REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 670 OF 2016

MATCH MASTERS LIMITED.....APPELLANT

VERSUS

GEDION MANGONDU GITARI.....RESPONDENT

(Being an appeal from the Judgment of Hon Orenge K.I., (SRM) in Milimani in CMCC No 6003 of 2012 delivered on 6th day of October 2016)

JUDGMENT

INTRODUCTION

1. In his decision of 6th October 2016, the Learned Trial Magistrate, Hon Orenge K.I., Senior Resident Magistrate, found the Appellant to have been wholly liable for the injuries that were sustained by the Respondent herein and delivered judgment in favour of the Respondent against the Appellant herein for a sum of Kshs 135,000/= made up as follows:-

General damages Kshs 120,000.00

Special damages Kshs 15,000.00

Kshs 135,000.00

Plus costs and interest thereon at court rates from the date of judgment.

2. Being aggrieved with the said judgment, the Appellant filed its Memorandum of Appeal dated 3rd November 2016 on 4th November 2016. It relied on five (5) Grounds of Appeal.

3. Its Written Submissions were dated 24thJune 2019 and filed on 25th June 2019 while those of the Respondent were dated and filed on 23rd July 2019.

4. The parties requested that the court deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

5. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.

6. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123**and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the

advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"

7. Having looked at the parties' Written Submissions, it appeared to this court that the only issue that was before this court was whether or not the Learned Trial Magistrate erred when he found the Appellant liable for the injuries that were sustained by the Respondent and thus awarded him the general damages in the sum of Kshs 120,000/= general damages and Kshs 15,000/= special damages. This court therefore considered all the grounds of appeal together as they were related.

8. The Appellant submitted that it filed a Defence in which it totally denied the occurrence of the alleged accident, the allegations of negligence that were levelled against it and that the Respondent sustained the injuries he alleged to have sustained.

9. It referred this court to Section 107 and Section 108 of the Evidence Act Cap 80 (Laws of Kenya) where it is provided that he who asserts a fact must prove that those facts exist and that the burden of proof lies on that person whose case would fail if no evidence was adduced by either side respectively.

10. It was emphatic that the Learned Trial Magistrate erred when it shifted the burden to it by contending that it ought to have called the Supervisor who witnessed the accident. It argued that having refuted that the accident occurred, the Respondent ought to have called the Supervisor who allegedly witnessed the accident to confirm that the accident did indeed occur.

11. It further submitted that the Learned Trial Magistrate erred in having stated that the Respondent was not in control of the Accident Register since he was not allowed to countersign the same yet the authenticity of the same was not challenged and that the Respondent did not demonstrate that it had deliberately or mistakenly omitted to include his name in the Accident Register.

12. It relied on the case of **Nandi Tea Estate Ltd vs Eunice Jackson Were [2006] eKLR** where M.K. Ibrahim J (as he then was) held that the existence of the plaintiff therein having been treated at Nandi Hills Hospital was not proof that the injuries were sustained at her place of work and thus needed to call a witness who saw her fall in the defendant's place of work.

13. It further relied on Section 13(1) of the Occupational Safety and Health Act that imposes a duty on every employee to ensure his own safety and health and that of other persons that may be affected by his acts or omissions at the workplace. It placed reliance on the case of **Purity Wambui Murithi vs Highlands Mineral Water Company [2015] eKLR** where the Court of Appeal reiterated that an employer cannot be held liable where an accident is caused by the employee's own negligence.

14. Without prejudice to the foregoing, it reiterated its submissions of the lower court that a sum of Kshs 80,000/= general damages was adequate compensation for the injuries the Respondent allegedly sustained.

15. However, on the whole, it urged this court to set aside the judgment that was delivered in the lower court.

16. On the other hand, the Respondent was emphatic that he sustained injuries while in the course of his duty at the Appellant's premises on 13th September 2010. He averred that when he reported to work, he was instructed by the Supervisor to go and attend to a machine and that he would sign the Register later. He stated that that was the reason why his name did not appear in the Register of the aforesaid date. He agreed with the finding of the Learned Trial Magistrate that he was not in control with what was recorded in the Register.

17. It was his further evidence that after he sustained the injury, the Manager told him to go to hospital and on return surrender the medical receipts for reimbursement. He said that when he returned, the Appellant's officers refused to receive the medical receipts and proceeded to chase him out of the premises.

18. He relied on Section 6 of the Occupational Safety and Health Act that gives the duty of the employer or occupier to ensure the safety, health and welfare. He submitted that he was only issued with an overall but no gloves which would have reduced the intensity of the injuries that he sustained.

19. It was his submission that the Supervisor ought to have instructed him to stop working on the machine immediately he reported to her that the said machine was not functioning properly. He relied on the case of several cases amongst them **Makala Mailu Mumende vs Nyali Golf Country Club [1991] KLR** where the common holding was that the employer owes a common law duty to take reasonable care for his employee's safety by ensuring that an employee has a safe working environment.

