REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 66 OF 2018

DAVID ONYANGO NYONGA...APPELLANT

VERSUS

MINI BAKERIES LIMITED...RESPONDENT

(Being an appeal from the judgment and decree of H. BARASA, Principal Magistrate

in Eldoret Cmcc No. 387 of 2016 delivered on 18th May, 2018)

JUDGMENT

1. On 19/12/2015, the Appellant (**DAVID ONYANGO NYONGA**) was working for the respondent as a dough maker when he went to the store with a trolley to get flour which were stacked vertically in 14ft high bales. As he was pushing the trolley, the bales collapsed and came tumbling down towards him, To save himself, he let go of the trolley, and in the process, he sustained a fracture to his thumb He sustained injuries of fracture on his right thumb, and he blamed the incident on the respondent's negligence.

2. The respondent denied liability, and through **GEOFFREY OBAYO** (the respondent's supervisor), it was stated that the appellant was on 2nd duty shift on the date and was supposed to clock out at 10.00pm. He noticed that the appellant had a bandage around his dinger, but he did not follow-up to establish the cause of injury. The appellant requested to be allowed to do cleaning work that day due to his injury. Being aggrieved by the said judgment entered in favour of the respondent the appellant contested the decision and raised the following grounds of appeal:

1. **THAT** the Leaned Magistrate erred in law and infact in failing to hold in favor of the appellant and to duly award damages to the appellant as sought.

2. **THAT** the Learned Magistrate erred in law and in fact in using the wrong principal applicable in law while determining and making the decision of dismissing the Appellant's suit whereas the Appellant proved his case based on the injuries sustained in the case on a balance of probabilities.

3. **THAT** the Learned Magistrate erred both in law and infact in applying the wrong basis and principles in holding or setting the threshold making a case and proving it on a balance of probability whereas there was prove of permanent disability and or grievous harm sustained by the Appellant as the result of the accident occasioned by the negligence on the part of the Respondent.

4. **THAT** the Learned Magistrate erred both in law and in fact in failing to take into account the certainties and severities of the injuries while making his decisions.

5. **THAT** the Learned Magistrate erred both in law and in fact in failing to consider the Appellants evidence, exhibits, whatsoever and his case in general in the absence of any sufficient and appropriate rebuttal of defense evidence.

6. **THAT** the Learned Magistrate erred in law and in fact in failing o consider all the evidences exhibits and witnesses adduced and tendered before him which is aggregately made and proved the case on the balance of probability.

7. **THAT** the Learned Magistrate erred in law and in fact in applying the wrong principles applicable in the circumstances in admiring at his decision.

8. **THAT** the learned magistrate erred in law and in fact in failing to consider the evidence on record.

3. The appellant prayed that the appeal be allowed and the trial Magistrates judgment of dismissal be set aside with costs to the appellant.

4. The Appellant testified as PW1, and stated that on 19th December, 2015 while on duty at the Respondents premises got injured when bales of floor which were vertically stacked to a height of 14 feet almost fell on him and in a bid to save himself, he let go of the trolley and sustained a fracture of his thumb. He presented treatment records to support his evidence about the injury.

He further explained that he went to hospital on 23rd December, 2015 because the person who was to release some money to him was not immediately available. He confirmed on cross-examination that he did not know what caused the bales to fall, although he claimed that they were not properly arranged, he also stated that they tumbled accidentally, and denied suggestions that he is the one who hit the stack. Incidentally, the bales of flour did not land on him, nor was the injury caused by those bales and stated as follows:

"I tried to avoid the flour which was falling, and in the process my thumb got into a hole, and that is how I got injured"

5. DR PAUL KIPCHUMBA RONO (PW3) told the trial court that the appellant sustained a fracture on the right thumb due to a fall, although no xray was done, but he explained that physical palpation of the thumb was enough to confirm the nature of the injury

6. It was not disputed that the Appellant was an employee of the Respondent, the only contention being that at all material times there was a store keeper manning the store, and whose task was to ensure that the dough makers and deepeners have the right package of floor. The respondent doubted that the accident occurred on that day, since no such report was made to him as the supervisor. This position was reiterated by **PATRICK BUTUBA(DW2)**, the foreman at **MINI BAKERIES**.

7. That when the supervisor noticed that the Appellant had a bandage on his finger, he assigned him light duties of cleaning because he could not work as a dough maker.

8. The respondent pointed out that although the Appellant stated that he got injured on 19/12/2015 all his treatment chits confirmed that he went to hospital on 23/12/2015 four days after the alleged injury.

