REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 46 OF 2015

MACKDONALD CHARO MBOGO.....APPELLANT

VERSUS

SMOKY HILL LIMITED.....RESPONDENT

(An appeal from the judgement delivered by Hon. L.N. Wasige, Senior Resident Magistrate at Kilifi on the 26th October, 2015 in the SRMCC. No. 163 of 2010)

JUDGEMENT

1. The Appellant is Mackdonald Charo Mbogo and the Respondent is Smoky Hill Limited. The Appellant being dissatisfied with the finding of the trial court on his claim for damages over alleged negligence by his employer (the Respondent) that allegedly occasioned him injury has preferred this appeal on the following grounds: that the Appellant proved his case as there was overwhelming evidence in support of his claim; that the trial court misapprehended the law when it found that the Appellant had failed to prove that he was injured at work; that the trial court failed to consider the Appellant's submissions; that the trial court applied a standard of proof higher than on a balance of probabilities; that the trial court failed to assess damages; that the trial court erred in law in finding that the Appellant was to produce documents that were in the custody of the Respondent; and that the trial court failed to adequately evaluate the evidence. The Appellant therefore prays that the appeal be allowed, the trial court judgement be set aside and that he be awarded damages and costs of the suit.

2. In brief, the Appellant's case was that on or about 15th March, 2007 whilst in the employment of the Respondent and acting on instructions to excavate building stones from a quarry, the lever of the stone excavating machine snapped while it was being adjusted hitting him on the forehead and occasioning him injury. According to the Appellant, the Respondent owed him a duty of care to take reasonable precautions for his safety whilst engaged at work and not to expose him to danger or injury which the Respondent knew or ought to have known. Further, that the Respondent had a duty to provide and maintain a safe and proper system of work.

3. The Appellant particularized the particulars of negligence on the part of the Respondent as permitting him to work in dangerous conditions, failing to take adequate precautions for his safety, exposing him to injury, permitting him to work in circumstances which were inherently dangerous and hazardous, and failing to provide a safe system of work.

4. The Appellant averred that as a result of the injury he received a cut on the face and claimed special damages of Kshs. 2,000 and general damages.

5. The Respondent's defence was that the Appellant was not its employee. This was followed with a denial of the alleged incident and all the particulars of negligence and injuries. The Respondent also raised the defence of *volenti non fit injuria*. Further, and on a without prejudice basis, the Respondent stated that if the accident occurred it was solely caused by the Appellant's negligence, particulars of which included failure to exercise due care and diligence when carrying out his work.

6. At the trial, the Appellant testified in support of his case. His testimony was that on the material day while using the excavating machine to excavate building stones the lever snapped and hit him on the forehead occasioning him a cut on the face region. He reported the incident to the site manager and was referred to Mtondia Medical Clinic where he was treated and given sick leave. The Respondent paid him Kshs. 400 for medication and thereafter dismissed him.

7. The Appellant testified that at the material time the Respondent had not provided him with protective gear such as goggles, gloves, helmet and gumboots. Thereafter he was examined and a medical report prepared for him for which he paid Kshs. 2,000. The Appellant produced in evidence treatment notes, the medical report and its receipt, his employment identity card and the demand notice issued to the Respondent.

8. Upon cross-examination, the Appellant stated that he was employed in March, 2001 and had worked with the Respondent for nine years as a casual employee. Further, that he had no employment contract and he was a machine operator. He explained that he had no protective gear

and even though he knew the risks involved in working without protective gear the needs of life compelled him to work in such circumstances. He also stated that he did not ask for the protective gear and that the Respondent had begun issuing the same in 2003 but stopped doing so in 2009. His testimony was that nobody witnessed the incident though he was with his colleague and the supervisor got to know about it. In re-examination he stated that the safety gear was introduced in 2009.

9. The Appellant was recalled to testify almost four years after his initial testimony due to the fact that the Respondent's witness had introduced a document not filed under Order 11 of the Civil Procedure Rules, 2010. Instead of being required to focus his testimony on the document that had been introduced by the Respondent's witness, the Appellant was allowed to testify afresh. In his new testimony he told the trial court that the site manager, one Ezekiel Charo, issued him with the employment identity card. He also testified that a piece from the machine dislodged and hit him on the forehead above the right eye. He informed the site manager of the incident and he referred him to the accountant who gave him Kshs. 300. The Appellant explained that whenever one got injured they informed the site manager who referred them to the nearest medical facility and that it was not compulsory for one to go to Kilifi District Hospital where serious injuries such as fractures were referred to. It was his evidence that in his case and such like cases one received money from the accountant and sought treatment.

10. It was the Appellant's testimony that the Respondent failed to provide them with a safe working environment and did not issue them with protective gear though they kept requesting for the same. According to him, a helmet would have mitigated the injury. The Appellant further stated that the site manager issued him with the employment identity card. Further, that the employees used to sign in a register. He talked of three registers; one for permanent staff, a second one for casual – permanent staff and a third one for casual staff. He used to sign in the register for permanent staff and he was paid weekly. He again produced the exhibits he had earlier produced.

11. Subjected to cross-examination the Appellant stated that he was employed in April, 2001 and issued with a job card in 2008. He was first employed on casual basis as a machine operator and confirmed on permanent terms in 2003. He stated that their employer used to remit their NHIF contributions although he did not have any documentation to prove so. He explained that he was not a trained machine operator but had experience in machines having worked with them from 1998. It was his evidence that the supervisor, Ezekiel, worked with the company from 2001 to 2009. His evidence was that he left employment in 2009 and that his job card was issued on 27th August, 2007. He could not remember the date of the incident. He further stated that he signed a voucher before receiving Kshs. 300 and the voucher remained at the office and that he was not issued with a note to go for treatment. He testified that he never used to sign in the register for machine operators but in the one for permanent staff. In re-examination he explained that the storekeeper prepared and kept the registers and that it was the Respondent who directed where the employees were to sign.

12. DW1 Tom Mboya Amolo was the sole witness called by the Respondent. He testified that he was a general manager with the Respondent company and had worked with the company for over twenty years including 2007. DW1 stated that he oversaw operations, administration, finances and personnel of the Respondent. He did not know the Appellant. It was his testimony that casuals were not issued with employment cards. His testimony was that if the employment card produced by the Appellant existed he would have been aware of it and in any case it did not bear his signature as he was the one who was to sign it. In addition, DW1 stated that the Appellant's name did not appear in the staff payroll list nor the machine operators' register. He also stated that the Respondent does not issue staff identification cards when one is employed. He was categorical that if the Appellant was employed by the Respondent he would appear in the registers. His testimony was that he only learnt of the Appellant at the point of service of the suit papers.

13. DW1 further stated that Ezekiel was a casual worker and not a site manager and did not have supervisory duties over other employees nor did he (DW1) assign him duties as the site manager. He insisted that no accident was reported to him and any accident occasioning injury was referred to Kilifi District Hospital. He stated that the site manager was expected to report to him any accident after the injured employee received first aid at the site. It was DW1's testimony that in 2007 they did not have a register for permanent staff. The Respondent only had a register for casuals and machine operators and the casuals were paid weekly. Further, that the casuals were not allowed to touch machines as the machines were sophisticated and required training.

14. During cross-examination DW1 explained that there were no permanent staff at the site in 2007. He stated that those in the management positions were paid by cash or through their bank accounts although he did not have the records in court. He stated that in 2007 there were three employees, himself included, in the managerial cadre and they were employed on permanent basis. He explained that he could not recall who the site supervisor was in 2007 and further that site supervisors were casuals. DW1 further stated that they had several sites and he recalled that Ezekiel Charo was not a site supervisor but did clerical work which entailed picking new casuals, registering them and handing over the list to the office. His evidence was that in 2007 they had about 100 employees and he would not know all the casuals at the site but only knew the ones who dealt directly with him. He added that the note referring an injured worker for treatment remained at the hospital. In re-examination he stated that he employed site supervisors who orientated the new casual employees.

15. In summary the trial magistrate found the Appellant's testimony to be at variance with his pleadings as he claimed to be a permanent staff and further that it was illogical to be paid weekly whilst in permanent employment. The trial court concluded that the Respondent was not liable and did not assess damages.

16. The appeal was disposed through written submissions which the advocates for the parties relied on entirely. The Appellant submitted that the trial court erred when it held the Appellant was not at work on the material day. It was urged that as Ezekiel's work entailed picking casuals and registering them then he was the eyes of the Respondent at the site. Further, that the trial court did indeed appreciate the work Ezekiel did and it was therefore proper for a layman to consider him a supervisor considering that the other employees did not know his terms of employment.

17. The Appellant also submitted that the Respondent did not challenge the testimony that protective gear was introduced in 2008 after the accident had already taken place.

18. The Appellant further submitted that the trial court failed to appreciate that the two registers produced were solely made by the Respondent and were copies and not originals. The Appellant therefore asserted that it was possible that his name was omitted. Further, that

the trial court failed to appreciate that his name appears on the NHIF Card Printing Status report for the Respondent as at 20th September, 2007. The Appellant queried how his name could appear in the Respondent's NHIF remittance statement and fail to appear in their register. It was the Appellant's submission that since the Respondent had denied that he was their employee, there was no way that they could have admitted the occurrence of the accident.

19. It was further submitted that the Appellant having worked for a period of nine years with the Respondent was entitled to believe that he was permanently employed. Further, that the attendance register was never produced to establish if the Appellant was at work on the material day and in any case the Appellant could not produce documents in the custody of the Respondent. In his view, the trial court erred in concluding that the third register did not exist without considering that it may have been concealed. Further, that the allegation that the Respondent refers employees to Kilifi District Hospital was unsupported by documentary evidence. He relied on the decision in **Eastern Produce (K) Limited v Joseph Mamboleo Khamadi [2015] eKLR** where it was held that failure to produce the accident register should result in the court drawing an adverse inference against the employer.

20. According to the Appellant, the trial court failed to consider relevant facts nor proposed the awardable general damages. The relevant facts being that the vouchers remained with the Respondent, that the Respondent did not have referral documents to Kilifi District Hospital and that the likely place he would have sustained the injury was at the Respondent's quarry.

21. In addition, the Appellant submitted that the burden of proof imposed by the trial court was higher than on a balance of probabilities. According to him, the Respondent could have tweaked its 2007 records which the trial court looked upon as the truth. The Appellant contended that the trial court contradicted itself by finding that the Respondent's witness was better placed to explain the operations of the Respondent and at the same time finding that the Appellant was an employee of the Respondent and yet the Respondent had denied this fact. The Appellant relied on the case of **Kanyungu Njogu v Daniel Kimani Maingi [2000] eKLR** for the proposition that when a court is faced with two probabilities it can only decide on a balance of probabilities if there is evidence to show that one probability was more probable than the other. The Appellant further submitted that the trial court filled the gaps in the Respondent's case.

22. The final point taken up by the Appellant was that the trial court was obligated to assess the damages the court would have awarded him had his claim succeeded. In support of this submission, reliance was placed on the decisions in **Oluoch Eric Gogo v Universal Corporation Ltd [2015] eKLR** and **Lei Masaku v Kalpna Builders Limited [2014] eKLR**.

23. Opposing the appeal, the Respondent submitted that the judgement in the record of appeal differs from the one issued to them from the lower court's registry. The Respondent pointed out that the issues identified by the trial court in their copy were seven namely whether or not the Appellant was employed on or about 22nd January, 2010; whether the Appellant was injured in the course of duty; whether the Appellant assumed the risk of injury; whether the Respondent owed a duty of care to the Appellant; whether the Respondent breached the duty of care; whether the breach of duty of care occasioned injury to the Appellant; and the quantum of damages available to the Appellant, if any.

24. Referring to page 11 of the copy of judgement, counsel for the Respondent submitted that it was improperable for the trial court to reach the conclusion that the Appellant was employed and at the same time reach the conclusion that he was not injured as per the judgement on the record of appeal. The Respondent urges this court to consider the two judgements and act equitably. It is the Respondent's case that a court of equity ought to look at all circumstances including the conduct of the parties as was decided in the case of **Kenya Hotels Limited v Kenya Commercial Bank Ltd & another [2004] 1KLR 80**.

25. Turning to the next point, the Respondent, relying on the holding in **Kiema Mutuku v Kenya Cargo Hauling Services Ltd 1991** submitted that the onus lay on the Appellant to prove his case. It was submitted that the Appellant did not prove that he was at work at the material time and that he had changed his narrative when he stated that he was given Kshs. 300 though earlier on had talked of Kshs. 400 and in any case the Appellant did not produce a voucher.

26. In addition it was submitted that there was no proof that the injuries were sustained at work and reference was made to the treatise of **Salmond on the Law of Torts, 17th ed**. Further, that it was upon the Appellant to prove failure to provide a safe working environment as stated at page 2003 in the treatise of **Winfield and Jolowicc on Tort, 13th ed**. The Respondent urged that the Appellant had admitted that he did not have knowledge to operate the machine and was aware of the danger he was exposing himself to. This assertion was supported by reference to the statement in **Joseph Mamboleo Khamadi** (supra) that an employer was not obligated to follow the activities of the employee where the employee has gone outside the scope of employment. The Respondent prayed for the dismissal of the appeal.

