REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 15 OF 2018

KATOYO MWAKAMUSHA LUGOGO.....APPELLANT

VERSUS

KRYSTALLINE SALT LIMITED.....RESPONDENT

(An Appeal from the Judgment of Hon. J. Wandia, Resident Magistrate on 11.8.17 in Malindi CMCC NO. 281 of 2013)

JUDGMENT

1. The Appeal herein arises from the judgment of Hon. J. Wandia, Resident Magistrate on 11.8.17 in Malindi CMCC NO. 281 of 2013, Katoyo Mwakamusha Lugogo v Krystalline Salt Limited. The Appellant, Katoyo Mwakamusha Lugogo instituted the suit in the trial Court against Krystalline Salt Limited, the Respondent, claiming both general and special damages arising from an accident that occurred in the course of employment. The Appellant in his amended plaint alleged that on 20.5.10, while working as a mason at the Respondent's plant at Gongoni, Malindi, building a warehouse, the word upon which he stood pouring concrete broke. As a result, he fell from a height of 8 meters and sustained serious injuries. He accused the Respondent of negligence and breach of its statutory duty of care and failure to ensure the safety of the Appellant in the course of his duties.

2. The Respondent in its statement of defence denied the occurrence of the accident and all the allegations of negligence. The matter then proceeded to hearing at the conclusion of which the trial Magistrate entered judgment in favour of the Appellant for the sum of Kshs. 50,000/= in general damages. The Respondent was also awarded special damages of Kshs. 2,000/= and costs. The Respondent's liability was assessed at 25%.

3. Being aggrieved by the said judgment, the Appellant preferred the Appeal herein. The summarized grounds of appeal are that the trial Magistrate erred in fact and in law in that she:

1. failed to analyze the evidence and found the Respondent 25% liable in negligence for the accident.

2. failed to state the reasons for finding the Respondent 25% liable and the Appellant's degree of contribution.

3. assessed damages on wrong principles of law without considering the evidence, submissions and authorities cited.

4. failed to consider that the Respondent did not adduce any evidence to contradict that of the Appellant.

5. Failed to consider the seriousness of the injuries sustained by the Appellant and future treatment and awarded a sum that was inordinately low in the circumstances. arrived at an erroneous decision.

6. she was biased in her trial and judgment.

4. The Appellants prayed for the following orders:

i) That thee judgment with regard to damages be set aside and be substituted with orders for reassessment of the same.

ii) That the order for damages be enhanced.

iii) That assessment of liability be made based on the evidence.

iv) Costs.

5. Parties filed their written submissions which I have considered together with the cited authorities. This being a first appeal, the Court is under a duty to reconsider and reevaluate the evidence and draw its own conclusion. However the Court must make due allowance with respect to the fact that it has neither seen nor heard the witnesses. These principles were set out in Selle and another –vs- Associated Motor Boat Company Ltd.& Others (1968) EA 123 by Sir Clement De Lestang, V. P. as follows:

> ***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 made 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 (Abdul Hameed Saif –v- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).***

6. Out of the grounds of appeal raised by the Appellant, my view is that this appeal turns on the following 2 issues which fall for determination:

> i) Whether the learned Magistrate erred on the issue of liability.
>
> ii) Whether the learned Magistrate erred on the issue of quantum.

Whether the learned Magistrate erred on the issue of liability

7. In his testimony at the trial, the Appellant stated that he was working on the material date at about 6:30 pm. The wood plank upon which he stood to fill concrete in columns in the building under construction, broke and he fell down 8 meters. He was injured in his right knee and left middle finger. He blamed the Respondent for the accident for having failed to provide a belt attached to the wall for protecting the Appellant from the fall. The Respondent also provided 1 plank which was not strong enough to hold the Appellant up while working, and refused to provide a second one. His knee was still swollen and he needed Kshs. 100,000/= for further treatment.

8. In the impugned judgment, the learned Magistrate stated as follows on liability:

> ***"It follows then as per common law and the employment Act the Krystalline salt company is liable in damages for the accident that occurred to the Plaintiff at the defendant company at the course of duty.***
>
> ***Having analyzed the evidence on record, I am inclined to hold that the defendant is 25% liable for negligence in respect to the accident."***

9. The Appellant's submission is that the Appellant discharged his burden of proof as stipulated in Section 109 of the Evidence Act. He proved negligence on the part of the Respondent for failure to provide a safe working environment for the Appellant. The Respondent however disagrees and contends that the Appellant did not discharge the burden of proof placed upon him by law.

10. The record shows that the Appellant's evidence is that prior to the accident, he requested the foreman to provide a belt attached to the wall to hold him as he climbed onto the scaffolding, but was told that none was available. The Appellant further stated that the scaffolding which was made by other persons was not safe. His request for a second plank of wood to reinforce the same was declined and he was told to get up and work. He fell from the scaffolding when the wood plank broke in two and sustained the injuries set out in the medical reports produced in Court. This evidence was given by the Appellant on oath supported by documentary evidence. It is to be noted that although the Respondent in its statement of defence denied the allegations of negligence by the Appellant, it did not call any evidence to substantiate the denial. It is well settled that the pleadings of a party who fails to call evidence in support of its case, remain mere statements of fact.

11. In Linus Nganga Kiongo & 3 Others v Town Council of Kikuyu [2012] eKLR, Odunga, J. found that the plaintiffs therein were entitled to succeed based on their evidence on oath supported by documentary evidence, in the absence of evidence to the contrary. He stated:

> ***"Pursuant to the foregoing the plaintiff's averments in light of the letter dated 4th December 2008 placing the value of the suit land at Kshs. 1,100,000.00 remain wholly uncontroverted. What are the consequences of a party failing to adduce evidence? In the case of Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002 Justice Lesiit, citing the case of Autar Singh Bahra and Another vs. Raju Govindji, HCCC No. 548 of 1998 stated:***
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> ***"Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail".***
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> ***Again in the case of Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001 the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged."***

12. I am in agreement with the findings in the foregoing cases. Given that proof in civil cases is on a balance of probabilities, in the absence

of any evidence to controvert the Appellant's evidence, I find that his evidence remains unchallenged and he is entitled to succeed.

13. The Appellant further faults the trial Magistrate for holding that the Respondent was 25% liable for the accident. The finding, in his view, had no basis in evidence or in law. For its part, the Respondent argued that Section 13(1)(a) of the Occupational Safety and Health Act places a responsibility on an employee to take reasonable precaution to ensure his safety at the work place while performing his duties. The Respondent urged the Court to find the Appellant 100% liable for the accident. Reliance was placed on the case of Wilson Nyanyu Musigisi v Sasini Tea & Coffee Ltd [2006] eKLR, where the Court found that an employee who injures himself while engaged in manual labour requiring no exceptional skill cannot hold his employer liable under statute or common law.

14. The tenor of the Occupational Safety and Health Act in as far as safety is concerned is that safety is a responsibility of every person. Section 6(1) provides:

> ***Every occupier shall ensure the safety, health and welfare at work of all persons working in his workplace.***

It is to be noted that the Act defines occupier to include employer.

15. Section 13 provides in part:

> ***(1) Every employee shall, while at the workplace—***
>
> ***(a) ensure his own safety and health and that of other persons who may be affected by his acts or omissions at the workplace;***
>
> ***(b) …***
>
> ***(c) at all times wear or use any protective equipment or clothing provided by the employer for the purpose of preventing risks to his safety and health;***

16. While the employee has an obligation to ensure his own safety and to wear or use any protective equipment or clothing for the purpose of preventing risks to his safety and health, it is the duty of the employer to ensure the safety, health and welfare at work, of all employees. The employer must also provide protective equipment or clothing to all employees.

17. This dual responsibility was captured by Visram, J (as he then was), in the case of Statpack Industries v James Mbithi Munyao [2005] eKLR, cited by the Respondent, where he stated:

> ***"An employer's duty at common law is to take all reasonable steps to ensure the employee's safety. But he cannot baby-sit an employee. He is not expected to watch over the employee constantly."***

18. In the present case, the Appellant informed the Court that at the time of the accident, he had on a helmet and gumboots. Were these enough to ensure the safety of the Appellant? Clearly not. In addition to providing the gumboots and helmet, the Respondent was under a statutory duty to ensure that the scaffolding upon which the Appellant stood as he poured concrete in the columns, could hold his weight. In this regard, I am in agreement with Aburili, J who in Garton Limited v Nancy Njeri Nyoike [2016] eKLR stated:

> ***"The primary duty rests with the employer to prove that there were precautions put in place and brought to the attention of the employee but the employee failed to adhere and deliberately put himself in harm's way."***

19. As stated earlier, no evidence was adduced on behalf of the Respondent. As such, nothing was placed before the Court to show that the Respondent had any safety precautions put in place and brought to the Appellant's attention and that the Appellant put himself in harm's way by deliberately disregarding the same. Indeed the unchallenged evidence is that the Respondent refused to put adequate measures in place to ensure the Appellant's safety.

