



REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL NO. 40 OF 2015

MUMIAS SUGAR COMPANY LTD.....APPELLANT

VERSUS

SILAS OKHUYA INDAKWA.....RESPONDENT

(Being an appeal from the Judgement and Decree of Hon P. Areri in Bungoma CMCC No. 505/2011 delivered on 11th June, 2015)

JUDGEMENT

The respondent SILAS OKHUYA INDAKWA was an employee of the appellant as a casual labourer assigned to tighten/replace bolts and nuts to machines at the appellants production section.

By a plaint dated 20th July, 2011, the respondent herein (plaintiff in the lower court) sued the appellant over an accident which occurred on 5//4/2010 or thereabouts where the respondent sustained injuries. The plaintiff sought general damages for pain, suffering and loss of amenities, Kshs 2,000/- being special damages, costs and interest.

The appellant filed a defence denying liability and attributing the occurrence of the accident to the respondent's negligence.

At the trial, the respondent called 2 witnesses and testified as PW-1. He stated that at the material time, he was working for the defendant as a casual worker in the Maintenance Section and on 5th April, 2010 while tightening loose bolts on top of the boiler, a metal bar suddenly fell from above hitting him on the left arm and left knee. He was taken by his supervisor to the company clinic and later St. Mary's Hospital where he was treated. He blames the appellant for not providing him with protective gear and not warning him of the dangers of the work.

On cross examination, he stated that he was treated by tablets and injection, that he was not experienced for the work, he was not given protective gear though he knew he was supposed to though he agreed to work without. He finally stated that the respondent ought to know that the metal would fall.

PW-2 was Dr. Mulianga Ekesa who prepared and produced the Medical Report. He stated that at the time of examination, the respondent's main complaints were pain over the injured sites. He formed the opinion that he had suffered soft tissue injuries and psychological trauma. That in arriving at his opinion, he relied on the medical documents from St. Mary's Hospital and chit from the Factory Clinic.

The appellant on their part called 2 witnesses. DW-1 David Wanjala Juma who stated that he worked in the appellant's Security Services Section. That he was tasked by the Company Secretary to investigate the respondent's claim whereupon he came to the conclusion that the respondent had never been employed by the company. That the respondent's Temporary Pass Number 123812 had been previously used by 4 other individuals. That the holders of the pass had been charged in Mumias Criminal case number 1184/2013.

DW-2, Andrew Ngarisha stated that he worked as Supervisor Maintenance. He stated that he did not see the respondent work with the appellant.

Thereafter, parties filed their submissions and judgment was delivered where the Learned Trial Magistrate found the appellant liable, awarded General Damages at Kshs 120,000/= and special damages of Kshs, 2,000/= with interest and costs.

The appellant being dissatisfied preferred the instant appeal on the following grounds;

1. That the trial magistrate erred both in law and in fact by failing to take into account the weight of the evidence adduced before court.

2. That the trial magistrate erred in law and in fact by not considering the appellant's submissions.

3. The trial magistrate erred in law and in fact by not dismissing the plaintiff's case in failing to adhere to the defence witnesses and their evidence.

4. The trial magistrate erred in law and in fact by finding the defendant 100% liable.

5. That the trial magistrate applied wrong principles of law in his judgement.

6. That the trial magistrate erred both in law and fact by awarding damages when the plaintiff failed to prove its case on a balance of probability.

7. The trial magistrate erred in law and in fact by awarding the plaintiff damages against the weight of evidence produced in court.

Directions were given for the disposal of the appeal by way of written submissions. The appellant filed its submissions through Mr. Nyachiro who submitted as follows;

On whether the respondent discharged the burden of proof placed on him, counsel submits that the respondent did not discharge the burden of proof placed on him and consequently did not prove his case on a balance of probability. That the position in law is that it is not enough to plead the particulars and alleged breach, but a party must also prove the same. That the learned trial magistrate erred in holding the appellant 100% liable when no evidence and proof of the same was adduced to impute negligence. That the respondent did not prove his case on a balance of probability.

In this regard, the cases of *Martin vs Shamash Brothers Ltd (1995-1998)1 EA 177* and *Kenya Tea Development Agency Ltd vs Andrew Mokaya (2010)eKLR* were cited.

On whether or not the respondent was an employee of the appellant, counsel for the appellant submits that there was no nexus established between the appellant and the respondent. That there was no contract produced to substantiate the allegation of employment. That the gate pass was a forgery which had since been subjected to investigation and the respondent together with 4 others charged in Mumias Criminal Case Number 1184/2013 which was pending hearing.

That the Gate Pass indicated the respondent was a labourer and as such he could not have been tightening bolts in the factory. That the finding that even if the respondent was a trespasser, the appellant owed him a duty of care is a theory without evidentiary proof and never pleaded by the respondent. The case of *Lagony Construction Company Ltd & Anor vs Wanjohi Njuguna (2006)eKLR* has been cited.

On whether or not the respondent sustained the alleged injuries while in the course of employment, counsel submits that the respondent did not call any co-worker and or eye witness in proof of the allegations hence his evidence was uncorroborated.

That there was no evidence that the respondent was treated at the Company Clinic or even referred to and or sent to the hospital by the appellant. That the documents produced by the respondent are allegedly from St. Mary's Hospital, an institution not managed/run by the appellant.

That the learned trial magistrate should not have found in the respondent's favour as he did not provide vital medical documents and as such, his evidence lacked corroboration. Counsel referred to *Eastern Produce (K) Limited (Kaitet Estate) vs Joseph Lemiso Osuku (2006) eKLR* in support of this proposition.

On whether the learned trial magistrate applied wrong principles of law in his judgment, counsel submits that the respondent pleaded he sustained injuries on the left upper arm and left thigh which he confirmed in examination in chief while the magistrate found the injuries to be on the left arm and right leg and therefore the trial magistrate applied the wrong principles of the law.

The respondent filed his submissions on 15th July, 2020 through M/s Change Advocate.

Counsel submits that the appellant is the owner of the factory premises designated as Mumias Sugar Company Limited, that the appellant owed the respondent a duty of care under the Occupiers Liability Act and the appellant need to have given effective warning of the danger which was likely to affect him.

That the learned trial magistrate's finding that the respondent was the appellant's employee was correct, that the appellant did not adduce evidence to prove that the respondent's gate pass was forged and finally that the appellant has not adduced evidence of a conviction in the criminal case arising from the alleged forgery of the gate pass.

This being a first appeal, the guiding principles are as espoused in *Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123 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 demeanour of a witness is inconsistent with the evidence in the case generally.

It is not in dispute that the respondent was in the appellant's premises on the day of the alleged accident. The appellant contends that the respondent gained entry by use of a forged gate pass which had been used previously by 4 other individuals who had been charged in a criminal case. It is further contended for the appellant that the said gate pass indicated Out of crop (OOC) which according to DW-1 essentially means that the factory was closed for maintenance, that he was employed as a casual labourer and there is no way he could be tightening bolts.

From the record, the respondent testified as PW-1 and his evidence was that he was employed as a casual labourer. That he had been instructed to tighten loose bolts on top of the boiler when a metal bar suddenly fell from above hitting him on the Left arm and left knee. The issue then that ought to be answered is whether the respondent was injured in the course of his employment with the appellant. This relationship has been contested by the appellant on the grounds that employment contract was not produced, the gate pass was forged, and; by virtue of his being a casual labourer did not allow him to be working at the place he alleged to have been working.

On the issue of failure to produce an employment contract, this court has had the benefit of examining the Temporary Pass issued to the respondent produced as Exhibit 1. The same indicates that the pass was valid from 30/3/2010 to 29/4/2010. The accident occurred on 5/4/2010 during the validity of the gate Pass. It is the finding of this court that even if the employment contract was not produced, the same was not fatal to the respondent's case as the Gate Pass entitled him to have been within the premises. The appellant did not tender any sufficient evidence to dispel the respondents claim on this point.

The other contention was that the Gate Pass used to gain entry to the premises was a forgery and subject of a criminal case in Mumias Court.

It is trite law that he who alleges must prove. The provisions of section 107 and 108 of the Evidence Act places the duty of proving a fact on he who alleges the existence of a fact.

The appellant called David Wanjala Juma as DW-1 whose testimony was; **“...The matter was reported to CID Office, Mumias and police investigated the matter and charged the five of them in Mumias Court Criminal Case Number 1184 of 2013. I want the case dismissed.”**

The above is the only evidence by the defence on the allegation of forgery. The appellant did not produce any evidence to prove the existence of the criminal case beyond a mere mention. A basis has not been laid upon which the court can conclusively determine the existence or otherwise of that matter. This court therefore finds the appellant's contention on this point has not been proved to the required standard.

The appellant also submits that by virtue of his work as a casual labourer, he was not entitled to working at the section where he was injured. No material was placed before the trial court by the appellant showing the respondent's job description and whether he was on a frolic of his own. In the absence of such proof and having found that the respondent was duly working at the appellant's premises as an employee on the material day, the appellants' contention on this limb is baseless and lacking in merit.

On liability, the Learned Trial Magistrate held;-

The only defence the defendant could have had in this case was that he had given effective warning of the danger but the plaintiff had ignored that warning. There is no such defence and for that reason, I find the plaintiff has proved his claim to the required standards and I find hold the defendant liable.

The appellant submits that it defeats logic why the respondent would blame the appellant for metal bolts and nuts that fell from a height or metal bar suddenly falling. The respondent on the other hand submits that the appellant owed the respondent a duty of care under the Occupiers Liability Act and the appellant need to have given effective warning of the danger which was likely to affect him.

I suppose that the respondents' reference to the occupier's liability Act is in relation to cap 34 laws of Kenya and more particularly Section 3 which provides thus;

3. Extent of occupier's ordinary duty

(1) An occupier of premises owes the same duty, the common duty of care, to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.

(2) For the purposes of this Act, “the common duty of care” is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.

Having found that the respondent was working for the appellant at the time of the accident, it was and is the appellant's duty to provide safe working environment free from hazards such as falling metal.

The appellant attributes the occurrence of the accident to the respondent's negligence.

Black's Law Dictionary 9th Edition defines negligence as

“ failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation: Any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly or willfully disregarding of other rights. The term denotes culpable carelessness”

The same dictionary defines negligence *per se* as

“conduct, whether of action or omission, which may be declared and treated as negligence without any argument or proof as to the particular surrounding circumstances, either because it is in violation of statute or valid municipal ordinance or because it is so palpably opposed to the dictates of common prudence that it can be said without hesitation or doubt that no careful person would have been guilty of it. As a general rule, the violation of a public duty, enjoined by law for the protection of person or property, so constitutes.”

Applying the above test to this appeal, this court finds no fault in the respondent’s action that caused the accident. He was owed a duty by the appellant to ensure that the working environment was safe for one to work in. It was appellant’s duty to ensure that such metal are firmly secured knowing very well that such loose material was a danger to anyone in the area.

On whether this court should interfere with the discretion of the trial court on quantum, the principles which guide courts in exercising discretion were stated in *Mbogo & Another versus Shah (1968) E.A. 93*, where it was held at page 96 that:-

“An appellate Court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate Court should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result, there has been injustice”.

If this court must interfere with the findings of the trial court, the appellant must satisfy the conditions set in *Butt v Khan (1977) KAR 1*, thus; the aggrieved party satisfies one of the two conditions:

- 1. That the trial Court took into account irrelevant factors or left out relevant factors when assessing damages; or**
- 2. The amount of damages is so inordinately high or low that the quantum awarded must be a wholly erroneous estimate of damages.**

This court finds that the principles applied by the Learned trial magistrate in this matter were sound and legal. No extrinsic factor has been found to have been considered by him nor a relevant factor that was not considered.

No good cause has been advanced by the appellant to warrant the setting aside of the award. For these reasons, the appeal has no merit and is hereby dismissed with costs to the respondent.

Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 25TH DAY OF MAY, 2021

S.N RIECHI

JUDGE