27. Considering the lack of uniformity in the copy of the judgement in the record of appeal and the one exhibited by the Respondent in the submissions I called for a copy of the judgement from L.N. Wasige, SRM, Kaloleni Law Courts who delivered the judgement while she was still at Kilifi Law Courts. A perusal of the judgement supplied by the trial magistrate disclosed that the same is a replica of the one found in the record of the appeal. Therefore, the judgement in the record of appeal will be the one to be considered in this judgement.

28. This being a first appeal the duty of this court is to reconsider and re-evaluate the evidence afresh in order to reach its own conclusion bearing in mind that the trial court had an opportunity to observe the demeanour of the witnesses as they testified.

29. This being a claim based on the tort of negligence, the Appellant needed to establish that the Respondent owed him a duty of care which was breached by the Respondent thus occasioning him injury deserving of compensation.

30. The Appellant claimed to have been an employee of the Respondent. The records produced by the Respondent do not feature him either as a casual or as a machine operator. He however claimed that there was a third record but the trial court found such a record to be non-existent. There was however no basis for the trial court to make such a finding as no record was produced for permanent staff.

31. In addition, the records produced by the Respondent were not for the date of the alleged accident. Further, DW1's evidence was that they took up casuals supervised by designated employees and that he did not know all the casuals. It is also noted that the attendance register for

the material day was never produced by the Respondent who was the custodian of such a document. Further to this, the Appellant indicated that it was the Respondent who would refer the injured worker to a medical facility, a fact conceded by the Respondent, save that the Respondent indicated that the supervisor had to report the accident and the only facility the injured would be referred to was Kilifi District Hospital. This means that the Respondent would be in the know of the employees injured and referred for treatment. However, DW1 did not know the particular supervisor on that material day. The attendance register was not produced and neither was there documentary evidence adduced to show that Kilifi District Hospital was indeed the only referral facility. There was also nothing in support of the trial court's conclusion that permanent staff cannot be paid on weekly basis. From the evidence adduced, the Appellant had established to the required standards that he was an employee of the Respondent and was injured while on duty on the material day. The Appellant's case was supported by a document produced by the Respondent which had the Appellant's name as number three on the list titled "NHIF Card Printing Status report."

32. DW1 was categorical that casuals did not handle the machines but as already stated, he failed to disprove that a third register existed. DW1 indicated that he signed job cards and denied issuing one to the Appellant. The Appellant however produced a card signed by Ezekiel, an employee of the Respondent as acknowledged by DW1, showing that he was a machine operator. Failure by the Respondent to produce the attendance sheet makes it most likely that the Appellant was indeed a machine operator as he stated. Indeed DW1 stated that he did not know the supervisor on the material day and the possibility of Ezekiel being the supervisor as alleged by the Appellant cannot be ruled out. The trial magistrate therefore erred in finding that the Appellant was not on duty on the material day.

33. The Appellant testified that employees were not being issued with protective gear such as helmets at the material time. This was not disproved and though the Appellant may have known the dangers of using the machine there is no proof that the snapping of the lever was a foreseeable risk and even if it was, there was no protective gear to mitigate the risk. The provision of a helmet was the employer's duty hence the principle of *volenti non fit injuria* is not applicable. There was a breach of duty by the Respondent and that breach occasioned the injury.

34. Even having found the Respondent not liable, the trial court was nevertheless required to assess the damages it would have awarded had the Appellant's claim succeeded – see **Lei Masaku** (supra).

35. In awarding damages comparable injuries should be compensated by comparable awards. In the case of **Michael Kariuki Muhu v Charles Wachira Kariuki & another [2015]** the appellant who had suffered a small cut on the forehead and other soft tissue injuries was awarded Kshs. 120,000. Another case with similar injuries is that of **Elizabeth Bosibori &another v Damaris Moraa Nyamache [2017]** where an award of Kshs. 220,000 to the Respondent who had sustained deep cut on the chin, cut on the knee and bruises to the forehead was confirmed on appeal.

36. In the instant case the Appellant had received an injury on the face and had fully healed without any permanent disability. In my view therefore an award of Kshs. 100,000 is sufficient compensation. I therefore award the Appellant this amount as general damages.

37. In short, the appeal is allowed. The trial court's judgement dismissing the Appellant's case is set aside and substituted with an order allowing the Appellant's claim. The Appellant is awarded Kshs. 100,000 as general damages and Kshs. 2,000 as special damages making a total of Kshs. 102,000. The Appellant shall have from the Respondent the costs of this appeal and the costs at the trial court.

Dated, signed and delivered at Malindi this 24th day of January, 2019.

W. KORIR,

JUDGE OF THE HIGH COURT