20. The case of Wilson Nyanyu Musigisi (supra) cited by the Respondent is distinguishable in that while the appellant therein was a manual worker, the Appellant herein was an experienced mason. Further, in that case, the appellant was in control of the slasher that cut him. Indeed Kimaru, J stated:

> ***The swing of the slasher was within his control. He controlled the rate at which he swung the slasher to cut the grass. This court wonders how the respondent can be made to be liable in the performance of such a manual task.***

21. In the present case, the scaffolding had been made by other persons and not the Appellant and was not within his control. Indeed he had asked for reinforcement but this was denied. I do therefore find that the Respondent failed to discharge its duty of care to ensure the safety of the Appellant while engaged in his duties while in the Respondent's employment. In the premises, I do find that the Court erred in finding that the Respondent's contribution was just 25%. My view is that based on the evidence, this is the liability that ought to have been born by the Appellant.

Whether the learned Magistrate erred on the issue of quantum.

22. The learned Magistrate gave an award of Kshs. 50,000/= in general damages. The Appellant submitted that the trial Magistrate did not consider the authorities cited which were over 27 years old. She misapprehended the issue of inflation and awarded Kshs. 50,000/=. It was

further submitted that the trial Magistrate did not make reference to the recommendations by Dr. Ndegwa that the Appellant required Kshs. 100,000/= to repair the knee. As such, she failed to evaluate the evidence on record before arriving at her erroneous decision. For this reason, it was submitted, this was a classic case for the Court to interfere with her decision. For the Respondent, it was submitted that the injuries sustained by the Appellant as listed in the medical report by Dr. Adede were soft tissue injuries which were completely healed with no permanent disability.

23. The record shows that the injuries suffered by the Respondent as enumerated in the medical report dated 5.8.10 by Dr. Adede of Gama Medical Clinic are blunt object injury to the right leg and bruises on the left middle finger and upper lip. The report further indicates that the examination was done 3 years and 3 months after and that the finger had a 2 cm scar while the scar on the upper lip had faded. The report concluded that these were soft tissue injuries which left no permanent disability.

24. A subsequent medical report by Dr. S. K. Ndegwa dated 21.4.15 indicated that the right knee was stiff and swollen with clinical evidence of ligament tear and meniscus injury. The doctor recommended arthroscopic examination and repair at Kshs. 100,000/=.

25. The record also contains another medical report by Dr. Udayan R. Seth. Dated 1.12.15. Dr. Seth found there was no swelling over the right knee which had full and painless movement. He also found no limp on walking. Further the report indicates that there is no scar on left middle finger and upper lip.

26. In arriving at the quantum for award of general damages, the learned Magistrate stated:

> ***"The plaintiff proposed a sum of kshs 200,000 as general damages considering the injuries sustained. The defendant proposed an award of kshs 30,000. I have considered the nature of the injuries sustained by the plaintiff and given due regard to submissions by both parties. I have also considered the vagaries of inflation. In my opinion, a sum of kshs. 50,000 would be adequate compensation. I award the same."***

27. The injuries sustained by the Appellant were soft tissue injuries. Although the report by Dr. Ndegwa of 21.4.15 recommended further treatment, I note that the subsequent report by Dr. Seth of 1.12.15 indicated that the knee was completely healed. The report by Dr. Seth being the latest, I find that it represents the true state of the Appellant's injuries.

28. The Appellant relied on the cases of Nairobi HCCC No. 3944 of 1990: Kenneth Onyango & 4 Others – v – Hassan Genya Juma & Another in which an award of Kshs. 50,000/= was made to a plaintiff who suffered soft tissue injuries on the back, right knee and leg and Civil Appeal No. 180 of 1993 William Kiplangat Maritim & Another versus Benson Omwenga where the plaintiff was similarly awarded Kshs. 50,000/= for slight injury to the right leg and face. The Respondent did not cite any authority on the issue of quantum.

29. While considering whether the learned Magistrate erred in arriving at this award, this Court is guided by the holding in Butt v. Khan [1981] KLR 349 per Law, J.A that:

> ***"An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on 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."***

30. The injuries in the cited cases of 1990 and 1993 where Kshs. 50,000/= was awarded in general damages, are comparable to those sustained by the Appellant herein. My view is that the trial Magistrate's award of Kshs. 50,000/= in 2017 was inordinately low, taking into account inflation. I am therefore inclined to review the award of general damages upwards to Kshs. 80,000/=.

31. The upshot is that the Appeal succeeds. The learned Magistrate's finding on liability and assessment of damages is hereby set aside. In its place, the Court enters judgment for the Appellant against the Respondent in the sum of Kshs. 80,000/= together with costs and interest from date of judgment in the trial Court, less 25% contribution. Special damages remain as awarded by the trial Court save that interest shall run from date of filing suit.

DATED this 24th day of February 2020

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M. THANDE

JUDGE

SIGNED and DELIVERED in MALINDI this 28th day of February 2020

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NJOKI MWANGI

JUDGE

In the presence of: -

...for the Appellant

... for the Respondent

...Court Assistant