REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 101 OF 2008

LOCHAB BROTHERS LIMITED.....APPELLANT

VERSUS

STEPHEN WANJALA WANYONYI....RESPONDENT

(An Appeal arising out of the Judgment and Decree of Hon. Innocent Maisiba RM Eldoret delivered on 10th September, 2006 in Civil Case No. 880 of 2006)

JUDGMENT

The Appellant was the Defendant and the Respondent the Plaintiff in the original trial in **Eldoret Resident Magistrate's Court Civil Case No. 880 of 2006**. The Respondent instituted the said suit in the trial Court for general and special damages on account of the Appellant's alleged breach of its statutory duty to provide him with a safe working environment. The trial magistrate, in a judgment delivered on 10 th September, 2006, held that the Respondent was able to prove that the Appellant was 100% liable for the injuries sustained by the Respondent, and awarded the Respondent general damages amounting to Ksh.80,000/- and special damages amounting to Ksh.1,500/- as well as costs of the suit .

The Appellant, being dissatisfied with the said judgment, filed an appeal against the same and raised several grounds challenging liability. The Appellant faulted the trial magistrate for holding the Appellant liable without any evidence in that regard. The Appellant took issue with the trial magistrate's finding that the Respondent was an employee of the Appellant with no evidence in that regard. The Appellant was aggrieved that the trial magistrate failed to consider evidence tendered in its totality. The Appellant was of the view that the trial magistrate's verdict was erroneous since the Respondent was a total stranger to the Appellant, and that the Appellant never had any dealings with him. Finally, the Appellant asserted that the trial magistrate failed to comply with **Order XX Rule 4** of the **Civil Procedure Rules** (Now **Order 21 Rule 4** of the **Civil Procedure Rules, 2010**).

By consent of the parties, the appeal was disposed of by way of written submissions. Both parties filed their written submissions. During the hearing of the appeal, the Appellant argued that the Respondent failed to prove his case to the required standard. The Appellant denied ownership of the company that the Respondent alleged he worked for. The Appellant relied on **Section 107** of the **Evidence Act** which provides that he who alleges must prove. The Appellant asserted that the Respondent claimed that the two companies, that is Lochab Brothers Limited (Appellant herein) and Kitale Timber Company Limited belonged to the same person but did not adduce any evidence to ascertain those claims. The Appellant further relied on the case of **Kirugi & Another vs Kabiya & 3 others [1987] KLR 347** where the Court of Appeal held that:

> **"The burden was always on the Plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof."**

The Appellant maintained that they produced certificates of incorporation which showed that the two companies were separate and different. The Appellant argued that the Respondent testified that he worked for Kitale Timber Company Ltd when he got injured. The Appellant stated that they denied ownership of Kitale Timber Company Ltd and that Respondent failed to prove that he was employed by the Appellant. The Appellant maintained that it had been sued as the wrong entity.

The Appellant submitted that their administration manager, Maranga Otiso Okari (DW1), denied ever knowing the Respondent as an employee of the Appellant. He further testified that the Respondent's name did not feature in the Appellant's master roll for year 2004 ***(DEX 3)***. He also stated that the staff identity card produced by the Respondent ***(PEX 3)*** did not emanate from the Appellant. He pointed out that the postal address indicated in the staff identity card produced by the Respondent was **'259 Kitale'**, yet the Appellant's address was **'257 Eldoret'**. He further asserted that he was in charge of issuing staff identity cards, and that he has never issued the Respondent with one since the Respondent was never an employee of the Appellant. The Appellant argued that the trial magistrate disregarded this testimony. The Appellant relied on the case of **Hon. Daniel Toroitich arap Moi vs Mwangi Stephen Muriithi [2014] eKLR** where it was held that;

> **"It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side."**

The Appellant further submitted that the trial magistrate failed to comply with **Order XX Rule 4** of the **Civil Procedure Rules** (Now **Order 21 Rule 4** of the **Civil Procedure Rules, 2010)** which outlines the required contents of a judgment. The Appellant argued that the said contents include a concise statement of the case, the points for determination, the decision arrived and the reasons for such decision. The Appellant maintained that the trial magistrate failed to consider to the plaint, defence and review of the evidence adduced by parties in making a finding on liability and damages awarded. The Appellant was of the view that the trial court's judgment ought to be set aside and the appeal allowed.

The Respondent, while opposing the appeal, stated that he was employed by the Appellant in 1998 as a mechanic. He maintained that he was injured on 16th April, 2004, while working for Appellant at Kibigos Primary School. The Respondent asserted that he was hit by a hook which was connected to a wire that was used to tie the trees after they were cut. He stated that the hook had been incorrectly placed by Mr.Nasoso, a fellow employee, and as a result it hit him on the forehead. He submitted that he was taken to Kibigos Dispensary for treatment. He further averred that Dr. Aluda (PW2) confirmed the pleaded injuries. He asserted that the Appellant was to blame for his injuries for failure to provide him with protective gear, adequate training and a safe environment. The Respondent also argued that he was employed by the Appellant, and that he produced a staff identity card issued to him by the Appellant ***(PEX3).*** He maintained that he had sued the right entity because the Appellant employed him to work for its company known as Kitale Timber Company Limited. He also asserted that the signature on his staff identity card belonged to the Appellant's managing director since no expert witness was called to prove otherwise.

This court has carefully re-evaluated the evidence adduced before the trial court. It has also considered the submissions made by the parties to this appeal. As can be seen from the grounds of appeal and the submissions filed on behalf of the parties, this appeal is only limited to the issue of liability.

This being a first appeal, this Court is obligated to re-evaluate and re-appraise the evidence in order to arrive at its own independent conclusion. This principle of law was well settled in the case of **Selle Vs Associated Motor Boat Co. Ltd [1968] EA 123** where **Sir Clement De Lestang** stated that:

> **"This court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had 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 Hammad Sarif – Vs – Ali Mohammed Solan (1955) 22 EACA 270)."**

In the present appeal, the issue for determination is whether the Respondent proved that he was employed by the Appellant and that he was injured while at work at the Appellant's premises.

As regards an action in negligence it is stated in **Halsbury's Laws Of England, 4th Edition** at paragraph 662 at page 476 as follows with respect to the what is required to be proved in an action such as the Respondent's:-

> **"The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal connection must be established."**

Therefore, the Respondent has to prove that he was injured while engaged on duties that he was assigned or expected to perform in the course of his employment. Further, he also has to prove any one or more of the particulars of negligence and breach of statutory duty pleaded as against the Appellant, and to show that he was also not negligent in the performance of his duties.

This statutory duty stems from **The Occupational Safety and Health Act, 2007** which, in **Section 6(1),** requires every occupier to ensure the safety, health and welfare at work of all persons working in his/her workplace. In addition, **Section 10(2) of the Work Injury Benefits Acts, 2007** provides that an employer is liable to pay compensation in accordance with the provisions of the **Act** to an employee injured while at work.

In the present appeal, it was not a disputed fact that the Respondent sustained injuries on the 16th of April, 2004. The Respondent stated that on the said date, while at work at Kibigos Primary School, he was hit on his forehead by a hook, which was connected to a wire that was used to tie together trees after they were cut down. He averred that his forehead was swollen and he sustained two laceration wounds. He added that he was taken to Kibigos Dispensary for treatment. He produced a treatment chit from the said dispensary ***(PEX2)*** which confirmed that he was treated on 16th April, 2004 of the said injuries. Dr. Aluda (PW2) who also examined him confirmed the pleaded injuries and produced a medical report to that effect ***(PEX4).***

It was however disputed whether the Respondent was an employee of the Appellant on the day the accident allegedly occurred. It was the Respondent's evidence that he was employed by the Appellant to work for its company known as Kitale Timber Company Limited. He

maintained that Kitale Timber Company Limited was a branch of the Appellant company. The Respondent however did not produce any evidence to prove this claim. He produced a staff identity card which indicated that he was employed by **"Lochab Bros"** whose address was **"P.O Box 259 Kitale"**. This card was however challenged by the Appellant's administration manager, Maranga Otiso Okari (DW1), who testified that the Respondent was a stranger, and has never been an employee of the Appellant. He stated that the card was not issued by the Appellant and pointed out that the Appellant's staff identity cards were not similar to the one produced. He stated that the Appellant's postal address was **"257 Eldoret"** and not **"259 Kitale".** He added that he did not recognize the signature on the Respondent's card and that staff identity cards were usually signed by the Appellant's managing director. He further asserted that the he was in charge of issuing staff identity cards, and that he has never issued the Respondent with one since the Respondent has never been an employee of the Appellant. In addition, he produced the Appellant's master roll for year 2004 **(DEX3)** and the Respondent's name did not feature in any of the entries. This court however notes that the master roll was not signed, and neither did it bear the official name of the Appellant nor its official stamp.

The Appellant's administration manager, Maranga Otiso Okari (DW1), asserted that Lochab Brothers Limited (Appellant herein) and Kitale Timber Company Limited were two separate entities and that the latter was not a branch of the Appellant. He produced two certificates of incorporation (***DEX1*** and ***DEX2***) belonging to the two companies to prove that they were separate and independent entities. He maintained that the Appellant has never operated in Kitale. These certificates were not challenged by the Respondent.

This court notes that Lochab Brothers Limited (Appellant herein) and Kitale Timber Company Limited are indeed two separate entities. They are both limited liability companies with capacity to sue and be sued. The Respondent in his testimony stated that he was working for Kitale Timber Company Limited when he was injured. He maintained that Kitale Timber Company Limited was a branch of the Appellant, but failed to provide any evidence to prove this claim. He claimed that he was employed by the Appellant but on the other hand states that he was working for Kitale Timber Company Limited at the time of the accident. The Respondent failed to produce in evidence, a sub-contract between the two companies to prove that the Appellant hired him to work for Kitale Timber Company Limited. Since he failed to prove that the latter was indeed a branch of the Appellant, he cannot claim to have been injured while working for the Appellant.

This court is not certain that the Respondent sustained the injuries in the course of performing his duties at the Appellant's premises as the same has not been proved. It is for this reason that this court finds that the Appellant cannot be held liable for the said injuries and further do find that the Respondent cannot be said to be entitled to damages.

It is therefore for these reasons that this court finds that this appeal is merited. The same is consequently allowed. This court hereby sets aside the judgment and decree of the trial court and substitutes it with the judgment of this court dismissing the Respondent's suit with costs. The Appellant shall have the costs of the appeal. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 5TH DAY OF DECEMBER 2018

L. KIMARU

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 24TH DAY OF JANUARY 2019

HELLEN OMONDI

JUDGE