



REPUBLIC OF KENYA
 IN THE EMPLOYMENT AND LABOUR RELATIONS
 COURT AT MOMBASA
 APPEAL NUMBER 15 OF 2015

[Originally Mombasa High Court Civil Appeal Number 105 of 2011]

BETWEEN

UNIVERSAL CARRIERS LIMITED.....
 APPELLANT

AND

- 1. ALFRED KIMUYU MUTISO
- 2. KENYA CONTAINER TERMINALS LIMITED RESPONDENT

[Appeal from the Judgment of the Learned Chief Magistrate’s Court at Mombasa, Hon. Chief Magistrate Mrs. R. Mutoka, given in Mombasa Chief Magistrate’s Court Civil Case Number 4408 of 2004, on 25th day of May 2011]

BETWEEN

ALFRED KIMUYU MUTISO.....
 PLAINTIFF

VERSUS

- 1. KENYA CONTAINER TERMINALS LIMITED
- 2. UNIVERSAL CARRIERS LIMITEDDEFENDANTS

Rika J

Court Assistant: Benjamin Kombe

Mr. C.B. Gor Advocate instructed by C.B. Gor & Gor Advocates for the Appellant

Ms. Kedeki Advocate instructed by V.W. Maina Advocates for the 1st Respondent

JUDGMENT

1. The 1st Respondent was employed by the Appellant as a Loader. He was working at the 2nd Respondent's premises loading empty containers, under the instructions of the Appellant, on or about the 10th December 1996, when he was injured by the 2nd Respondent's Forklift, which was being driven by the 2nd Respondent's Driver.

2. The 1st Respondent filed the Civil Case Number 4408 of 2004 in the Chief Magistrate's Court at Mombasa, seeking General Damages, Loss of Earnings, and Special Damages against the Appellant and the 2nd Respondent. He was granted General Damages of Kshs. 1,200,000, Loss of Earnings at Kshs. 31,500, and Special Damages of Kshs. 12,558, all added up at Kshs. 1,244,058, payable 100% by the Appellant. The 2nd Respondent was found not to be liable.

3. The Appellant challenges the above decision on the following principal grounds:-

- a. The Learned Chief Magistrate erred in law and fact in holding the Appellant 100% liable.
- b. She erred in law by dismissing the 1st Respondent's Case against the 2nd Respondent's, the 1st Respondent having been granted leave to file the Case against the 2nd Respondent out of time.
- c. She erred by failing to hold the 1st Respondent was wholly or substantially to blame for the accident leading to his injuries.
- d. She erred in assessing general damages at Kshs. 1,200,000, and did not adequately evaluate medical evidence.

4. The Appeal was transferred by the High Court, Mombasa to the Employment and Labour Relations Court, Mombasa, on the 14th May 2015. Parties were heard before the latter Court, on the 7th March 2016.

Appellant's Submissions

5. The Appellant adopts its Memorandum of Appeal, and Submissions filed in the Trial Court. The evidence given by the 1st Respondent and 2nd Respondent shows the Appellant was in no way to blame for the accident. The 1st Respondent authored his own misfortune. He jumped off the Forklift which was driven by the Driver of the 2nd Respondent. He ought to have been held largely liable. The injury suffered would not have been prevented by supply of safety boots to the 1st Respondent by the Appellant. The Appellant made this submission before the Trial Court. On quantum the Appellant submits it concurred with the position of the 2nd Respondent at the Trial Court, that General Damages should have been assessed at Kshs. 450,000, not Kshs. 1,200,000.

1st Respondent's Submissions

6. The 1st Respondent submits the Appeal has no merit, and the Trial Court properly evaluated the evidence of the Respondents' Witnesses. The 1st Respondent blamed the Appellant for not providing him with safety boots. He blamed his Employer for not supervising him while loading. He was wearing sandals when the accident occurred. He had worked for 3 years. He testified he suffered multiple fractures, skin loss and soft tissue injuries. He suffered 25% total disablement. He did not fully heal. He prayed for Kshs. 2,000,000 in General Damages. The award of Kshs. 1,200,000 was fair.

2nd Respondent's Submissions

7. The 2nd Respondent submits that the Case against the 2nd Respondent was dismissed on the lone ground that negligence was not attributable to the 2nd Respondent. The 2nd Respondent submits this was erroneous. The Trial Court had the obligation to consider if the *ex parte* leave to bring the Case against the 2nd Respondent was granted to the 1st Respondent validly. Relying on the ***Court of Appeal at Nyeri in Civil Appeal Number 253 of 2011 between Tana and Athi River Development Authority v. Joseph Mbindyo & 3 Others [2013] e-KLR***, the 2nd Respondent urges the Court to find that the Trial Court, should have considered whether the *ex parte* order granting extension of time was valid or not. The Case against the 2nd Respondent should therefore have been dismissed on the ground of time limit. The 2nd Respondent finally submits the Trial Court could not be faulted on the assessment of General Damages. The Appellant did not call evidence to rebut what was said by the 1st Respondent and his Witnesses.

