



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

ELRC APPEAL NO. 7 OF 2016

(Before D. K. N. Marete)

JAMES FINLAY (K) LTD.....APPELLANT

VERSUS

JOSEPH OMBATI NYAANGA.....RESPONDENT

JUDGMENT

This is an appeal dated 14th June, 2011. It is set out as follows;

- 1. The learned trial Magistrate erred by arriving at a finding on liability, which was not supported by evidence.*
- 2. That learned trial Magistrate erred in law and fact in basing his finding on irrelevant matters.*
- 3. The Respondent's case was not proved on balance of probability as is required by law.*
- 4. The trial Magistrate should have found that there was no basis on which the Appellant could be blamed.*
- 5. The learned trial Magistrate's award of damages was inordinately too high and manifestly excessive for the injuries allegedly suffered by the Plaintiff.*
- 6. The learned trial Magistrate erred on all points of fact and law in as far as the award of damages is concerned.*

The Appellant pray for relief and judgement as follows;

- 1. That the decision of the Resident Magistrate on quantum in Kericho PMCC No.656 of 2003bet PMCC No.208 of 2009 be set aside and a proper finding be made by this Honourable Court.*
- 2. That this Honourable Court do make such further orders as may be just and expedient.*
- 3. This appeal be allowed with costs.*

The appellant in her written submissions dated 9th September, 2013 reiterates his appeal. She submits that this is an appeal against quantum and liability as awarded by the trial court. The award was as

follows;

(i) Special damages	Kshs.3,000.00/=
(ii) General damages	Kshs.100,500/=
(iii) Less 10% contribution	Kshs.20,00/=
Net award	<u>Kshs.83,000/=</u>
(iv) Plus costs and interest	

The appellant wishes to rely on her grounds of appeal in disputing liability and adds that the issue for determination is whether the respondent was in total control of the implement that inflated the injury as he performed his duties of cutting grass.

It is also her submission that no eye witness was called to testify in favour of the respondent's case or collaborate the same. Again, the respondent would not succeed on a claim for negligence as he did not itemize the particulars of such negligence during the hearing.

She seeks to rely on the authority of **Wilson Nyanyu Musigisi – vs-Ssini Tea And Coffee Ltd, Kericho HCCA No. 150 OF 2003** and **Mumias Sugar Co Ltd –vs- Samson Munyinda, Kakamega HCCA No. 58 of 2000** as follows;

In the first authority above the learned judge observed that;

- a) *The appellant was cutting grass using a slasher and not operation a Machine.*
- b) *The work involved swinging of a slasher.*
- c) *That he controlled the slasher entirely.*
- d) *That he injured himself*

Again,

From the above 2nd mentioned authority, the Judge observed in a nutshell that when a person is in total control of the implement he cannot blame anyone if he did the work badly and injured himself. The above authorities serve to illustrate the similarities of the slasher he was using hence it was upon him to take necessary precaution to ensure that he does not cause harm to himself. He should therefore carry his own cross.

On the issue of quantum, she sought to rely on the authority of **SOKORO SAW MILLS LTD-VS-GRACE NDUTA NDUNGU [2006] eKLR**

The Judge stated that to interfere with award by the trial Magistrate the Judge must be satisfied that either the Trial Magistrate in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high, that it must be a wholly erroneous estimate of damages. He went on to reduce the award from kshs.80,000/= to Kshs. 30,000/= for soft tissue injuries to the right hip joint and back.

Again, in the authority of **PETER KAHUNGU & ANOTHER –vs- SARAH NORAH ONGARO [2004]eKLR** as relied on, it was held as follows;

For soft tissue injuries suffered, the Judge reduced the trial Magistrate's award of Kshs.150,000/= to Kshs.80,000/=

The respondent in her written submissions dated 21st September, 2015 discounts the appeal entirely. She seeks to rely on the authority of **WINFIELD & JOLOWICZ ON TORT (London 2000) at page 270 – 271,**

“ That the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances and to maintain them in a proper condition, so as to carry on his operations as not to subject those employed by him to unnecessary risk”

She also relied on the authority of **DAKAWOU TRANSPORTERS – VS PAUL NZOMO KINGOO NBI CIVIL APPEAL No.92 of 2003** where the court while quoting **WINFIELDS AND JOLOWISZ ON TORT 14TH EDITION at page 203** stated;

“If a worker is injured just because no one has taken the trouble to provide him with an obviously necessary safety device, it is sufficient and generally satisfactory to say the employer has not fulfilled his duty.”

Further, in the authority of **AFRICAN HIGHLANDS PRODUCE COMPANY LTD-VS-COLLINS MOSETI ONTWEKA KERICHO HCCA No.38 of 2012 at page 11** the court held as follows;

“.....the failure of an employer to provide protective gear to an employee, especially when he is working in a dangerous environment means that in the event such an employee is injured, then such an employer shall be guilty of breach of a statutory duty liability in such an event is strict so is in this case”.

On quantum, the respondent submitted that the medical report adduced in evidence showed that he sustained a deep cut wound on the right ankle which left a very ugly scar upon healing. This therefore justifies the award on quantum.

As a court of first appeal, this court is mandated to reconsider and re-evaluate the evidence of the witnesses before the trial magistrate so as to arrive at an independent decision as to whether to uphold the decision of the trial magistrate

In arriving at the decision and award of quantum and liability, the trial court took into consideration the evidence of the parties. The appellant had ample opportunity to controvert the case of negligence by the appellant but did not go far in so doing. I agree with the evidence of the respondent vis-à-vis that of the appellant and find that the trial court came out well in its analysis and conclusion.

I am, however, observant that the award of Kshs.100,000.00 as general damages for the injury sustained may not have been sustainable in the circumstances. This is on the higher side and therefore excessive and inordinate. I choose to interfere and reduce the amount of award in general damages to Kshs.60,000.00 but retain the award in special damages.

I am therefore inclined to partially allow the appeal specifically on the issue of quantum as provided above. This being the case I further order that each party bears their own costs of the appeal.

The orders of court on relief therefore are as follows;

(i) Special damages	Kshs.3,000.00/=
(ii) General damages	Kshs.60,000/=
(iii) Less 10% contribution	Kshs.20,000/=
Net award	<u>Kshs.43,000/=</u>

(iv) That each party bears their own cost of appeal.

Delivered, dated and signed this 26th day of April 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Miss. Ngeno holding brief for Mitei instructed by Sila Munyao & Company Advocates for the Respondent.
2. Soita holding brief for Kibichiy instructed by Kibichiy & Company Advocates for the Appellant.