9. The trial magistrate in his judgment noted that by the time the appellant was being assigned light duties as a cleaner on 19/12/2016, not on account of having been injured at the premises that day, but rather, that he was already wearing a bandage on his right thumb, and could not possibly have performed the work of a dough mixer That would suggest that he had sustained the injury much earlier, and probably elsewhere. That the treatment documents he presented showed he sought treatment four days after the alleged incident, thus militating against his claim as to when he got injured. The trial court thus expressed doubt as to whether the accident actually happened

10. It was submitted on behalf of the appellant that the documents produced showed he sustained injuries while at work, and the defendant did not rebut the evidence that he was not issued with protective gears for use in cause of employment.

The Appellant clings to the fact that he was on duty on 19/12/15 a fact in not contested, and he was assigned light duties around that period. The appellant faults **DW1 (Geoffrey Asayo)**, a supervisor who ascertained that he saw the plaintiff injured but took no further action into confirming why his finger was bandaged, terming this as utter negligence by the defence witness who together with the defendant has a duty of care towards its employees.

11. Further that on the material day as some witnesses spotted him with a bandage as proof of the accident and proof of his presence at work, and that the evidence demonstrated that the Appellant suffered harm, while in the course of duty and thus deserves the court orders as sought before the court.

12. The Respondents submit that the trial court was right in reaching the conclusion and dismissing the Appellants case based on the evidence adduced. The maintains that Appellant did not prove negligence as liability could only be visited for injuries sustained in the course of. Further, that the trial court properly and correctly considered the evidence on the mater, taking into account the evidence as adduced by the parties.

13. The Appellant is faulted for failing to prove his case on a balance of probabilities and this court is urged to find that the appeal lacks merit and should be dismissed with costs to the Respondent.

14. It is trite law that there is no liability without fault and that for liability to lie; this has to be proved on balance of probabilities in civil cases.

The duty of a first appellate court is now well settled that a first appellate court is enjoined to re-evaluate all the evidence adduced before the lower court in order to reach its own independent conclusions but in doing so, it should give due allowance to the fact that it did not have the opportunity of seeing or hearing the witnesses.

15. As a general rule, an appellate court should not interfere with the findings or decision of a lower court unless it is demonstrated that in reaching its decision, the lower court made an error of law or took into account irrelevant considerations or that the court based its decision on no evidence or a misrepresentation of the evidence.

16. The burden of proof would not shift on to the respondent to prove that the Appellant was injured while on duty. Indeed, that burden remained with the Appellant, and he failed to discharge it. **PW1 (DR JOSEPH SOKOBE) and PW2 (DR PAUL KIPCHUMBA RONO)** who testified on behalf of the Appellant merely confirmed that the Appellant was injured but it did not in any way confirm that he was injured at his place of work.

17. DW1 **GEOFFREY OBAYO** the Respondent's supervisor stated that he was on duty on that day. Further, that he is the one who assigns duties and prepares payment vouchers. It was his evidence that the Appellant was on duty on the 19th December, 2015 and was to report on the 2nd shift from 2:00 pm to 10:00 pm.

18. When Appellant requested for light duties, he noticed that his finger was bandaged. He produced a payment voucher which showed that the Appellant worked as a cleaner on that day.

19. This being the first appeal, this Court is obligated to re-evaluate and re-appraise the evidence in order to arrive at its own independent conclusion. Further, the Court has jurisdiction to delve into matters of fact and law. (See **Selle V Associated Motor Boat Company Ltd [1968] EA 123.)**

20. In the present appeal, the issues for determination are whether the Appellant proved that he was injured while at work at the Respondent's premises and secondly, if the first issue is answered in the affirmative, the amount that ought to be awarded to the Appellant as damages for purposes of compensation.

21. 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 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."**

22. The burden rested with the Appellant 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 had to prove any one or more of the particulars of negligence and breach of statutory duty pleaded as against the Respondent, and to show that he was also not negligent in the performance of his duties.

23. The statutory duty stems from **Section 6(1)** of the **Occupational Safety and Health Act, 2007** which 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.

24. The Appellant was also required to adduce evidence to rebut the Respondent's assertion that his failure to seek treatment on the same day of the injury showed that he was injured while out of work.

25. The Appellant should have given a reasonable explanation as to why he failed to avail the eye witness. In **High Court Civil Appeal 183 of 2009 Timsales Limited v Noel Agina Okello [2014] eKLR** the court held that:

> **"When therefore a name of a litigant who claims to have been a casual or even permanent employee, who is required to have his name entered in the Muster Roll, or an Accident Register (in the event of an accident), does not appear in either the Muster Roll or Accident Register, the degree of proof of probability of having worked, or having had an accident on a particular day becomes much higher."**

26. The Appellant having failed to proof that he was injured while working on the Respondent's premises, the appeal herein is without any merit both on liability and on quantum. I find no error on the part of the trial court and the appeal is subsequently dismissed with costs to the respondent.

Delivered and dated this 29th day of October 2019 at Eldoret.

H. A. OMONDI

JUDGE