



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO 267 OF 2017

P. M. MBUTHIA.....APPELLANT

VERSUS

FRANCIS NJUGUNA KIMANI.....RESPONDENT

(Being an appeal from the judgment of Honourable G.A. Mmasi (Mrs) Principal Magistrate

delivered in Milimani CMCC No 1625 of 2006 on the 18th May 2017)

JUDGMENT

1. In a decision delivered on 18th May 2017, the Learned Trial Magistrate, Hon G.A. Mmasi (Mrs), Principal Magistrate found the Appellant to have been wholly liable for the injuries that were sustained by the Respondent herein and thus entered judgment in the Respondent's favour against him as follows:-

General damages **Kshs 400,000/=**

Special damages **Kshs 2,000/=**

Kshs 402,000/=

Plus costs and interest at court rates.

2. Being dissatisfied with the said decision, on 30th May 2017, the Appellant filed a Memorandum of Appeal dated 29th May 2017. He relied on eleven (11) grounds of appeal.

3. His Written Submissions were dated and filed on 5th November 2019 while those of the Respondent were dated 16th December and filed on 18th December 2019.

4. The Judgment herein is based on the said Written Submissions which were relied upon by both parties in their entirety.

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 **[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. It appeared to this court that the issues that were placed before it for determination were:-

a. Whether or not the Appellant herein was liable for the injuries that were sustained by the Respondent herein or if at all.

b. Whether or not the Learned Trial Magistrate awarded the Respondent damages that were excessive in the circumstances.

8. The court therefore dealt with the said issues under the distinct and separate headings shown hereunder.

I. LIABILITY

9. Grounds of Appeal Nos 1, 2, 3, 4, 6, 7, 8, 9, 10 and 11 were dealt with under this head as they were all related.

10. The Appellant's submission was that the Respondent was not in his employment. He pointed out that the Respondent did not adduce an iota of evidence to show that he had employed him or provide proof of payment or mention him as his employer in Form L.D. 104. He stated that he was out of the country on the date the Respondent had alleged that he took him to hospital at Kikuyu Nursing Home and that his evidence in this regard was un rebutted by the Respondent.

11. He added that the Respondent's evidence was contradictory as he had also testified that he was taken to hospital by his foreman and that his children paid the hospital bills which showed that he had fabricated his case and lied to court. He therefore urged this court to uphold his Appeal and dismiss the Respondent's case.

12. On his part, the Respondent argued that he was the Appellant's casual employee who would be hired whenever his skills were required and thus had no documentation to show that the Appellant had employed him. He averred that the Appellant failed to produce a sample contract or to bring any witness to support his claim that all his employees signed employment contracts.

13. It was his contention that the medical reports were prepared by medical practitioners at Kikuyu Hospital and Kenyatta National Hospital and consequently, that the Appellant's assertions that he did not take him to hospital were neither here nor there. He averred that while he sustained the injuries on 15th July 2003, the Appellant's passport showed that he entered the United Arab Emirates (UAE) on 31st July 2003. He submitted that the Appellant failed to produce an air ticket or itinerary to support his claim that he was out of the country at the time he sustained the injuries as aforesaid.

14. He asserted that he had proved his case on a balance of probability and that the Learned Trial Magistrate arrived at the correct conclusion and thus asked this court to dismiss the Appeal herein with costs to him.

15. In his evidence on 6th February 2014, the Respondent testified that the Appellant took him to Kikuyu Nursing Home after he sustained injuries following a fall from a rotten ladder that broke. It appeared that he was not cross-examined and closed his case. Judgment was then delivered on 25th July 2014. The proceedings were subsequently set aside and the Appellant allowed to defend the suit.

16. During the second hearing on 6th October 2016, the Respondent stated that after falling from a rotten ladder, he was taken to hospital by the foreman who was seated in court. In his Cross-examination, he stated that the driver by the name of Mwangi took him to hospital. When he was re-examined, he stated that he was taken to hospital by the Appellant herein. His injuries were confirmed by Dr George Kungu Mwaura (hereinafter referred to as "PW 2") who adduced in evidence a Medical Report.

17. On his part, the Appellant told the Trial Court that he did not know the Respondent and that he met him for the first time in court. He denied ever having employed the Respondent, having taken him to hospital at Kikuyu Nursing Home or had any repairs at his house in Karen. He pointed out that there were many hospitals near his home and that on the material date of the alleged incident, he was out of the country in Dubai. He stated that he left on 19th June 2003 and returned on 5th August 2003. He was categorical that he always entered into contractual agreements with the employees that he had employed and asserted that the Respondent had not produced a contract to show that he had employed him.

18. On being cross-examined, he told the Trial Court that his passport had expired but was extended. He admitted that he had not produced any document to show that he was in Dubai at the material time. At the time of being re-examined, he averred that there were stamps on his passport showing that the exit from Kenya and his arrival to Dubai.

