that their employer did not provide them with safety gears like gloves. The witness also stated that there were many other people who have been hurt at the factory.

The Respondent knowing very well the nature of work done by the Plaintiff ought to have provided the Respondent with safety gears and in this case gloves. I find that the Appellant did not take any reasonable step to provide protective clothing and instruct the employees on safety methods of work. The breach of duty on the part of the Respondent is the cause of injury in this case. The Respondent is liable 100% for damage. The learned magistrate therefore erred in apportioning liability at the ratio of 80:20 when there was no evidence supporting. [emphasis added].

25. The respondent thus placed did not demonstrate that the tools and apparel provided to the employee, the deceased Ezekiel Kangwana was sufficient to remove him from the risk leading to his injury and death. Where a helmet was required as part of the issued tool, where such had been provided, which not the case here was, and where the deceased failed to use or wear the same, such would have been negligent on his

part. In this case, such a tool was not issued. As confirmed by the respondent's witness Mr Martin Ekahunyiti, the night guards were not issued with a helmet as this would put them at risk. Unfortunately, such rationale is lost here as the non-issuance of such a tool led to the fatal injury to the deceased, Ezekiel Kangwana.

26. In arriving at this finding, consideration is given to The Court of Appeal in the case of **Embu Public Road Services Limited Versus Riimi [1968] EA 22** and the findings that;

where the circumstances of the accident give rise to the inference then the defendants, in order to escape liability, has to show that there was a probable cause of the accident which does not connote negligence or that the explanation for the accident was consistent only with an absence of negligence.

27. And in the case of **Mumias Sugar Company Ltd Versus Charles Namatiti CA 151/87** the Court of Appeal held that:

An employer is required by law to provide safe working conditions of work in the factory and if an accident occurs while the employee is handling machinery the employer is responsible and will be required to compensate the injured employee.

28. In the instant case, the Appellant in his plaint pleaded that the Respondent breached his statutory duty of not providing the deceased with safe and proper working tools. The Respondent knowing very well the nature of work done by the deceased ought to have provided the safety gears and in this case a helmet. The breach of duty on the part of the Respondent is the cause of injury in this case. The Respondent is liable 100% for damage. The learned magistrate therefore erred in dismissing the appellants' case in its totality on the basis that there was no evidence supporting the same.

29. On the issues of damages, the court in **Boniface Muthama Kavita versus Carton Manufacturers Limited [2015] eKLR** held that;

On the issue of damages, it is trite law that an appellate Court can only interfere with an award of damages where the award was either based on wrong principle or is so inordinately high or low as to be a wholly erroneous estimate.

30. Based on the material before the trial court, an assessment had the claims been successful had been allocated at Kshs.470,000.00 and on the findings that the deceased was earning a wage of Kshs.3,000.00 a month and that loss of dependency had not been proved and a multiplier of 30 was made. The trial court also held that the deceased being aged 25 years at the time would have worked for 30 years. This was assessed at kshs.360, 000.00

31. For pain and suffering, the award of Kshs.100, 000.00 is found reasonable and appropriate.

32. For the award of Kshs.10, 000.00 the basis is not set out and this is removed.

In the final analysis I find the assessment reasonable and confirm an award of damages at kshs.460, 000.00 being loss of dependency, pain and suffering. Special damages not challenged at 10,000.00.

The end result is that this appeal succeeds to the extent set out above. Costs of the appeal are also to the Appellant.

Orders accordingly.

Delivered in open court at Nakuru this 17th day of September, 2018.

M. MBARU

JUDGE

In the presence of:

Court Assistants.....

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