Devki Steel Mills Limited v Injera (Civil Appeal 124 of 2018)
[2023] KEHC 21191 (KLR) (31 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21191 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 124 OF 2018

MW MUIGAI, J

JULY 31, 2023

BETWEEN

DEVKI STEEL MILLS LIMITED ..... APPELLANT

AND

KENNETH LOVENGA INJERA ..... RESPONDENT

(Being an Appeal from the Judgment of the Hon. Kassan (SRM) delivered on 30.01.2018 in Mavoko CMCC No 52 of 2016)

JUDGMENT

Trial Court Record

1. Vide a Plaint dated February 10, 2016, the Plaintiff averred that the cause of action arose on January 26, 2014 the Plaintiff was in the course of his lawful duties at the defendant's premises on the instructions of the defendant, its agent or servant where he was working in an unsafe working environment while charging the furnace suddenly explored throwing hot metals which entered his left eye as a result of which he sustained serious injuries.

2. He claimed the accident was caused by the negligence, carelessness, breach or statutory duty and breach of contract on the part of the Defendant. The injuries were particularized as burn on the left cornea and other injuries to be furnished at the hearing by way of medical report.

3. The Plaintiff prayed for General damages, special damages of Kshs 3,000, costs and interest.

Amended Defence

4. The Defendant filed a defence on March 3, 2016 denying the contents of the Plaint and putting the Plaintiff to strict proof thereof. It was stated that if the accident occurred it was out of the negligence of the Plaintiff. Further, that the Plaintiff was not at work since he was on off duty.

Hearing

5. The Plaintiff testified as PW1, He said he used to work with the Defendant and on January 26, 2014 he was charging a jiko, it burst and a piece of metal hit his eye. First aid was done and he went to Machakos County where he was treated. He said his eye still pains and prays for compensation. He produced the following documents;

    a. Plaintiff's identity card

    b. Treatment notes from level five hospital

    c. Medical report from Dr Ndeti

    d. Receipts

    e. Demand letter

    f. payslip

6. Upon Cross- examination, he stated that he was at work on 26th and would oppose any document showing he was not at work. He said the document in the Defedant's list of documents no. 2 had his name and shows date of arrival as 'O'. Document number 3 does not show that he was injured on that day. He said that when one is injured at work, a report is made to the supervisor who takes the injured to the office of Devki, it is reported to HR. He did not know if report was made. The HR called Munyao was there but he could not secure his attendance in court. He said he had worked for a few months before he was injured. Machines used to fail. He said the Defendant could have given him helmet and googles.

7. In re-examination, he stated that he was at work on January 26, 2014,his name was in the log in but the machine failed to capture he was present. He did not produce such register, prepared by the company doctor not himself. He did not know why he did not write his name.

8. The Defence called one witness, DW1 was EVANS OBWONGE who said that he was a supervisor of the defendant and adopted his statement. He further said that he has worked with the defendant for 10 years, the Plaintiff used to work for them. He filed some forms, the machine used to note anyone coming to work. workers used to punch time they report to work. he said on January 26, 2014, the Plaintiff was not injured. While making reference to the attendance from biometrical machine called the attendance sheet, he said 26th was a weekend. No one was at work. The document had the company stamp, It had arrival time. The Plaintiff did not work on that day, he was off duty.

9. He said that when one is injured, he reports to him, he takes them to the company clinic inside the company. They do not take injured to Level 5 Machakos, they refer to Athi River Medical Services. While making reference to record of January 2014 showing injuries, he said the Plaintiff name was not there. It had been closed and signed. No one was injured in January. He denied seeing the demand letter, it did not have their stamp. He prayed for the case to be dismissed.

10. He produced the clocking register and the medical sheet.

11. In cross- examination, he stated that the clocking analysis is computer generated and is signed by the supervisor. The signature was his, his name was not there. They do not work on Sunday. Names come out but it shows no one was at work. There was no proof that they do not work on Sunday. He said computer is accessible and can be tampered by anyone, it is hard to tamper. Employees only sign clocking register when they are at work. he said the accident register has their rubber stamp which is the only thing that can prove it is theirs. There was no document that the company had given safety

apparel, gloves were issued. There was no proof that googles were given. He was in charge of the furnace department but not overall.

12. In re- examination he said the medical sheet comes form the clinic, it has the company stamp. Clocking machine is not stamped. All the names are in the system and no one stamped it. He said he was the supervisor and knew any injury before.

Trial Court Judgment

13. The Trial Court found that the admission that the clocking system could be tampered with was a fatal blow to the defendant and it was upon the defence to prove that their own generated document couldn't be entered at all. That there was no clear proof that they do not work on weekends then it was difficult to imagine how a false claimer would choose Sunday as date of injury. The Trial court found in favour of the Plaintiff and entered judgments as follows;

    a. Liability at 90:10 % in favour of the Plaintiff against the defendant

    b. General damages Kshs 280,000

    c. Special Damages Kshs 3,000

    d. Costs.

The Appeal

14. Dissatisfied by this decision, the Appellant filed a memorandum of Appeal on September 24, 2018 seeking the following orders;

    a. The Appeal be allowed and the judgment of the Honourable Resident Magistrate be set aside

    b. The Appellant be awarded costs of the Appeal.

    c. Such further orders as the Honourable court may deem just and expedient.

15. The same was founded on the following grounds, THAT;

    a. The learned Magistrate erred in law and in fact in finding that the Respondent was entitled to the General Damages , special damages and costs.

    b. The learned Magistrate erred in law and in fact in finding that the Respondent proved his case on a balance of probabilities.

    c. The learned Magistrate erred in law and in fact in apportioning liability at 90:10 in favour of the Plaintiff.

