



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT NAKURU
APPEAL NO.14 OF 2017

(Formerly High Court Civil Appeal No.88 of 2011, Nakuru)

NINI LIMITED.....APPELLANT

VERSUS

MANYARA NJUGUNA.....RESPONDENT

(Judgement herein follows an appeal from the judgement and decree of

Senior Resident Magistrate, Naivasha in SPMCC No.622 of 2010

delivered on 17th May, 2011)

JUDGEMENT

1. On 17th May, 2011 the Senior Resident Magistrate Hon. T.C. Wamae delivered judgement in SPMCC No.369 of 2010 and from which the appellant filed this appeal and seeking for orders that the said judgement on liability and quantum be reviewed and or set aside with costs.

2. The grounds of appeal are that;

- a) *The Learned trial Magistrate erred in law and fact by holding that the plaintiff had proved his case on a balance of probability.*
- b) *The Learned trial Magistrate erred in law and fact by holding that the alleged accident indeed occurred at the respondent's premises while the evidence showed otherwise.*
- c) *The Learned trial Magistrate erred in law and misdirected herself in holding that the Appellant was to blame at all for the accident when the evidence shows that accident occur outside the Appellant's premises.*
- d) *The Learned trial Magistrate erred in law and fact by holding that the alleged accident indeed occur at the Appellant's premises while evidence, both oral and documentary clearly showed that the respondent sustained the injuries while playing football outside the Appellant premises.*
- e) *The Learned trial Magistrate erred in law and fact in failing to grasp and put into consideration the Appellant's documents produced as exhibits and thus arrived at an erroneous finding on liability.*
- f) *The Learned trial Magistrate erred in law and fact in failing to consider the Appellant's witnesses evidence which showed that the respondent was not on duty at the time of the alleged accident.*
- g) *The Learned trial Magistrate erred in law and fact in failing to consider the Appellant's submissions tended and thus arrived at erroneous finding on liability.*
- h) *The Learned trial Magistrate erred in law and fact by awarding general damages that are so manifestly excessive as to be erroneous visa a vies the injuries allegedly sustained by the plaintiff.*

i) The Learned trial Magistrate erred in law and fact by not properly considering the Medical Reports on record and hence arrived at a wrong assessment of damages that are so manifestly excessive as to be erroneous.

2. From the record the appeal was filed at the High Court Nakuru as Civil Appeal No.88 of 2011 and wherein no action was taken, the Record of Appeal was only filed on 3rd December 2014. On 18th December, 2015 when the matter came before the High Court Judge for directions, an order of transfer to this court was issued. On 6th December, 2016 parties agreed to address the appeal by way of written submissions.

3. The appellant addressed two (2) main grounds of the appeal and on which basis the court will examine. These relates to whether the respondent was injured in the course of his employment and the burden of proof and whether general damages awarded by the trial court were excessive.

4. As a first appellate court, the court has the duty to re-evaluate the evidence, assess it and reach its own conclusions and noting that it had neither seen nor heard the witnesses and hence making due allowance for that as held in the case of **Kamau versus Muigai [2006] 1 KLR**. Similar findings on the need to re-evaluate the evidence and sees it was also affirmed in the case of **Selle & another versus Associated Motor Boat Co. Ltd.& others (1968) EA 123**;

... this court must 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 this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has 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 ...

5. The appellant's first ground of submissions is that the respondent was not injured in the course of employment as the day of his alleged accident and injury he was not at work based on the work registered and master roll. No accident was reported to the respondent on the material day. There was no evidence called by the respondent to confirm there was an accident or injury.

6. The appellant's case is also that the respondent pleaded that he had suffered a fracture of the right elbow joint but the medical Report of Dr Omuyoma, the respondent is said to have suffered fracture supracondylar of the right elbow joint with permanent incapacity of 20%. The damages awarded were thus not commensurate to the injury suffered. The trial court by awarding Kshs.350, 000.00 was excessive.

7. The appellant relied on the following cases – **David Cullen versus Medical Superintendent Kitale District Hospital & Another [2014] eKLR**; **Simon Taveta versus Mercy Mutitu Njeru [2014] eKLR**; **Fast Choice Co. Ltd & another versus Hellen Nungari Ngure [2011] eKLR**.

8. The respondent's case is that the respondent was treated following accident and injury and the doctor issued a medical report. The respondent was spraying chemicals under the supervision of Philip Menjo and while crossing a wooden bridge, it gave way and he fell where he was injured and sustained a fracture of the right elbow. The respondent was taken to hospital in a vehicle of the appellant and where he was treated in the company of Lucy, the appellant's nurse. There existed a duty of care on the employer not to expose the respondent to danger and injury while at work. The trial court thus correctly found the appellant liable to pay damages. The award made was reasonable and correctly assessed.

9. Before the lower court, the respondent testified that on 2nd May, 2007 while on duty spraying chemicals in the flower farm, he went to the store to collect chemicals and while carrying a 10kg and 5kg of chemicals on the right and left hands respectively, the wooden bridge he was crossing gave way. He fell and fractured his right elbow. He was taken to the hospital by the respondent nurse where he remained for a week.

10. Upon cross-examination, the respondent testified that while at work he was under the supervision of Philip Menjo and when he got injured the respondent issued its motor vehicle to take him to the hospital. Lucy, the nurse accompanied the respondent.

11. The respondent also called a Medical doctor to testify in support of his case. Dr Omuyoma testified that on 2nd May, 2007 he treated the respondent following a fractured tot eh right elbow joint.

12. The respondent also called Mr Ephantus Macharia the accountant at Longonot hospital where he was treated and who testified that the hospital was running an account with the Appellant to treat its employees on credit since 2007. The respondent was thus treated at the facility on 2nd may, 2007.

13. The appellant on their part called its human resource officer Mr Japheth Wanyonyi who testified before the trail court that he did not have a record of the respondent's injury as he was not on duty and had been playing football when he got injured. Following an investigations, these facts were established. Upon cross-examination, the witness confirmed that there was no investigation report but the claimant was an employee of the respondent.

14. The appellant also called Ms Lucy Njeri Silisi, a community nurse at the clinic and kept all accident register and records on dispensation of medicines. On the register, on 2nd May, 2007 there was no accident reported. That on 12th May, 2007 the respondent submitted a medical report setting out that he had been injured while playing football on 2nd may, 2007 and was treated at Longonot Hospital. She denied ever accompanying the respondent to Longonot Hospital.

15. The fact of the respondent's injury to the right elbow is not in dispute. In addressing the evidence before the trail court, the following assessment was done that;

...a perusal of the defence shows that the fact that plaintiff was injured while playing football is not pleaded.

On the other hand neither of the particulars of negligence attributed to plaintiff by the defendant were proved. Parties are bound by their pleadings and defendant's attempt to depart from the pleadings by stating that plaintiff was injured while playing football must therefore fail. Defendant's witnesses admitted that plaintiff was working in parking/grading department and they tendered muster rolls to show that he was on duty on the date he was allegedly injured. ...

16. In the defence filed by the Appellant on 17th August, 2010 before the trial court at paragraph 5 there is denial of negligence as claimed by the respondent and at paragraph 6 the Appellant's avers that where there was an accident, the same was as a result of the respondent's negligence for failing to take precautions for his own safety while at work, exposing himself to risk, failing to follow safety procedures at work, working in a hurried and haphazard manner, permitting himself to be injured and failing to wear protective gear.

17. Indeed as set out by the trial court, the averments that the claimant was injured while playing football is not pleaded and is thus far-fetched noting the defence on record.

18. 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 connection must be established.

19. 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. ...

20. 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.

21. In this regard, the respondent has not demonstrated a probable cause of the accident by the respondent to challenge the facts as set out. The averments that the respondent was injured while at work and that such arose out of the negligence of the Appellant becomes material which I find has not been challenged in any material way. In **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.

22. In this case, the findings of the trial court can therefore not be faulted. To do so would be to avoid the findings that the Appellant failed to discharge its duty of care to its employee and respondent while at work. The assessment of quantum and damages awarded are thus fair and reasonable. The trial magistrate did not act on any wrong principle of the law based on facts before the court. The award of Kshs.350, 000.00 is justified.

For these reasons, I find no merit in this appeal and hereby dismiss it in its entirety. Costs awarded to the respondent.

Delivered in open court at Nakuru this 2nd day of October, 2018.

M. MBARU JUDGE

In the presence of: