China Zhongxing Limited v Ayima (Civil Appeal 262 of 2015)
[2022] KEHC 15905 (KLR) (Civ) (29 November 2022) (Judgment)

Neutral citation: [2022] KEHC 15905 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 262 OF 2015

JK SERGON, J

NOVEMBER 29, 2022

BETWEEN

CHINA ZHONGXING LIMITED ..... APPELLANT

AND

SHADRACK YOSE AYIMA ..... RESPONDENT

(Being an appeal from the judgment of Honourable Senior Principal Magistrate. Mr.Obulutsa in Milimani CMCC No.5302 of 2012 delivered on 30th April 2015)

JUDGMENT

1. At the onset, the respondent herein instituted a suit before the Chief Magistrate's Court by way of the plaint dated August 27, 2012 pursuant to a work related accident on January 9, 2012 and sought for reliefs against the appellant in the nature of general and special damages plus costs of the suit and interest thereon.

2. The respondent pleaded in his plaint that on or about January 9, 2012 while he was carrying out his normal duties of employment as stipulated by the appellant he suffered serious injuries and damages.

3. The respondent further pleaded in his plaint that the above stated injuries and damages were wholly caused by the negligence of the appellant's agents/employees and that he holds him liable.

4. The appellant filed its statement of defence denying the entire claim. The matter proceeded for hearing and judgment was eventually delivered in favour of the respondent in the sum of Kshs 122, 000/= plus costs and interests.

5. The appellant being aggrieved preferred this appeal and put forward the following grounds:

a. That the learned magistrate erred in law and in fact by finding that the appellant was 100% liable for the respondent's injuries and yet this was not proved in evidence.

b. That the learned magistrate erred in law and in fact by attributing the plaintiffs injuries to the negligence by the appellant while no such negligence was established.

c. That the learned magistrate erred in fact and in law by finding that the respondent was injured while in the course of his employment with the appellant and yet no evidence was tendered to support this.

d. That the learned magistrate erred in fact and in law in the way he weighed the evidence tendered in court.

e. That the learned magistrate erred in fact and in law by finding that the respondent was at work on the material day of the injury.

f. That the learned magistrate erred in law and in fact by awarding damages in a matter where liability was not proved.

6. Directions were given that the appeal be canvassed by way of written submissions but at the time of writing this judgment the respondent had not filed his submissions.

7. The appellant in its submissions submittedthat the lack of compliance by the respondent with his legal duties as an employee to report the alleged accident to his supervisor and his failure to provide his supervisor with a communication as required by Section 13 of the *Occupational Health and Safety Act* requesting that he provide protective clothing and equipment is sufficient evidence that no such accident occurred. As a result, the respondent could face a fine of up to 50,000 Kenyan shillings or perhaps jail time under the Act.

8. The appellant further submitted that according to Section 14 of the *Occupational Act*, which states that every employee has a mandatory responsibility to report to the immediate supervisor informing him of a danger in the work environment and failure to do so amounts to an offense, the respondent just made allegations that he was given gloves and goggles that would have prevented him from being injured on his eye.

9. The appellant contends that DW1 stated the respondent did not call any witnesses to support his testimony that he was hurt while offloading metal bars at work, in contrast to the allegations that he was working with glass. As a result, the respondent could not have sustained the alleged injuries as claimed because, contrary to the allegations, glasswork on the site began on January 15, 2013.

10. The appellant pointed out that this is a clear indication that the alleged accident did not occur on January 9, 2012, as it was not reported, and that the respondent went to work drunk, which is blatant negligence. DW2, Urbanus Wambua, a private investigator, claimed that the respondent only went to ask for money to go for treatment on January 10, 2012.

11. It is the appellant's submissions that the respondent stated during his testimony that the accident occurred on February 12, 2012, but during cross examination, he stated that it occurred on January 12, 2012, and during re-examination, he further contradicted himself by saying that he was injured in July 2012. The confusion regarding the date of the accident as submitted by the respondent was due to his memory being affected by an excessive delay in the matter.

12. The appellant therefore submits that from the evidence of the witness, it is quite clear that the alleged accident happened outside the scope of employment of the appellant.

13. On the issue of quantum, the appellant submitted that according to the medical report from January 17, 2012, the respondent had a foreign body damage to his right eye. The report described the injury as hurt and said it was a soft injury that would likely recover entirely.

14. The appellant further submitted that since liability was not proved on a balance of probability, the respondent was not entitled to an award of general damages of Kshs 120,000 but had he proved his case on a balance of probability he would have been entitled to general damages of Kshs 30,000/=.

15. The appellant has relied on the case of *Paul Ondera Akaka v Comply Industries Limited* (2017) eKLR the appellant was pierced and seriously injured in the eye by a piece of metal. The appellant was treated for foreign body in the right eye and irrigation was done. The injury sustained in this quoted case is very similar to this instant appeal.

    Justice R Lagat Korir awarded the appellant Kshs 30,000/= for general damages on July 27, 2017.

16. This is a first appeal and this court has a duty to re-examine and re-evaluate the evidence on record and arrive at its own conclusion. It should also bear in mind that it did not see nor hear the witnesses and give an allowance for that. See: *Selle V Associated Motor Boat Company Limited*, [1968] EA 123.

17. I have considered the appellant's submissions and authorities cited on appeal. I have likewise re-evaluated the material placed before the trial court. I find two issues falling for determination namely;

    i. Whether the appellants were 100% liable for the accident.

    ii. The issue of quantum

18. On the first issue, the appellant submitted that respondent's failure to fulfill his required legal obligations as an employee to notify his supervisor of the alleged accident and his failure to produce a communication to his supervisor as and to report to the immediate supervisor informing him a danger in the work environment and failure to the same amounts to an offence.

19. The appellant further submitted that the respondent is subject to a fine of up to 50,000 Kenyan shillings and/or incarceration in accordance with the Act and that he is responsible for his own safety and should therefore not blame anyone for the accident.

20. The respondent in his submissions at the trial court and in support of his case produced treatment notes, medical report receipts all of which pointed to the fact that the plaintiff was injured and was indeed injured by metal particles that entered his eyes.

21. The respondent had stated that he did not have the benefit of education and therefore he could not read or understand English therefore he signed the said witness statement which he may have not fully understood the contents of the same but reiterated that he was indeed injured by metallic particles.

22. The other thing that the appellant put him to task was the date of the injury, in his evidence in chief the respondent stated that he was injured on the February 12, 2012 however the plaint stated that he was injured on January 9, 2012 and the report prepared by DW2 stated that the respondent was injured on the January 9, 2012.

23. The respondent as had been stated earlier is literate and may not have the benefit of a personal diary thus a mistake on the date of accident is a very realistic occurrence.

24. While it is the respondent's responsibility to make sure he has access to all safety equipment provided by his employer, it is also the appellant's, as the employer, responsibility to ensure that his employees have

a safe environment and protective equipment. However, in this case, as the respondent had testified, their workplace lacked adequate lighting, and they were required to work into the night.

25. After considering the evidence, the trial court was satisfied that the appellant was wholly liable for causing the accident at 100% and I am in agreement with the trial court's decision on the same.

26. On the issue of quantum, the appellant submitted that since liability was not proved on a balance of probability ,the respondent was not entitled to an award of general damages of Kshs 120,000 but had he proved his case on a balance of probability he would have been entitled to general damages of Kshs 30,000/=.

27. On the other hand the respondent sustained injuries to his eyes and stated that his vision is no longer clear as it is used to before the accident.

28. Accordingly, I find no basis to interfere with the trial

    Magistrate's decision on being satisfied that the respondent suffered loss as a result of the accident and had his case against the appellants on a balance of probabilities.

29. The Appeal has no merit, the same is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 29TH DAY OF NOVEMBER, 2022.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent