Nyayo Tea Zones Development Corporations v Minyande (Civil Appeal 9 of 2021) [2025] KEHC 643 (KLR) (29 January 2025) (Judgment)

Neutral citation: [2025] KEHC 643 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CIVIL APPEAL 9 OF 2021

JN KAMAU, J

JANUARY 29, 2025

(FORMERLY KAKAMEGA HCCA NO 100 OF 2017)

BETWEEN

NYAYO TEA ZONES DEVELOPMENT CORPORATIONS ..... APPELLANT

AND

JESCA VIHENDA MINYANDE ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon M.L. Nabibya (SRM) delivered at Vihiga in Principal Magistrate's Court Case No 100 of 2017 on 31st August 2017)

JUDGMENT

Introduction

1. In her decision of 31st August 2017, the Learned Trial Magistrate, Hon M.L. Nabibya, Senior Resident Magistrate, found the Appellant to have been fully liable for the injuries the Respondent sustained in the course of her employment. She entered Judgment in favour of the Respondent herein against the Appellant as follows:-

    General Damages Kshs 200,000/=

    Special damages Kshs 2,000/=

    Kshs 202,000/=

    Plus costs of the suit and interest

2. Being aggrieved by the said decision, on 28th September 2017, the Appellant filed a Memorandum of Appeal dated 15th September 2017 at High Court Kakamega. It relied on twelve (12) grounds of appeal. Musyoka J transferred the file herein to High Court Vihiga on 15th December 2020.

3. The Appellant's Written Submissions were dated 1st August 2022 and filed on 18th March 2024 while those of the Respondent were dated 24th April 2024 and filed on 7th May 2024. The Judgment herein is based on the said Written Submissions which both the Appellant and the Respondent relied upon in their entirety.

Legal Analysis

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court to arrive at its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify.

5. This was aptly stated in the case of Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.

6. Having looked at the Grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the issues that had been placed before it for determination were as follows:-

    a. Whether or not the Learned Trial Magistrate erred in finding the Appellant to have been wholly liable for the injuries that the Respondent herein sustained;

    b. Whether or not the quantum that was awarded was excessive in the circumstances warranting interference by this court.

7. The court deemed it prudent to address the issue under the following distinct heads.

I. Liability

8. Grounds of Appeal Nos (1), (3), (4), (5), (6), (7), (9), (11), and (12) were dealt with under this head as they were all related. Grounds of Appeal Nos (5), (6) and (7) also applied to the issue of quantum. They will therefore be referred to later in the Judgment herein.

9. The Appellant denied that the Respondent was its employee as she did not produce any receipts to show that she was on duty on the material date of the incident. It asserted that the mere fact that she was with her colleague did not mean that she sustained any injuries on the said date.

10. It placed reliance on Section 107 of the *Evidence Act* and several cases amongst them Waguu Munyao vs Mutilu Beatrice & 3 Others [2017] eKLR and Amalgamated Saw Mills vs Joyce Mwihaki Macharia [2011] eKLR where the common thread was that the burden of proof lay with the person who alleged a fact.

11. On her part, the Respondent submitted that it was not disputed that she was not the Appellant's employee but rather the dispute was whether she was on duty on the material date when she sustained the injuries. She pointed out that the Appellant did not adduce in evidence the Accident Report Book to prove that she was not injured on the said date.

12. She contended that she was taken to hospital using the Appellant's Motor Vehicle which proved that she was its employee and that she was on duty on the material date.

13. She contended that the Appellant did not provide a safe working environment or call her Supervisor Mr Kirui to disprove that she was not its employee or was not present during the material time.

14. A perusal of the proceedings showed that on the material date of 31st October 2007, she was working at Nyayo Tea Zone picking tea. She testified that as she went to weigh the tea, she slipped, fell, and broke her leg. Her evidence was that her colleagues came to her rescue whereafter she was taken to Kapsabet District Hospital by the Appellant's Motor Vehicle.

15. Francis Mudoga (hereinafter referred to as "DW 1") was a supervisor at the Appellant's tea plantation. He tendered in evidence the Paysheet and Master Roll for the material date to show that the Respondent's name was missing. He also pointed out that the cash or kilogrammes were not there.

16. When he was cross-examined, he stated that the Paysheet was filled at the end of the day. He admitted that an employee's name could miss "if informed during the day" (sic). He was emphatic that he did not make any mistake. He stated that whenever any employee was injured, he would be informed as the Supervisor. He confirmed that he kept an Accident Report Book but that he had not produced the same as evidence in court.

17. The Trial Court observed that since the said Accident Report Book was not produced, then it could be presumed that it would have shown that the Respondent was injured. It also faulted the Appellant for not having called Mr Kirui, who was the Respondent's supervisor to confirm that the Appellant had provided a safe working environment for her.

18. Notably, the standard of proof in civil cases is proof on a balance of probabilities. Bearing in mind that the Payment Sheet was completed at the end of the day when cash and kilogrammes were indicated and the Appellant did not produce any document to show that the Respondent was not its employee and/or that she did not sustain injuries in the course of her employment, an inference could be made that the Respondent's Paysheet was blank because she did not complete her duties on the material date. The assumption that this court made was that she was not on duty at the end of the day because she had sustained injuries and had been taken for treatment.

19. The Appellant failed to rebut her evidence that she was taken to the hospital using its Motor Vehicle. In fact, DW 1 did not allude to that fact at all in his evidence. No plausible reason was advanced to show why the Appellant would take responsibility for a trespasser who had sustained injuries on its premises.

20. This court found and held that the Appellant was obligated to adduce evidence to rebut and/or controvert the Respondent's assertions that she was its employee and that she sustained injuries in the course of her duty. This could have been done by producing Paysheets and Master Rolls for other months other than October 2007.

