



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

APPEAL NO. 6 OF 2015

RAPID KATE SERVICES LTD.....CLAIMANT

VS

HILLARY INGWE M.....RESPONDENT

JUDGMENT

(Being an appeal against the judgment dated 2.7.2010 in

MOMBASA RMCC NO. 4851 of 2004 Mombasa by

Senior Resident Magistrate the Hon. M.K. Mwangi)

Introduction

1. This is an appeal by the defendant in the primary suit against the judgment of the trial Magistrate dated 2.7.2010. It is founded on 9 grounds:

- a. That the Learned Magistrate erred in law and in fact in making a finding that on the 2nd June 2004 the Respondent was employed by the Appellant and the said Learned Magistrate completely disregarded the evidence of the Appellant's witness that the Respondent was never its employee.
- b. That the Learned Magistrate erred in fact and in law in concluding that the Respondent was injured during and in the course of employment with the Appellant on the material date.
- c. That the Learned Magistrate erred in law and in fact in making a finding that the Respondent's name does not feature at all in the casual list labourers as well as the accident report register document that was produced by the Appellant's witness for the employees at work on the 2nd June 2004.
- d. That the Learned Magistrate erred in law and in fact in ruling that the Appellant's were inconsistent with the Appellant witness evidence when the pleadings and the evidence of the Appellant's witness were clear that the Respondent was never employed by the Appellant and could not have been injured on the 2nd June 2004 in the course of his employment because his name did not appear in the daily casual register and the accident register of the Appellant for that day.

e. That the Learned Magistrate erred in law and in fact in making findings on 30% liability against the Respondent and 70% against the Appellant when the Respondent never proved the particulars of negligence against the Appellant in evidence to warrant such appointment of liability.

f. That the Learned Magistrate erred in law and in fact by choosing to believe the evidence of the Respondent which evidence was so inadequate and fell short of proving his case at the required standards on a balance of probabilities.

g. That the Learned Magistrate erred in law and in fact in not making a finding that due to the fact that the Respondent did not bring any independent witness who was other than himself who witnessed the accident, there had been no corroboration of the Respondent's evidence to show that he actually worked for the Appellant.

h. That the Learned Magistrate erred in law and in fact in relying on the medical report prepared by Dr. S.K. Ndegwa who never treated the Respondent and who could not verify where the Respondent got his injuries from as the doctor who allegedly treated the Respondent was never called to testify in the trial case.

i. That the Learned Magistrate erred in law and in fact in assessing General Damages of kshs.120,000 for the Respondent which is so high not to be a reasonable assessment for the injuries suffered by the Respondent.

2. In the impugned judgment, the trial court awarded in favour to the respondent the sum of kshs.120,000 and apportioned liability at 30:70% in favour of the Respondent. The appellant prays for the impugned judgment to be set aside and or reversed; the suit be dismissed with costs or in the alternative, assessment of damages be reduced; costs of the appeal and the court below.

3. The appeal was first lodged in the High Court on 28.7.2010 but later it was transferred to this court on 19.1.2016 because it involved a Labour dispute. When the appeal came up for directions, the parties agreed to dispose off by way of written submissions.

Appellant's submissions

4. The appellant never argued the grounds systematically. She started with the issue of apportionment of liability in the ration 70:30%. She submitted that the trial court erred in her finding on liability because the evidence by DW1 was clear that the respondent never worked for the applicant on 2.6.2004. That the list of casual employees produced as exhibit did not bear the name of the respondent. That the validity of the list and the fact that Dw1 was the Supervisor of the appellant's workers on the material date was not contested by the respondent.

5. The appellant further respondent did not produce any treatment notes to prove that he was injured on 2.6.2014 and he could not remember the name of the supervisor or gang leader of the appellant on that date. That in his view there was no basis upon which the trial court could apportion liability at 30:70% in favour of the plaintiff because the particulars of negligence were not proved. Consequently, according to him the plaintiff's evidence was not adequate to show that he was injured at his place of work and as such the trial court erred by finding that the respondent had proved his case on a balance of probability.

Respondent's submissions

7. The respondent has also generally responded to appellant's submissions without dealing with the 9 grounds of appeal blow by blow. He submitted that his evidence during trial demonstrated beyond reasonable doubt, and blamed the appellant for: exposing the plaintiff to a risk of injury which they knew or ought to know; failing to have adequate precaution for safety of the plaintiff; instructing the plaintiff to work in a dangerous condition; failing to warn the plaintiff on the dangers entailed in his work; and failing to provide plaintiff with safe working conditions.

7. The respondent further submitted that there was dispute in the fact that the appellants owned the go down where the respondent was injured; that the appellant deals with fertilizer; that on 2.6.2004, the appellant hired casual employees to load fertilizer from the go down to a lorry; and that wooden pallets were used in the place of ladder on 2.6.2004 when the fertilizer was loaded to the lorry. He further submitted that he indeed fell down after slipping from the pallets and suffered fracture of the right 4th metatarsal which was confirmed by Dr. S.K. Ndegwa (Pw2).

