



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

APPEAL NO. 435 OF 2016

(Originally Nakuru High Court Civil Appeal No. 214 of 2012)

JOSEPH KANGETHE GITAU

APPELLANT

v

JASAN NG'ANG'A MWANGI

RESPONDENT

(Being an appeal from the judgment of the Chief Magistrate Court at Nakuru (Hon. J. Njoroge) delivered on 26/11/2012 in Chief Magistrate Civil Suit No. 1370 of 2009)

JUDGMENT

1. The Respondent sued the Appellant before the Chief Magistrate's Court alleging breach of contract/statutory duty and/or negligence. The Respondent sought both general and special damages.
2. In a judgment delivered on 26 November 2012, the trial Court found the Appellant liable in negligence and awarded the Respondent general damages of Kshs 400,000/- and special damages of Kshs 19,900/-.
3. The Appellant being aggrieved preferred the instant Appeal before the High Court contending
 1. THAT the learned Chief Magistrate erred in law and fact when he failed to find that the Respondent was not an employee of the Appellant.
 2. THAT the learned Chief Magistrate erred in law and fact when he found that the Respondent was injured in the course of his employment as the Appellant's employee.
 3. THAT the learned Chief Magistrate erred in law and fact when he held that the Appellant owed a duty of care to the Respondent.
 4. THAT the learned Chief Magistrate erred in law and fact when he found the Appellant liable to the Respondent in negligence yet the latter had not stated the particulars of the Appellant's negligence.
 5. THAT the learned Chief Magistrate erred in law and fact when he found that the Appellant had breached his statutory obligations yet the Respondent had not identified any statute that was breached by the Appellant.
 6. THAT the learned Chief Magistrate erred in law and fact when he held that the Appellant could have foreseen the injuries sustained by the Respondent.

7. THAT the learned Chief Magistrate erred in law and fact when he held that the Respondent was entitled to special damages yet the same were not proved by the latter.

8. THAT the learned Chief Magistrate erred in law and fact when he held that the Respondent was entitled to General Damages in the sum of Kshs 400,000/= or at all.

4. On 21 July 2016, the High Court ordered that the Appeal be determined on the basis of the record and written submissions to be filed and in this regard the Appellant filed his submissions on 26 September 2016 while the Respondent filed his submissions on 29 September 2016.

5. On 2 October 2017, the parties appeared before this Court and requested for a date to highlight the submissions.

6. The submissions were highlighted on 16 October 2017.

7. The Court has considered the record and the submissions.

Role of this Court on first Appeal

8. The role of the Court on first appeal was outlined in the case of *Kamau v Mungai* (2006) 1 KLR 150 where it was held that this being a first appeal, it was the duty of the Court.... To re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard the witnesses and hence making due allowance for that.

9. The Court has re-evaluated and assessed the evidence tendered before the trial Court.

Whether Respondent was an employee of the Appellant

10. The law at the material time when the cause of action was presented, as well as now, recognise various types of employment contracts. Some of the forms of employment contracts recognised then were oral as well as fixed term contracts.

11. In reaching the conclusion that the Respondent had proved that he was an employee of the Appellant, the trial Court considered the testimony of the Respondent that the Appellant's driver was one Njoroge and that the supervisor one Maina switched the harvester leading to the accident.

12. The Court also considered the Respondent's testimony that Appellant sent a Wainaina to take him to hospital.

13. And in making the finding on the question of employment relationship, the trial Court noted the failure by the Appellant to either confirm or deny that he had employees as mentioned by the Respondent.

14. In the view of the Court, there was sufficient evidence to link the Appellant and Respondent as being in an employment relationship.

15. Because there was no written contract, the Court is of the view that the inconsistencies as to the exact designation or occupation of the Respondent were minor and inconsequential as to whether there was an employment relationship.

Injury and liability

16. Grounds 2 to 6 of the Appeal relate to whether the Respondent sustained injuries in course of work and whether the Appellant was liable in negligence.

17. The Respondent set out the particulars of negligence in paragraph 6 of the Plaintiff but albeit under the moniker *particulars of breach of statutory obligations*.

18. The Respondent testified as to how the accident occurred and gave names of those who were present as a supervisor called Maina and a driver called Njoroge.

19. He also testified that the Appellant sent a driver called Wainaina to take him to hospital.

20. The trial Court took these in consideration in reaching the conclusion that the Respondent got injured in the farm and further noted that the Appellant never spoke as to the existence of these other employees nor explained the failure to call the to testify.

21. On the question of liability, with the finding that the Respondent was an employee of the Appellant and that he got injured in the course of work and that a fellow employee switched on the combine harvester without notice or a care, liability was legally ascribed to the Appellant (the common law long ago recognised principle of vicarious liability).

Special damages

22. The Respondent was awarded special damages of Kshs 19,900/-. The Respondent's first witness a doctor produced a receipt for Kshs 5,000/- as exhibit 4A while the Respondent produced treatment receipts totalling Kshs 17,400/- as exhibit 5.

23. The contention by the Appellant that special damages were not proved is not tenable. In fact the trial Court awarded less special damages than was proved.

General damages

24. The Respondent sustained a fracture of the right ulna and radius with temporary disability of 14 months and permanent disability assessed at 10%.

25. In awarding general damages, the trial Court considered the case of *Samuel Gikuru Ndungu v Coast Bus Ltd*, Civil Appeal No. 177 of 1999 where the Appellant had sustained a fracture of the right ulna and radius, a cut ear lobe and bruised back.

26. In the case, an award of Kshs 300,000/- was granted in 2000.

27. Similarly the trial Court considered *Mushambi Onde Gona v Associated Vehicle Assemblers Ltd & Ar*, Mombasa High Court Civil Case No. 9 of 1991 where an award of Kshs 380,000/- was given for fracture of the radius and ulna of the left arm in 1993.

28. Considering that the authorities relied on by the trial Court were over 10 years old, it cannot be that the award of general damages was excessive or erroneous in law or fact.

29. Before concluding, the Court notes that there is no record of the order transferring the Appeal to this Court from the High Court. The file was also registered as an ordinary Cause and not Appeal.

Conclusion and Orders

30. In conclusion and based on the foregoing, the Court finds no merit on the Appeal and dismisses it with costs to the Respondent.

31. The Kshs 279,934/- which was deposited into Court as security on 26 November 2014 should be paid out to the Respondent as part of the decretal sum.

Delivered, dated and signed in Nakuru on this 7th day of December 2017.

Radido Stephen

Judge

Appearances

For Appellant	Ms. Chepngetich instructed by Kariuki Muigua & Co. Advocates
For Respondent	Ms. Rop instructed by Ikua Mwangi & Co. Advocates
Court Assistants	Nixon/Martin