21. Indeed, Section 108 of the *Evidence Act* Cap 80 (Laws of Kenya) states as follows:-

> " The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

22. Without belabouring the point, this court came to the firm conclusion that the Trial Court did not err when it found that the Respondent was the Appellant's employee and that having sustained injuries at its premises, it was wholly liable.

23. In the premises foregoing, Grounds of Appeal Nos (1), (3), (4), (5), (6), (7), (9), (11), and (12) relating to apportionment of liability were not merited and the same be and are hereby dismissed.

II. Quantum

24. Grounds of Appeal Nos (2), (5), (6), (7), (8) and (10) were dealt with under this head as they were all related.

25. The Appellant submitted that Bernard Korir Langat (hereinafter referred to as "PW 1") who was a Clinical Officer at Kapsabet District Hospital was stood down because he was not the maker of the Medical Report and he did not therefore produce it together with the receipt for Special damages in the sum of Kshs 2,000/=.

26. It urged this court to reduce the general damages from Kshs 200,000/= to Kshs 40,000/= because the injuries the Respondent pleaded differed from those that were in the outpatient card that PW 1 produced. It relied on the case of Sokono Saw Mills vs Grace Nduta Ndungu [2006] eKLR but did not expound on the damages that were awarded.

27. On the part of the Respondent, it urged the court not to interfere with the award as it was a wholly erroneous estimate of the assessed damages in line with the holdings in the cases of Kemfro Africa Ltd t/a Meru Express Services (1976) & Another vs Lubia & Another [1985] eKLR and Johnson Evans Gicheru vs Andrew Morton & Another [2005] eKLR.

28. It relied on the case of Naomi Momanyi vs G4S Security Services Kenya Limited [2018] eKLR where the court therein awarded general damages in the sum of Kshs 300,000/= where the appellant therein had sustained soft injuries and a fracture of the leg that healed with a deformity. The other cases of Gogni Rajope Construction Limited vs Francis Ojuok Olewe [2015] eKLR and Veronicah Mkanjala Myapara vs Patrick Nyasinga Amenya [2021] eKLR did not have comparable injuries to the ones the Respondent herein sustained.

29. It is well settled in law that an appellate court will not disturb an award of general damages unless the same was so manifestly high or inordinately excessive or manifestly or inordinately low that a trial court had proceeded on the wrong principles or misapprehended the law, a principle that was dealt with in the case of Margaret T. Nyaga vs Victoria Wambua Kioko [2004] eKLR.

30. It must be understood that money can never really compensate a person who has sustained any injuries. No amount of money could remove the pain that a person went through no matter how small an injury appeared to be. It would be difficult to say with certainty that a particular amount of money would be commensurate with the injuries that a person had sustained. It was merely an assessment of what a court would find to be reasonable in the circumstances to assuage a person who had suffered an injury.

31. However, this assessment was not without limits. A court had to ascertain to itself the sum of general damages that courts and especially appellate courts would ordinarily award in respect of a particular injury. A court therefore had to be guided by precedents.

32. Indeed, in the case of Kigaraari vs Aya(1982-88) 1 KAR 768, it was stated that damages had to be within the limits set out by decided cases and also within the limits the Kenyan economy could afford. This was because high awards would lead to higher insurance premiums which would in turn affect the members of the public.

33. This court also had due regard to the case of Lim vs Camden HA [1980] AC 174 where it was held that even in assessing compensatory damages, the law sought to indemnify the victim for the loss suffered and not to punish the tortfeasor for the injury that he had caused.

34. Similar injuries ought to attract comparable awards. However, in the quest for consistency, courts also had to recognise that no case was exactly the same as the other. It must be noted that cases cannot contain exact injuries and they are merely for comparison purposes. Each case therefore had to be decided according to its own peculiar circumstances but keeping in mind that any monies awarded had to be sustainable.

35. Towards this end, an appellate court ought not to interfere with the discretion of a trial court merely because it could have awarded a lower or higher sum than that which was awarded by the trial court. It could only interfere where the award of general damages was so manifestly high or inordinately excessive or manifestly or inordinately low that a trial court had proceeded on the wrong principles or misapprehended as was held in the case of Margaret T. Nyaga vs Victoria Wambua Kioko (Supra).

36. The Respondent sustained a fracture of the right leg. PW 1 testified that the X-ray confirmed a closed fracture of the knee. Taking into account the inflationary trends, it was the view of this court that the sum of Kshs 200,000/= general damages that was awarded was reasonable.

37. In arriving at the said figure, this court relied on the case of Damaris Ombati v Moses Mogoko Levis & another [2019] eKLR where the appellant therein sustained tenderness on the neck, lower back, abdomen, anterior chest wall, cut wound on the pate of scalp, facial bruises, and a fracture of the right patella (knee joint) where the appellate court reduced the award of Kshs 800,000/= as general damages to Kshs 350,000/=.

38. It was evident that PW 1 submitted the receipt for Kshs 2,000/=. The Appellant's assertions that the receipt was not tendered in evidence to support the special damages were not correct. Its further submissions that PW 1 could not adduce the Medical Report and the said receipt were rendered moot because Section 33 (b) of the *Evidence Act* is clear that:-

> " Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—
>
> b. when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him..."

1. In the premises foregoing, Grounds of Appeal Nos (2), (5), (6), (7), (8) and (10) were not merited and the same be and are hereby dismissed.

Disposition

40. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was dated 26th April 2019 and filed on 30th April 2019 was not merited and it is hereby dismissed. The Appellant will bear the Respondent's costs of the Appeal herein.

41. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 29TH DAY OF JANUARY 2025

J. KAMAU

JUDGE