8. It is the respondents case that the trial court analyzed the evidence adduced correctly and apportioned liability at 70:30 in his favour and proceeded to award kshs.120,000 as General damages. He maintained that the trial court was right in finding that he was employed by the appellant on 2.6.2004 and that he had proved his case on a balance of probability. He relied on the case of **Peter M. Kariuki vs Attorney General [2014] e KLR** where the Court of Appeal held that it is trite law that the appellate court would not disturb the findings of a trial court on the issue of the amount of damages merely because it thinks that had it tried the case it would have given a higher amount of damages. The Court of Appeal went on to state that in order to justify reversing of the amount of damages granted by the trial court, the appellate court must be convinced that the trial court acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, entirely erroneous estimate of damage to which the plaintiff is entitled.

Analysis and Determination

9. After considering the record of appeal and the submissions by the 2 parties, the following issues arise for determination:

- (a) Whether the trial court erred in Law and fact by apportioning liability at 70:30% in favour of the plaintiff.**
- (b) Whether the award of kshs.120,000 as general damages is extremely high.**
- (c) Which of the reliefs sought should be granted.**

Apportionment of Liability

10. The appellant's case is that the claimant was not her employee on 2.6.2014 that he never went to her go down and as such he never got injured there on that date. The basis of the appellant's contention is that the respondent never featured in her list of casual employees of the day and that during his testimony he could not remember the name of the appellant's supervisor or gang leader.

11. The respondent has however given a detailed testimony of the site he was working and the appellants has never denied the same including a go down from where fertilizer in 50kgs sacks was being loaded onto a lorry using staves made of wooden pallets. He also explained that there was a supervisor employed by the respondent but he could not tell his name because it was his first day to work there. He also produced medical evidence through Pw2 to prove that he was indeed injured as pleaded in his suit.

12. I have perused the impugned judgment and noted that the trial court considered the evidence by both parties and reached a finding that the plaintiff had proved on a balance of probability that he worked for the respondent on the material day. In so doing the court held that:

“Pw1 was categorical of the nature of the work that he did and that he was not in control of the omission of his name onto the list”

13. The foregoing and the fact that Dw1 could not produce the original list of casual employees was a good basis to make a finding in favour of the plaintiff. In any case, the reasons for exclusion of the respondents name from the list were many including the time when it was prepared. If it was prepared after the respondent had been taken to hospital, obviously it was not possible for him to have his name on the list and his signature duly appended. In any case Dw1 confirmed that he could not remember all the

workers present on that day. He never prepared the list of casual workers. It was done by Mr. Were Muyayi who did not testify in the Primary Suit.

14. As regards the apportionments of liability, I have confirmed from the record that the respondent in his testimony did blame the appellant for the accident by providing a shaking and slippery ladder. That had the ladder been strong with no meshes, he would not have fallen and his hand would not have been injured. Dw1 confirmed that the appellant provided a ladder made up of pallets. He never denied that they were shaking and slippery.

15. After re-evaluating the evidence on record, I find no good reason to fault the trial court on his finding on the issue of liability. There is no doubt that the appellant failed to protect the respondent by providing safe working condition. Instead he erected a shaking and slippery ladder made up of pallets. She also failed to warn and supervise the respondent who was new in the dangerous work and as such he exposed him to the risk of falling down and getting injuries. I agree with the trial court that the respondent also ought to have exercised due care to avoid falling down from the shaken and slippery ladder. Consequently I will not disturb the decision of the trial court to apportion liability of 70:30% in favour of the plaintiff. The appellant will therefore continue to bear 70% liability for the said accident.

Quantum of Damages

16. I agree with the submissions of the respondent that the appeal has not met the threshold for an appellate court to disturb the amount of general damages awarded by a trial court. I am bound by the precedent relied upon by the respondent in **Peter M. Kariuki vs the Attorney General [2014] e KLR** where the Court of Appeal cited **Kemfro Africa Ltd vs Lubia & Another (No.2) 1987 KLR 30** where Kneller JA stated as follows:-

“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 court were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages, took into 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 wholly erroneous estimate of damages”.

17. As correctly submitted by the respondent, the appellant has failed to demonstrate that the trial court assessed the quantum of damages awarded after considering an irrelevant factor or after failing to consider a relevant one. In the alternative, she has also failed to demonstrate that the quantum of damages awarded is unordinately high and erroneous in the circumstances. In fact, the appellant never referred the trial court and this court to any relevant precedents. Consequently, I find no basis upon which to disturb and reverse the discretionary award of language by the trial court.

Reliefs

18. In view of the foregoing I decline to grant any of the reliefs sought by the appeal.

Disposition

19. For the reasons stated above, the Appeal is dismissed with costs to the respondent.

Signed, dated and delivered at Mombasa this 11th November, 2016

ONESMUS MAKAU

JUDGE