The Court Finds:-

8. There was sufficient evidence to find the Employer, the Appellant herein, liable for the accident which led to the injury of its Employee, the 1st Respondent herein. The Appellant did not call any evidence at all. It did not counter the evidence adduced by the 1st Respondent and his Witnesses.

9. It was the wrong argument by the Appellant, to say that supplying the 1st Respondent with safety boots would not have prevented the accident and injury to the 1st Respondent. The 1st Respondent, in addition to not having safety boots, worked unsupervised. In ***Employment and Labour Relations Court Appeal Number 1 of 2015 between Rashid Ali Faki v. A.O. Said Transporters Limited [2016] e-KLR***; ***High Court of Kenya Case between Mghosi v. Grayatri Engineering Works Limited [1981] KLR, 163***; and ***High Court of Kenya att Nakuru Civil Case Number 38 of 1995 between Sokoro Saw Mills Limited v. Bernard Muthimbi***, the Courts held:-

- Employers have a statutory and common law duty to supply their Employees safe working environment.
- Employers have a duty to train their Employees on systems of work, and offer effective supervision to Employees in discharge by Employees of their given roles.
- In Cases where Employees allege Employers were negligent leading to Employees sustaining injuries, it is the duty of the Employers to rebut claims of negligence.

10. The Appellant did not adduce any evidence to show it fulfilled any of these duties imposed on it by the law. The Trial Court did not err in holding the Appellant liable.

11. There was no evidence that would have justified the apportionment of liability to either of the Respondents.

12. The 1st Respondent was injured in an accident which took place on 10th December 1996. He was late in filing the Case for damages, and obtained leave to file the Case, in High Court Originating Summons Number 349 of 2000.

13. Such *ex parte* leave, this Court agrees, is not necessarily final. It does not oust the Defendant's right to raise the defence of time bar during the trial. The Defendant is not present at the time the *ex parte* orders for extension of time issues. There are facts leading to grant of *ex parte* leave. The defendant may wish to challenge those facts during the trial. The Claimant may wish to explain by way of further and preferably oral evidence during trial, the circumstances surrounding delay in coming to Court. *Ex parte* orders extending time may also be challenged through application for review in the *ex parte* proceedings, but such a route would have the effect of delaying the hearing of the main Claim, and serve no useful purpose. Parties are not foreclosed from contesting grant of the *ex parte* order in the trial, and indeed the trial offers the best platform for determining the merit of the order for extending time. It offers Parties and the Court the opportunity to know the real circumstances surrounding delay. The Court is able to

determine the validity of the extension with the full benefit of oral evidence.

14. This has been the reasoning in a number of Judicial Authorities cited by the 2nd Respondent, most of which are binding on the Employment and Labour Relations Court, and on other Courts below. In the ***Tana and Athi River Development Authority Court of Appeal decision*** cited above, the Court held the Trial Court should have considered whether *ex parte order* issued validly. The record shows the 1st Respondent was aware of all the material facts during the limitation period. He stated in the Originating Summons the delay in filing the Case was due to a mistake on the part of his Advocate.

15. It was not made clear to this Court however, why the 2nd Respondent did not counter-appeal on this ground. The 2nd Respondent submits the Court should find the 1st Respondent's Case against the 2nd Respondent should have been dismissed on the basis of limitation of time. There is no Appeal against the Judgment of the Trial Court, lodged by the 2nd Respondent. Secondly, the order extending time was issued by the High Court, while the Trial took place before the Chief Magistrate. The Trial Magistrate rejected the evidence questioning the order for extension, stating she could not question the discretion of the High Court. Where *ex parte* leave is granted by a Superior Court, it would be impossible for the Lower Court to revisit the subject without appearing to question the discretion of the Superior Court. There was no ground therefore for the Trial Court to go into details of the *ex parte* leave, such leave having been granted by a Court of superior jurisdiction. Revisit of *ex parte* orders for extension of time during trial, would seem to the Court to be workable in cases where the Courts involved are Courts of cognate jurisdiction. The Chief Magistrate does not enquire into the validity of orders, be they *ex parte* orders, granted by a Judge.

16. The quantum of General Damages at Kshs. 1,200,000 was fair, regular, and commensurate with the injuries the 1st Respondent is shown, through uncontested medical evidence, to have suffered. Past cases, with Plaintiffs who suffered similar injuries, were availed to the Trial Court by the 1st Respondent. He pursued Kshs. 2,000,000 in General Damages, but was granted Kshs. 1,200,000. The Court sees no reason to interfere with the Learned Trial Court's findings on liability and quantum of damages. IT IS ORDERED:-

- a. ***The Appeal is dismissed.***
- b. ***No order on the costs of the Appeal.***
- c. ***Costs in the Lower Court shall be paid as ordered by that Court.***

Dated and delivered at Mombasa this 22nd day of June 2016

James Rika

Judge