19. In her Judgment, the Learned Trial Magistrate dismissed the Appellant's assertions that he was out of the country on the ground that his passport had expired because he could not have travelled out of the country on an expired passport. She determined that he took the Respondent to Kikuyu Hospital and paid for the bill.

20. On 11th June 2019, this court allowed the Appellant's Notice of Motion application dated and filed on 8th October 2018 in which he had sought to have new evidence relating to his Original Passport Number A438543 admitted during the hearing of the Appeal herein in accordance with Order 42 Rule 27 of the Civil Procedure Rules, 2010. It directed that a magistrate other than the Trial Magistrate take evidence regarding the validity of the Appellant's Original passport at the material time of the Respondent's injury.

21. Notably, the Appellant had denied ever having paid for the said bills and the Respondent was categorical in his examination-in-chief and his re-examination that the medical bill was paid by his children. The Learned Trial Magistrate therefore erred in fact and law in having made a determination that the Appellant paid for the Respondent's bill for Kikuyu Hospital (**sic**).

22. That out of the way, this court agreed with the Appellant that the Respondent's evidence was contradictory. When the Respondent

testified on 6th February 2014, he stated that he was taken to hospital by the Appellant herein. At the second hearing on 6th October 2016, the Respondent stated that he was taken to hospital by the foreman who seated in court. On being cross-examined, he stated that he was taken to hospital by a driver called Mwangi and then said that he was taken to hospital by the Appellant when he was cross-examined.

23. The Respondent was under oath and was expected to have spoken truthfully. If as he stated he would be employed by the Appellant occasionally when his skill was required, he would have known with certainty who took him to hospital. Due to the familiarity between them, he could not have then referred to the Appellant as a “foreman who was seated in court.”

24. If on the other hand he had been taken to hospital by the foreman or driver as aforesaid, he failed to demonstrate that the Appellant assigned him duties as his home on that material date so as to successfully argued that the Appellant owed him a duty of care while he was working for him.

25. On the other hand, if the Appellant was out of the country at the material time, he would not have known if the Respondent really sustained the injuries as he had contended. If that was the scenario, then the Respondent ought to have demonstrated that he had been employed by the Appellant herein.

26. This court carefully considered the evidence that was adduced on 18th July 2019 and noted that the Appellant testified that he did not have the original passport with him in court and that the passport was valid until 18th January 2008. The passport showed that he exited Kenya on 19th June 2003 and returned on 5th August 2003. Whereas he arrived at UAE on 31st July 2003, there was nothing to show that he was in Kenya on 15th July 2003. The passport was retained by the Learned Magistrate who took the evidence.

27. The Appellant’s evidence that he was not in Kenya on 15th July 2003 was not rebutted by the Respondent. He was under no obligation to prove that he was not around by producing an itinerary or air ticket. The burden of proof was on the Respondent to prove his case and not for the Appellant to disprove it.

28. In the circumstances foregoing and in view of the Respondent’s changing testimony, this court entertained doubts as to whether the Respondent sustained injuries as he had alleged.

29. This court recognised the limitations imposed on an appellate court as was held in the cases of **Selle vs Associated Motor Boat Company Ltd** (Supra) and **Peters vs Sunday Post Limited** (Supra) and after carefully re-evaluating the evidence that was adduced in the Trial Court, it came to the conclusion that it could interfere with the finding of fact that was made by the Learned Trial Magistrate as it had reached the threshold of being interfered with as was held in the case of **Muhiddin Mohamed Muhiddin (suing for and on behalf of the Estate of Mohamed Muhiddin Mohamed Hatimy) vs Jackson Muthama & 168 Others [2014] eKLR** that was relied upon by the Appellant herein.

30. The law is clear. He who asserts must prove failing which his case would fail. This court came to the conclusion that the Respondent had not proved his case on a balance of probability which is the standard of proof in civil cases.

31. In the premises foregoing, Grounds of Appeal Nos 1, 2, 3, 4, 6, 7, 8, 9, 10 and 11 were successful and are hereby allowed.

II. QUANTUM

32. It therefore followed that as the Respondent’s case had failed, Ground of Appeal No (5) was also successful and the same is hereby upheld.

DISPOSITION

33. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Appeal was successful and the same is hereby allowed. The effect of this decision is that judgment of the Learned Trial Magistrate in the sum of Kshs 402,000/= plus costs and interest at court rates that was delivered on 18th May 2017 be and is hereby set aside and/or vacated.

34. In its place, it is hereby ordered that the Respondent’s suit against the Appellant is hereby dismissed with costs to him. The Respondent will also bear the Appellant’s costs of this Appeal.

35. It is so ordered.

DATED and DELIVERED at NAIROBI this 28th day of July 2020

J. KAMAU

JUDGE