



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT MOMBASA
APPEAL NUMBER 20 OF 2015

BETWEEN

WONDERNUT [K] LIMITED.....
APPELLANT

VERSUS

CALEB ODHIAMBO OLAGO.....
RESPONDENT

[An Appeal from the Judgment of Mrs. J. Gandani, Learned Principal Magistrate delivered on the 16th September 2010 in Kilifi Senior Resident Magistrate’s Court Civil Suit Number 144 of 2006]

BETWEEN

CALEB ODHIAMBO OLAGOPLAINTIFF

VERSUS

WONDERNUT [K] LIMITED DEFENDANT

Rika J

Court Assistant: Benjamin Kombe

E.W. Njeru Advocates for the Appellant

J.A.Abuodha & Company Advocates for the Respondent

JUDGMENT

1. The Respondent/ Employee filed a Claim against the Appellant/ Employer in the Senior Resident Magistrate’s Court Kilifi, through a Complaint dated 1st March 2006 and subsequently amended on 9th October 2006. He claimed he was employed by the Respondent. On or about 2nd February 2005, he was instructed by the Appellant to sharpen cashew nut blades, using a sharpening machine. The machine

cracked, throwing a piece of stone particle in the Respondent's left eye. He suffered traumatic left eye conjunctivitis. He claimed damages from the Appellant, and the Trial Court, granted him Kshs. 70,000 as General Damages and Kshs. 2000 in special damages.

2. The Appellant lodged an Appeal at the High Court in Mombasa, being Appeal Number 69 of 2012. This was transferred by the High Court to the Employment and Labour Relations Court on the basis of jurisdiction, and given the above registration number. The Appellant in brief, states that the Trial Court erred in:-

- a. Finding the Respondent to have proved his case.
- b. Finding the Respondent was not provided with work goggles.
- c. Finding the Doctor who testified for the Respondent to have been a competent medic.
- d. Finding the Respondent was not to blame.
- e. Awarding large amount in damages.

3. Parties agreed to have the Appeal considered and disposed of by way of written submissions. The Appellant filed its Submissions on the 4th November 2015. The Court has not been able to trace any submissions filed by the Respondent, although the Respondent was placed at liberty to file such submissions within 14 days, at the last mention in Court on the 4th November 2015.

4. The Appellant submits that the Amended Complaint was filed out of time, and ought to have been struck out with costs by the Trial Court. The Medical Report contradicted the Complaint. The Respondent told the Trial Court he was sharpening blades using a grader when something chipped, and hit his left eye. He stated the grinding stone bit broke. The Medical Report stated the Respondent was injured by the grinder machine when grinding cashew nuts. '*A nut jumped into his eye causing him injury,*' [sic] the Report stated. The Doctor who prepared this Report was exposed as a fraudster and charged with a Criminal Offence in the Magistrate's Court Mombasa, after the hearing and before Judgment subject matter of the Appeal. The Trial Court stated in its Judgment that the Respondent had not shown the Doctor was a fraud, nor objected to the production of his Report.

5. The Respondent failed to prove negligence on the part of the Appellant. He was provided with goggles, but failed to wear them. He was 100% liable for his accident and injury. At paragraph 14 of its submissions, the Appellant states that the award of Kshs. 100,000 as General Damages was excessive. Lastly the Appellant submits the Trial Court did not consider submissions and judicial authorities filed by the Appellant.

The Court Finds:-

6. The Court as pointed out above did not have the advantage of reading any submissions filed by the Respondent, noting in particular that Parties agreed the Appeal be disposed of through written submissions.

7. The assertion by the Appellant, that the so-called Doctor Frank Obwanda was a charlatan, was first made in the Appellant's submissions at the Trial Court. It was brought to the attention of the Trial Court, in the submissions filed on the 31st May 2010 that Obwanda had been charged at the Mombasa Chief Magistrate's Court for impersonation. This was a serious submission, coming from an Officer of the Court, which ought to have been given greater consideration, by the Trial Court. The Trial Court should have perhaps stayed the writing of the Judgment, and directed Parties to provide further evidence on Obwanda's bona fides. Going ahead to write a Judgment based on questionable medical evidence, while it was open to the Court to seek further evidence, appears to have been an error. The facts surrounding Obwanda were not in the hands of the Appellant at the time of the trial. Those facts became available after the trial, but before the Judgment. The case rested on the veracity of the medical evidence, and the Trial Court had the opportunity to reopen proceedings, and call further evidence on the subject. If there was a Criminal Case against Obwanda filed at the Magistrate's Court at Mombasa, there was no reason why the Parties could not be allowed the chance to bring the record of such criminal proceedings to Kilifi. The failure to call further evidence resulted in flipping over a very serious allegation of crime, and placed

questions on the integrity of the process and the outcome.

8. The General Damages were awarded at Kshs. 70,000 not Kshs. 100,000 as submitted by the Appellant. If the injury suffered had the support of a proper medical report, the amount granted appears comparatively fair. There nonetheless were contradictions as pointed out by the Appellant, in the Respondent's evidence on the accident. There was material contradiction between the Respondent's account, and that given by his 'Doctor.' There was merit likewise in the Appellant's submission on the late filing of the Amended Plaint. The Respondent took 2 years after being granted leave by consent, to file his Amended Plaint These are sufficient grounds to allow the Appeal.

IT IS ORDERED:-

[a] The Appeal is allowed.

[b] Parties to meet their costs of the Trial and the Appeal.

Dated and delivered at Mombasa this 4th day of March, 2016

James Rika

Judge