



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL APPEAL NO. 6 OF 2017

P.J. DAVE FLOWERS LTD.....APPELLANT

VERSUS

DAVID SIMIYU WAMALWA.....RESPONDENT

Being an appeal for the judgment and decree of the principal magistrate's court at Kajiado Hon. E.A. Mbicha SRM delivered on 11th April, 2017 in PMCC No. 117 of 2016

JUDGMENT

David Simiyu Wamalwa had sued PJ. Dave Flowers Ltd, (the appellant) in this appeal in the magistrate's court claiming general and special damages costs of the suit and interest thereon arising out of an accident which occurred on or about 25th September, 2013 in the course of his employment with the appellant.

The respondent's claim was based on facts of negligence on the part of the appellant company's agent, servant, employee or management. The appellant contested the claim by filing the defence taking issue on every pleading on the plaint. The particulars of negligence and breach of statutory duty were denied by the appellant in the defence filed.

On account of the evidence rendered by both parties and submissions filed by counsels representing the plaintiff and the defendant, learned trial magistrate made the following finding;

Judgment on liability at 80% ; 20 % in favour of the plaintiff /respondent as against the defendant /appellant general damages for pain and suffering and loss of a amenities at Kshs 150,000 less 20% thereof net award Kshs 120,000/- Special damages Ksh 3000 less 20% net pay Kshs 2400 and also cost of the suit and interest at court rates. Being aggrieved with the judgment of the lower court, the appellant grounds of appeal are directed against both liability as well as the quantum of damages.

Briefly the facts as deduced from the evidence by the respondent David Simiyu Wamalwa reveal that he was an employee with the appellant company some of his duties involved cutting and sorting of flowers. He alleged in his testimony that while carrying the flowers with a bucket he fell down on a fence which was wet due to the presence of water. Thereafter he reported the incident to one Mary Kanini who failed to allow him to visit the company clinic. He finally decided to go Isinya Health center for examination and treatment. At the hearing he produced the treatment notes as exhibits.

The appellant company on its part called two witnesses whose evidence is as follows:

Dw1 Mary Kanini testified as the Senior Supervisor with the appellant company. Her evidence admitted that indeed the respondent was their employee working in the production unit. Dw1 in further evidence denied that the respondent who was on duty between the 25th and 26th September, 2013 was injured at the work place as stated in his testimony.

She took issue with the piece of evidence by the respondent that no one else saw him get injured on the material day. She also referred to the appellant company policy on work injury claims by the employees which are made available to each employee upon signing the contract.

The second witness was Judy Sumbae – the Human Resource and Administrator with the appellant company. DW2 testified that in the month of September, 2013 as confirmed from the accident register defence exhibit 2 no employee was injured within the company premises.

An Appeal

Ms. Kenya – learned counsel for the appellant submitted reiterating the grounds in the memorandum of appeal in her submissions counsel contended that vicarious liability for the acts of negligence and or breach of statutory duty were not established on a balance of probabilities. Learned counsel further submitted that the respondent alleges to have been injured while in the course of duty with other workers but failed

to demonstrate why nobody else saw him get involved in the accident. She argued that the respondent evidence of having reported to the supervisor Mary Kanini (Dw1) was rebutted with cogent evidence. According to learned counsel the flaw lay in the fact that the respondent never visited the company clinic, nor did he report to the supervisor or seen by any of his co-workers in the same premises. Learned counsel urged this court to find that the foundation in pursuit of vicarious liability on the part of the appellant was not proved to warrant apportionment of 80% as stated by the trial learned magistrate thus; Learned counsel submitted and urged this court to re-evaluate and appraise the evidence adduced in the trial and came up with the determination that there was no enough evidence to make the appellant company liable for negligence or breach of statutory duty of care.

In supporting of the appeal learned counsel cited the following decisions; *Grace Kanini Muthini v Kenya Bus Service Ltd & Another, Court of Appeal at Nyeri No. 270 of 2000, James Finley K. Ltd vs Evans Nyati – Civil of Appeal at Kisii No. 223 of 2006, Selle v Associated Motor Boat company Ltd 1986 EA 123, Isabella Moraa v The Kenya Power & Lighting Co. Ltd civil Appeal No. 92 of 2010, Timsales Ltd v Noel Agina Okello – Court of Appeal NO. 183 of 2009.*

I have perused and read the authorities that have been cited and the legal principles will be factored during the final analysis in this appeal.

On her part Ms. Namida for the respondent vehemently opposed the appeal. She submitted that the evidence on liability is very clear from the testimony of the respondent (Dw1). Learned counsel contended that it is not in dispute that the respondent was an employee of the appellant company when the injury occurred. That relationship which gives right to the duty of care has not been controverted argues Counsel Ms. Namida argued and submitted that the fact that the respondent sought medical treatment outside the company clinic does not void his claim.

It was Ms. Namida's contends that the respondent continued working because he was denied permission by the supervisor (Dw1). Ms. Namida submitted that evidence as to employment, at the time and date of the accident was given by the respondent. According to Ms. Namida, the evidence was enough to identify the scene and the scope of the claims on liability.

According to Ms. Namida it is the law duty of care by employers for acts of negligence fall within the facts of this case. She relied on the following authorities in support of liability, and quantum *Abok James Odera and Associates v John Patrick Machira T/A Machira & Co., Advocates 2013 eKLR, Kirugi & Another v Kabiya & 3 Others 1987 KLR 347, Boniface Muthama Kavita v Carton Manufacturers Ltd – Civil of Appeal No 670 of 2003, Butt v Khan [1977] KAR, George Kinyanjui T/A Climax CoacheS & Another v Hussein Mahad Kuyare 2016 eKLR, Jacob Omulo Anyango & 2 Others vs. Jubilee Jumbo Hardware Ltd 2017 eKLR, Joseph Oduor Anode v Kenya Red Cross Society 2012 eKLR.*

In terms of the explicit language in the pleading and evidence Mr. Namida urged that this court to find that the appeal as filed and argued lacks merit to be entertained by this appellate court.

Analysis and determination

The jurisdiction of this court on appeal is premised on the laid down principles in the cases of *selle vs Associated Motor Boat Co. Ltd (supra) Pandya v Republic 1957 EA 335* where I am required to re-evaluate and examine the evidence before the trial court and in so doing reach an independent decision on the matter. The court further stated that due regard should be given to the fact that as an appellate court I have not heard nor can be able to make any findings as to the demeanor of witnesses.

Secondly, this appeal provides the legal principle on exercise of discretion by a superior court over jurisdiction of a subordinate court or inferior tribunal. The classic case of *Mbogo v Shah 1968 EA 93, Sir Clement De Lestang, VP* held as follows;

“I think it is well settled that this court will not interfered with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters which it should not have acted or it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion”

The appellant bears the burden of proof and to satisfy this court that the inferior court in delivering the judgment dated 11th April, 2017 failed to address its mind to the evidence and the law as such arrived at a wrong decision. That being so I propose to deal with two issues in broad spectrum raised in this appeal.

(a) whether the respondent proved liability before the trial court to entitle him to an award of damages.

(b) if the above answer is in the affirmative what measure of damages should the trial magistrate award in the circumstances and the facts of the case.

My starting point is in the legal threshold on liability in cases of this nature. There is a long line authorities on the parameters to be proven on the issue of liability.

In the cases of *Murgan v Launchbury & Others 1972 2 ALL ER 605; PA Okiro & Another T/A Kaburu Okello and Partners v Stella Karimi Kobi, Civil appeal No. 183 of 2003* the court held *inter alia* as follows on vicarious liability;

“Ina assigning vicarious liability, it arises when the tortious act is done in the scope or during the course of his employment”

It has been repeatedly been said by judges of the superior courts that a party who desires any court to give judgment as to any legal rights or

liability has the duty to prove the existence of facts which he asserts that gives rise to that liability or judgment (see **section 107 (1) of the evidence Act cap 80 of the laws of Kenya**).

It is therefore trite law as illustrated by the principles in the cases of *Mount Elgon Hardware v. Millers C.A. No. 19 of 1996 and Mwaure Mwalo v Akamba Public Road Services Ltd HCC No 5 of 1989* that the burden of proving a claim anchored on torts of negligence or breach of statutory duty of care rests on the claimant throughout the trial on absence of probabilities. The position is thus the trial court had the plaintiff alleging various acts torts of negligence on the part of the appellant company. In reference to those pleadings the order of the claim has to adduce evidence in support of facts in issue which are not admitted.

The English Court in a case of *Rose v Plenty & Another 1976 1 ALL ER 97* held as follows:

“but basically, as I understand it, the employer is made vicariously liable for the tort of his employees not because the plaintiff is an invitee, nor because of the authority possessed by the servant, but because it is a case in which the employer, having put matters into motion should be liable if the motion that he has originated lead to damages to another”

Closer home Sir Charles Newbold stated in the case of *Muwonge v Attorney General of Uganda 1967 EA 17* on employer liability:

The legal position is quite clear and has been quite clear for some considerable time.

A Master is liable for the acts of his servant committed within the course of his employment. The master remains so liable whether the acts of the servant are negligent or demonstrate or wanton or criminal. The test is where the acts done in the course of his employment.

In the instant appeal the bone of contention has nothing to do with employment contract between the appellant company and the respondent. What is disputed from the very onset are acts of negligence for an accident which never took place in the first place. The respondent was employed as a flower cutter with the appellant company. It is not disputed that on 25th September, 2013 he reported on duty and went about his assignment within the employer’s premises. While executing his duties as per his evidence he fell on a wet ground injuring his back. The complaints were addressed at Isinya Medical Centre as supported with the treatment notes dated 26th September, 2013.

