REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORETELRC APPEAL NO. 260 OF 2018

(Before D.K.N Marete)

JOHN MBURU T/A B.P HIGHWAY PETROL STATION.....1ST APPELLANT

AMOS OMONDI….....2ND APPELLANT

VERSUS

WILSON JEREM OGOLLA.....RESPONDENT

(Being an appeal from the judgment and decree delivered by the Honourable Senior Resident Magistrate, Mrs. Grace Mmasi in ELDORET CMCC NO. 1227 OF 2001)

JUDGEMENT

This matter was originated by a Memorandum of Appeal dated 12th February, 2010. at HCC appeal No. 23 of 2010. It comes out as follows;

1. The Learned Magistrate erred in law and fact in awarding damages that were excessive.

2. The Larned Magistrate erred in fact and in law in finding to consider the Appellants submissions

3. The Learned Magistrate erred in law and in fact in finding the Appellant 100% liable for the accident

.4. The Honourable Magistrate erred in law and in fact in finding that the Respondent had proved his case on a balance of probabilities.

5. The Learned Magistrate erred in fact and in law in failing to find that the Respondent had not proved what was pleaded.

She prays as follows: -

(a) The judgement of the lower court in ELDORET CMCC NO. 1227 OF 2001 be set aside and be replaced with an order dismissing the Respondent suit.

(b) In the alternative the award of general damages be reassessed downwards.

(c) Any other relief this court may deem fit to grant.

The respondent in his written submission dated 17th June, 2015 denies the appeal and deems it not meritorious and prays that the same be dismissed with costs.

The appellant in his written submission dated 27th October,2015 submits that on cross-examination during trial at the lower court, the respondent confirmed that he was indeed employed by the 1st appellant's wife and not the 1st appellant. The 1st appellant's wife paid him. In re-examination, the respondent testified that he was an employee of both the 1st appellant and the 1st appellant's wife, though the wife paid him. It is therefore not clear as to who employed the respondent.

The appellant further submission is an answer to the question as to whether the respondent was injured while on duty. This also raises a twin issue as to whether this therefore is a causative of the negligence of the 1st appellant? This is as follows: -

The respondent did not state in his examination-in0chief what he had been employed for. He stated in re-examination that he has been a mechanic since 1995, he further stated that he used to repair vehicles and that he was not a pump attendant.

Further,

> ... *this evidence by the Respondent is highly contradicted and sharply contrasted by the contents of the Respondent's/ Plaintiff Exh 4 which was the LD 104. In the LD 104 it is clearly shown that the Respondent was employed as a pump attendant and not as a mechanic*

As was the case of the respondent, he was injured in a compressor room. The question this begs is what is the work of a pumper operator in a compressor room, poses the appellant?

The appellants further submit that for the respondent to succeed in his claim, he needs to prove, *inter alia*, that he was injured while engaged on duties he was assigned or expected to perform in the course of his employment with the 1st appellant. This is not done as its clear that the respondent was employed as a pump attendant and not a mechanic. He would not be expected to replace compressor belts.

The appellant's further submission is that the respondent was acting outside the scope of his employment as he has no authority to operate as a compressor and the appellant cannot be held liable for injuries sustained on such circumstances. The learned magistrate's finding of a 100% liability for the accident is erroneous in the circumstances of the case.

The Respondent in his written submission dated 17th June, 2015 opens his submissions by a reflection of his case.

This is as follows;

> ... *the respondent herein commenced civil suit no ELD CMCC NO. 1227 OF 2001 against the defendants (appellants) seeking damages for injuries sustained by the plaintiff (Respondent) on or about 15th March 2000 when the plaintiff was legally carrying out his duties at the defendant's employment*
>
> *It was the plaintiffs (respondents) cased that he had been employed by the defendant as a mechanic and that on the material day he had reported on duty as usual and had been given the days assignment to repair one of the compressor machines. That he ensured to switch off all the electric switches before commencing on his duty. That while in the process of doing his work one of the defendants, other employees AMOS OMONDI switched on the electricity without warning the plaintiff and it nipped off the plaintiff's right-hand fingers. That he was subsequently rushed to the Moi Teaching and Referral Hospital where he was treated.*

Again,

> *The plaintiff reiterated that he got injured while on the defendant's employment and that the injuries sustained were caused due to the defendant's negligence and breach statutory duty which the plaintiff proceeded to enumerate in his evidence. That the duties were assigned to him by the defendant's employees and that they witnessed the injuries sustained.*
>
> *The plaintiff proceeded to produce as evidence treatment notes and medical reports as well as documents from the labour office as proof of his employment.*

It was the respondent's case and submission that he was injured on duty and further for the injury(ies) were actioned by the negligence of the appellant. During the trial at the lower court, his (plaintiff's) evidence during the trial remains unchallenged and the defendant (appellant) did not call any witnesses to controvert his case. The appellants can therefore only mitigate on the issue of quantum but not liability. The findings of the learned magistrate is therefore correct, acceptable and sustainable.

I have had occasions to scrutinize the respective cases of the parties and their evidence on trial at the lower court. I would not agree more with the respondent. He established a case of injury as at his work place as a consequence of the negligence of the appellant. The appellant did not furnish the requisite protective gear to protect the respondent in the course of the performance of his work. The argument and submission by the appellant that the injuries were inflicted to the respondent outside his scope of duty are an exercise of splitting hairs and cannot pass for a feasible defence. His case must therefore fail.

The issue of quantum has become irrelevant due to effluxion of time. This matter was originated in 2001. Judgment in the lower court was delivered on 14th January, 2010. It is now nine (9)years down the line of the judgements. It is nineteen (19) years since the inception of this cause. Any issue(s) of quantum, if at all, has been overridden by the forces of time and inflation. An adverse consideration of the same would only amount to injustice. I leave it at that.

I am therefore inclined to dismiss the appeal with orders that each party bears there costs of the appeal. The appellants however shall bear the costs at the lower court.

Delivered, dated and signed in open court this 20th day of December 2018

D.K. Njagi Marete

JUDGE

Appearances

1. Miss Kiplagat instructed by Kalya & Company Advocates for the appellants

2. Miss Awinja holding brief for for Chesoo instructed by Ledisha J.K. Kitony Advocates for the respondents.