16. The Appeal was canvassed by way of written submissions and at the time of writing this judgment, only the Appellant's submissions were on record.

Submissions

17. The Appellant filed submissions on February 27, 2023 in which the Appellant raised three grounds. As to whether the finding that the respondent was entitles to the awards, it was submitted that the Respondent did not prove breach of statutory duty or establish negligence against the Appellant on

a balance of probabilities. That the Appellant proved that no accident took place at its premises on the material damages.

18. Secondly, as to whether the Respondent proved its case on a balance of probabilities, it was submitted that the clocking system works in a way that employees are able to be tracked and once a day is done, the defendant witness who is the supervisor goes through the print out and signs it to confirm the said employees had worked on that particular day. Even if one was to walk out, they would clock out as it captured finger prints which are unique to every person.

19. The onus was on the Respondent to prove that the accident occurred. The Appellant informed the court its normal working hours and the only way the Respondent was on the premises is if he was a thief. It was contended that this was a fraudulent claim intended at extorting money from the Appellant company.

20. It was submitted that the Appellant had produced evidence to the effect that incase of an accident involving its employees while at work, it facilitated the treatment and would not have allowed the employee to cover its own costs. Reliance was placed on section 107 of the *Evidence Act* and the cases of *Timsales Limited vs Harun Wafula Wamalwa Nakuru HCCA 95 of 195*, *Kenya Tea Development Agency Limited vs Andrew Mokaya [2010] eKLR* and *Statpack Industries Limited vs James Mbithi Munyao, Nairobi HCCA 152 of 2003* (unreported).

21. Lastly, on liability, it was submitted while citing the case of *Japheth Natse Ifedha vs Colllindale Security Company Limited [2014] e KLR* that the Respondent is 100% liable for the accident as the Appellant had proven that it provides a safe working environment for its employees.

Determination

22. I have considered the Trial court record, the memorandum of Appeal and the submissions on record.

23. It is not in contention that the Respondent worked for the Appellant. The contested issues are the following;

    a. 'Whether the Respondent was injured at work on January 26, 2014

    b. Whether the Respondent was entitled to the awards given by the trial court.'

24. This being the first appeal, it is this court's duty under section 78 of the *Civil Procedure Act* to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified.

25. This principle of law was well - settled in the case of *Selle v Associated Motor Boat Co Ltd (1968) EA 123* cited by the appellants where Sir Clement De Lestang (VP) stated that:

> ' An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence

or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally'.

26. The Appellant contends that the said 26.01.2014 was a weekend and they do not work over weekends. The onus is on the Appellant to prove the same. It is trite law that he who alleges must prove. This has been set out under section 107 of the *Evidence Act* which provides that;

> ' Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.'

27. This is called the legal burden of proof. There is however evidential burden of proof which is captured in Sections 109 and 112 of the same Act as follows:

> 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.
>
> 112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him

28. In *Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR* it was held that:

> ' As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail find. no evidence at all were given as either side.'

29. The Respondent in response contends that he was injured at work but the machine did not capture his presence. I note that the Appellant produced a log in sheet dated January 29, 2014 being time analysis for the period of January 26, 2014 that shows that the name of various employees. The arrival time, depature time, late arrival, clocked hours, worked hours all indicate 00.00 which the Appellants witness interpreted to mean that no one worked on the said day. At the lower part of the document, is crossing with no names which was said to mean that no injuries were reported on the material date.

30. From the medical report, the Respondent was injured on January 26, 2014 but perhaps at a different location. The onus was on the Respondent to prove that he was injured at his place of work. The Appellant produced the treatment register for the month of January wherein no accident was reported to have taken place.

31. From the treatment notes from Machakos Level Five hospital card produced, the same indicate the dates of January 26, 2014 and April 23, 2014. The document bears a stamp of February 9, 2011 which is a serious discrepancy that was not explained by the Respondent. How was the document stamped in 2011 and treatment was in 2014?

32. The court noted that the medical sheet for January 2014 has names of what appears to be employees names, section, date , time, cause and injury sustained. The report also has a stamp from the Appellant's company which was not contested by the Respondent. The injuries are for the following dates January

2, 2014, January 11, 2014 and January 27, 2014. none of the employees' names corresponds with that of the Respondent.

33. In addition, the court takes judicial notice that the said January 26, 2014 is a Sunday and from the evidence before the court, no one clocked in on the said date. The Respondent did not provide any evidence even by calling a witness to show that they worked on that particular Sunday or any other weekend.

34. This court relies on the case of *Re H and Others (Minors) [1996] AC 563, 586* where it was held that;

> ' The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.'

35. The balance of probability in this case tilts in favour of the Appellant who managed to prove that the Respondent was not injured at its premises. In the absence of a witness to corroborate the evidence of the Respondent, the Appeal succeeds and the judgment of the Trial Court is set aside.

Disposition

36. In the end, I issue the following orders;

    a. The Appeal is allowed and the judgment of the Trial Court is set aside in its entirety.

    b. The Appellant is awarded the costs of the Appeal.

37 It is so ordered.

JUDGMENT DELIVERED, SIGNED DATED IN OPEN COURT IN MACHAKOS ON 31ST JULY 2023 (PHYSICALLY/VIRTUALLY)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MR. AYUGI - FOR THE APPELLANT

NO APPEARANCE- FOR THE RESPONDENT

GEOFFREY/PATRICK - COURT ASSISTANT(S)