The appellant disputed all that evidence through the testimony of Senior Supervisor Dw 1 Mary Kanini and the Human Resource Manager, Judy Sumbai. The gist of the two appellant’s witnesses together with documentary evidence tendered an accident register and the master roll covering all employees who reported on duty between 25th -26th September 2013.

The respondent has not denied that on 25th September, 2013 while engaged in the task of Flower cutting and carrying them in the bucket there were other employees within the appellants company premises. The work he was engaged did not take place at night but other similar activities were on going with other employees. He was however not able to register the occurrence of this accident with the appellant company supervisory nor seek permission to visit the company clinic on the material day.

On the 26th September, 2013 he appears to have been seen at Isinya Health Centre. The treatment notes do not indicate the time when these hospital visitation was done by the respondent. On part of the appellant company, a master roll of employees who were present on duty on both days of the 25th – 26th September, 2013 was produced in evidence. The respondent was one of the employees on duty.

In our view the contention by the respondent on the accident which allegedly took place on 25th September, 2013 is untenable in lieu of the rebuttal evidence by the applicant company witnesses. With respect to the learned trial magistrate nowhere in the judgment does he address the issue of credibility and demeanor of the respondent and the appellant witnesses. Again if indeed the learned trial magistrate believed the testimony of the respondent as against the rejoinder by the appellant witnesses that ought to come out in his decision. The situation in this case on evaluation of record falls to describe in greater detail, the nature of the floor within the company where water had been poured to make it slippery. This specific fact is crucial as the respondent alludes to his work being at the Green Houses.

The particulars of the hazards and elements of breach of duty care must be clearly pleaded and evidence adduced to prove them. The plaintiff/respondent might have suffered harm but there is lack of nexus between the injuries and breach of employment contract with appellant company.

Secondly, taking into account the totality of the evidence it was unsafe for the trial magistrate to hold that the appellant was liable for acts of negligence or breach of duty to provide safe environment without credible and cogent evidence on the part of the respondent, **thirdly**, the evidence on causation and blameworthy falls below the legal threshold, **fourthly**, the exercise of discretions to apportion liability at a ratio of 80%; 20% by the learned trial magistrate is anchored on sinking sand and incapable of being ascertained from the evidence on record. Consequently, I agree with the learned counsel for the appellant that this appeal ought to be allowed on the basis of liability.

Quantum:

It will be useful to set out a brief statement on quantum. The principles on which an appellate court will go about interfering with the trial court findings on award of damages has been clearly discussed in a number of cases. Just to cite a few of these to demonstrate that the law is settled in this matter in Kenya.

In the case of *Butt v Khan 1982 -1988 1 KAR* the court pronounced itself as follows:

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely

erroneous estimate. It must be shown that the judge proceeded wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.

See **also Robert Nsioki Kitavi vs Coastal Bottlers Ltd 1982 -1988 I KAR 891-895**, it is generally accepted from the laid down legal principles on assessment of quantum that personal injuries are difficult to assess with precision and accuracy so as to satisfy the claimant. The courts discretion has been left to individual judges to exercise judicious in respect of the circumstances of each specific case. The sum total of the evidence and the medical reports positive findings will form part of the consideration in the award of damages. The trial court will also be expected to apply the principles in various case law and authorities decided by the superior courts on the matter.

As regards similar injuries the quantum of damages awarded should not be at variance in a manner to contravene the principles in **Butt v Khan case (supra)** which I consider settled concerning circumstances an appellate court can interfere with the decision of an inferior court or tribunal.

In the present appeal when I apply the principles in this case it is not in dispute that the respondent suffered tissue injuries with no permanent disability.

There was a medical report by Dr. Mwende Ndibo dated 26th January, 2016 which established bruises on the lower back and blunt trauma on the lower back. On this evidence on thing is clear that the respondent injuries were of superficial nature, with no fracture nor future medicals or residual permanent disability if the appellant had succeed on liability this ground on damages would have attracted a review and interference on grounds that the damages were inordinately excessive in the circumstances of the respondent.

Therefore I consider the figure of Kshs. 150,000 as wholly erroneous as a fair estimate for compensation of the respondent. Doing the best I can in circumstances the respondent could have been awarded paltry 50,000 as general damages for pain and suffering.

In the result the appellant's appeal succeeds in it's entirely.

The judgment of the trial court dated 11th April 2017 is hereby set aside on both liability and quantum.

Dated, delivered in open court on 7th day of June, 2018

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R. NYAKUNDI

JUDGE

In the presence of:

Mr. Aloo for B. Mutie for the appellant

The respondent

Mr. Omondi for Namida for the Respondent