



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

APPEAL NO. 5 OF 2016

(Before D. K. N. Marete)

AFRICAN HIGHLANDS PRODUCE CO. LTD.....APPELLANT

VERSUS

PHILIPO ONDIEKI.....RESPONDENT

JUDGMENT

This is an appeal dated 14th June, 2011 and is grounded as follows;

- 1. The learned trial Magistrate erred by arriving at a finding on liability, which was not supported by evidence.*
- 2. The learned trial Magistrate erred in law and fact in basing her finding on irrelevant matters.*
- 3. The learned trial Magistrate erred in law and fact in failing to hold that the Respondent's case was not proved on balance of probability as is required by law.*
- 4. The learned trial Magistrate erred in law and in fact in failing to dismiss the Respondent's case.*
- 5. The learned trial Magistrate erred on all points of fact and law in as far as both liability and award of damages is concerned.*

She prays as follows;

- 1. That the decision of the Resident Magistrate on liability in Kericho PMCC No. 411 of 2003 be set aside and a proper finding be made by this Honourable Court dismissing the said case with costs.*
- 2. That this Honourable Court do make such further orders as may be just and expedient.*
- 3. This appeal be allowed with costs.*

The respondent in his written submissions dated 7th May, 2016 opposes the appeal and prays that it be dismissed with costs.

The appellant submits that this is an appeal against the entire finding on liability and submits as follows;

The brief facts herein are that the Plaintiff claimed that he got injured on 22nd April 2001 at Cheptabei estate as he was pruning tea. He alleged that while pruning tea, a knife cut him on the left leg and that the knife was defective and had a loose handle.

22nd day of April 2001, Your Ladyship was on Sunday. DW1 testified (page 36 of Record of Appeal) and informed the court that workers don't work on Sunday and that no master roll is made on Sunday, he produced a master roll DWEX 1 (page 18 of the Record of Appeal) which showed blank entry on Sunday. The master roll further indicates that the Plaintiff was at work on 21st and 23rd of April 2001.

Your Ladyship, on the upshot of the above it is very clear that the plaintiff was not working on 22nd April 2001 and he was not injured at work place. In his testimony during cross examination (page 28 of the Record of Appeal) the Plaintiff confirms that they do not work on Sunday. He further confirms that his name is Philip not Philipo as indicated in the Plaintiff and all other documents filed in court.

It is therefore clear that the plaintiff did not prove his case to required standards. Your Ladyship this brings out the principle in both statute and common law that a party to succeed in a claim based on negligence, the particulars of negligence not only need to be itemized but also proved during hearing of the matter.

The respondent forments and submits a case of liability on the part of the appellant in that she did not provide the respondents with protective apparels and non defective tools to facilitate his work. This caused the injury sustained.

Makal Maihu Mumande Versus Nyali Gold and Country Clum CA No. 16 of 1989, where Nyarangi, J. (as he then was) observed thus;

'Just because an employee accepts to do a job which happens to be inherently dangerous is in my judgement no warrant or excuse for the employer to neglect to carry out his side of the bargain and ensure the existence of minimum reasonable measures of protection'.

The respondent further supports the award of damages and justifies this on his sustenance of a deep cut wound on his left leg near the knee. He relied on the authority of **Ben Ouma Odinga vs. J.K Kamunge & Another HCC No.1073 of 1990 Nairobi**.

In the cited case above an award of Kshs.60,000/= was issued to the plaintiff taking into account factors of inflation, the Respondent submitted for Ksh.100,000/= and the trial Magistrates exercised his discretion and actually awarded Kshs.80,000/=. This award was further reduced to Kshs.57,400/= in line with the ratio of liability. It is our humble submissions that this Honourable Court should therefore not disturb the award given by the Trail Magistrate.

Your Lordship we submit that the general damages awarded are not erroneous given the injuries sustained by the Respondent. The Trial Court exercised its discretion in assessing damages and it was governed by the prevailing principles of assessing the same.

In the case of **Tridex Construction vs. Charles Wekesa Kasembeli (2005) eKLR** where Dulu, Ag. J. observed thus;

That the award of general damages is a discretion of the trial court and that an appellate court should be slow to interfere with that exercise of discretion unless on justifiable legal reasons. It is our submission that the Trail Magistrate exercised this discretion reasonably.

*Justice Dulu further stated that the Court of Appeal reiterated the principles to be observed by appellate courts for disturbing the quantum of damages as enunciated in the case of **Kemfrom***

Africa limited t/a Meru Express Service Gathogo Kanini Vs. A.M Lubia And Olive Lunia (1982 – 88) 1 KAR 727, that;

‘The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of East Africa to be that it must be satisfied that either the judge, in assessing damages, took into relevant account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.’

A look at the record of court reveals a lop sided case of liability for the appellant. This is because there is a clear dispute as to whether the injury complained of was sustained at work. It is the respondent’s evidence that the injuries complained of were had on 22nd April, 2001 which date was a Sunday. The appellant evidence was that no work is done on sundays and therefore there is no possibility that the respondent sustain his injuries at work. The appellant adduced evidence of master roll DWEX1 indicating that the plaintiff was at work on 21st and 23rd April, 2001 and not 22nd.

From the foregoing, the respondent’s case falls into a limbo and suffers a severe blow of authentication and proof. This would be constructed as a case not proven on a balance of probabilities as is required of civil law.

It is no wonder that the appellant complaints of this case not being proven on a balance of probabilities and therefore no justification for any award of damages by the lower court. I agree.

I am therefore inclined to allow the appeal with orders that each party bears their own costs of the appeal.

Delivered, dated and signed this 17th day of October 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Ms. Kipyego instructed by Kibichiy & Company Advocates for the Appellant.
2. Mr. Obosso holding brief for Gekonga instructed by Gekonga & Company Advocates for the Respondent.