20. It was therefore his averment that he had proved his case on a balance of probability and that the Learned Trial Magistrate did not err in having found the Appellant wholly liable for the injury that he sustained and having awarded him Kshs 120,000/= general damages.

21. This court perused the evidence that was adduced by the Respondent and noted that on the material day of 13th September 2010, he was on duty from 6.00pm. He reported that a machine he was operating was faulty. He called the technician who referred him to the Supervisor who showed him how to repair it. He tried to repair the same but he failed and it crushed his two (2) fingers. He was taken for first aid by a person known as Margaret and given light duties till morning.

22. He explained what transpired the following day leading to his being chased. He testified that he used to clock in and out whenever he reported to work but that on this day, he did not do so as he was instructed to attend to the machine.

23. When he was cross-examined, he stated that he had worked for the Appellant for three (3) years and he had a lot of experience in operating the machine. He admitted that he tried to remove papers that had jammed the machine when it was still running. He conceded that he could have switched it off before removing the papers.

24. Dr Moses Kinuthia (hereinafter referred to as "PW 2") re-examined the Respondent and prepared a Medical Report, He testified that he referred to documents from St Jude Huruma where the Respondent was stitched. He observed that the Respondent was complaining of pains in the middle finger and he had scars on the index finger. On being cross-examined, he stated that the Respondent had healed with no incapacity save for pain which would affect his working on exertion.

25. Simon Kinanyabo (hereinafter referred to as "DW 1") worked as a Supervisor in the Appellant company. He was emphatic that while he was on duty on the material date of 13th September 2010, the Respondent was not. He further averred that the Respondent was also not on duty on 14th and 15th September 2010 and that is the reason why the Register did not capture the Respondent's name. He added that the respondent's name was also missing from the Accident register because no incident as he alleged occurred on the material date.

26. During his cross-examination, he stated that he had nothing to show that he was on duty on the material date. He, however, admitted that there was a Margaret who used to work at the Appellant company. He was categorical that employees had to sign the Register before entering the company premises. He conceded that the Respondent was an employee of the Appellant company although the Appellant's Defence had showed that the Respondent was not its employee.

27. In his decision, the Learned Trial Magistrate observed that the Respondent was not in control of what was recorded in the Appellant's register as he was not allowed to counter-sign it. He added that the Appellant failed to adduce evidence to rebut that of the Respondent. He found the Appellant wholly liable for the injuries that the Respondent sustained as it failed to provide the respondent with a safe working environment and/or give him protective gear.

28. This court carefully considered the evidence that was adduced by the DW 1 and the Respondent herein and noted that it was a case of one party's word against the other. As the Respondent correctly stated, the duty to prove a fact lies on the person who asserts that fact and that the burden of proof lies on the person whose claim would fail if no evidence was given by either side.

29. Indeed, Section 107 of the Evidence Act provides as follows:-

> **1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**
>
> **2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**

30. Further, Section 108 of the Evidence Act states that:-

> **"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."**

31. This court did not agree with the finding of the Learned Trial Magistrate that the Appellant ought to have called evidence to rebut the Respondent's evidence that he sustained the injuries as he had alleged. A party cannot be called upon to prove what does not exist. The burden of proof was on the Respondent to have present a cogent case to show that he was on duty on the material date.

32. It was also baffled why the standard operating procedures were not observed on the material date of the accident. The Respondent did not demonstrate why the Appellant would have wanted to treat him differently from other employees. He did not allude to any grudge. It was not clear why he did not sign the Register after he stopped operating the machine. Indeed, he continued to work on light duties until the end of the shift. He did not explain what efforts he made to sign the Register after the alleged incident.

33. In view of the fact that the procedure at the Appellant company was for employees to receive first aid before they went for treatment, it was not clear to this court why he was assigned duties yet he had sustained severe cut wounds on his crushed fingers. He failed to show the cause for the differential treatment.

34. Having considered the evidence in totality, this court came to the firm conclusion that if the Appellant had not called any evidence, the Respondent had failed to present a water tight case to prove that he was indeed at work on the material date of the accident. In the absence of such proof, this court determined that the Respondent had failed to prove his case on a balance of probability and that the Learned Trial Magistrate arrived at an erroneous conclusion.

DISPOSITION

35. For the foregoing reasons, the upshot of this court's decision was that the Appellants' Appeal dated 3rd November 2016 and filed on 4th November 2016 was merited and the same is hereby allowed. The effect of this decision is that the judgment of the Learned Trial Magistrate in which he awarded the Respondent herein Kshs 120,000/=general damages and Kshs 15,000/= being special damages plus interest and costs is hereby set aside and/or vacated.

36. In its place, it is replaced with an order that the Respondent's suit against the Appellant herein be and is hereby dismissed with costs to the Appellant. The Respondent will also meet the Appellant's costs of this Appeal.

37. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **28th** day of **January** 2020

J. KAMAU

JUDGE