



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
APPEAL NO. 38 OF 2017
(ORIGINALLY NAKURU HIGH COURT CIVIL APPEAL NO. 118 OF 2015)

MEA LIMITED

APPELLANT

V

HENRY OKWAKO SINJIRA RESPONDENT

(Being an appeal from the Judgment/Decree of Hon. NYAKUNDI, Principal Magistrate, Nakuru, delivered on 16th September, 2015 in Nakuru CMCC No. 889 of 2013)

JUDGMENT

1. Henry Okwako Sinjira (Respondent) instituted legal proceedings against Mea Limited (Appellant) before the Magistrate's Court alleging breach of contract/negligence.
2. In a judgment delivered on 16 September 2015, the trial Court found the Appellant 100% liable in negligence and awarded the Respondent Kshs 300,000/- general damages and Kshs 2,500/- as special damages.
3. The Appellant being aggrieved filed an Appeal listing 3 Grounds of Appeal, to wit:
 1. **THAT** the trial magistrate erred in law and in fact in failing to constructively appreciate the Appellant's Doctor's 2nd medical examination report produced in evidence as Defence exhibit 1 and/or considered the Respondent's Doctor's medical examination report in isolation of the same.
 2. **THAT** the trial magistrate erred in fact in arriving at a determination to the effect that the Respondent had sustained a fractured spine.
 3. **THAT** the trial magistrate erred in law and fact by proceeding to award excessive damages for non-existent injuries contrary to the facts adduced.
4. On 11 May 2017, the High Court gave directions as to the filing of submissions, and in this regard the Appellant filed its submissions on 22 May 2017 while the Respondent filed his submissions on 24 May 2017.
5. When the parties appeared before the High Court on 13 July 2017 to get a judgment date, the High Court directed that the appeal be transferred to this Court because the foundation of the case was anchored on an employer and employee relationship.

6. The parties highlighted their submissions before this Court on 16 October 2017, and the Court has considered all the material placed before it.

Role of the Court on first appeal

7. The role of Court on first appeal was set out in the authority of *Kamau v Mungai* (2006) 1 KLR 150 thus 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.

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

Whether the Appellant's second medical report was considered/appreciated and whether Respondent sustained a fracture of the spine

9. The Appellant did not call any witness before the trial Court though the parties agreed by consent that a medical report by the Appellant's doctor (Dr. Malik) be produced.

10. The said report was categorical that the Respondent had not sustained a *fracture of the spinal cord* because the clinical notes from the first facility visited did not indicate whether there was any clinical examination, the x-rays taken on date of injury did not show any fractures of the spine and that there can be no fracture of the spinal cord as it is a mass of nerves.

11. According to the report, fractures only occur in bones and what likely happened was temporary sprain of the back as the Respondent was treated and discharged the same day.

12. The Respondent's doctor had however on his part categorized the Respondent as having sustained a *fracture of the spinal cord*.

13. When challenged during testimony, the Respondent's doctor stated that he based his report on treatment records from the Provincial General Hospital including an x-ray.

14. The Court has looked at the report from the Provincial General Hospital and it is clear that the x-ray turned a null verdict on connective and other soft tissues. Therefore there was no basis for the Respondent's doctor to make a finding of *fracture of the spine*.

15. The medical reports produced before the trial Court can only lead to the conclusion reached by the Appellant's doctor that the Respondent most likely sustained a sprain of the back and not *fracture of the spine*.

16. Yet, the trial Court found that the Respondent had sustained a *fracture of the spine*.

17. In my view, that conclusion by the trial Court showed a lack of appreciation of the medical evidence tendered in Court and thus leading to an error of fact and law.

Whether the award was excessive

18. Having come to the conclusion that the Respondent did not sustain a fracture of the spine and in all likelihood having sprained his back, the award of general damages for a *fracture of the spine* cannot stand.

19. The Appellant submitted that in light of the injuries sustained by the Respondent, an award of Kshs 150,000/- would have been appropriate and the decisions in *Patrick Mwiti M'imanene & Ar v Kevin Mugambi Nkunja* (2013) eKLR and *Caroline M. Kabae & Ar v Nancy Muthoni Njooora & Ar* (2010) eKLR were cited.

20. The Respondent cited Machakos High Court Civil Case No. 169 of 2000, *Ann Muriithi v Headmistress MKS Girls* to urge this Court not to disturb the award of general damages.

21. Having considered the authorities placed before Court, the Court has come to the conclusion that the award of general damages was excessive in light of the injuries sustained by the Respondent, and the same ought to be set aside.

22. An award of Kshs 150,000/- would have been appropriate.

Conclusion and Orders

23. In light of the foregoing, the Court sets aside the judgment/decree of the trial Court, and in substitution thereof assesses the general damages as Kshs 150,000/-.

24. Parties to bear own costs of the Appeal.

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

Radido Stephen

Judge

Appearances

For Appellant Mr. Situma instructed by Mukite Musangi & Co. Advocates

For Respondent Mr. Ogeto instructed by Ogeto & Ogeto, Advocates

Court Assistants Nixon/Martin