REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 98 OF 2018

JULIUS WAFULA CHEBI.....APPELLANT

-VERSUS-

GIBSON AKIFUMA.....1ST RESPONDENT

EGAP SOLUTIONS LIMITED.....2ND RESPONDENT

(An appeal from the judgement and ruling of Hon. D. W. Mburu (Mr.)

Principal Magistrate in Milimani CMCC 7812 of 2015 delivered on 12th May, 2017)

JUDGEMENT

1) Julius Wafula Chebi, the appellant herein filed an action before the Chief Magistrate's Court, Milimani Commercial Court against Gibson Akifuma and Egap Solutions Ltd, the 1st and 2nd respondents respectively, to recover damages for the injuries the appellant is alleged to have sustained while working for the 2nd respondent on 23rd April 2013.

2) The suit was heard and dismissed for being resjudicata by Hon. K. W. Mburu, learned Principal Magistrate. The learned Principal Magistrate in his judgment delivered on 12.5.2017 stated in part as follows:

> **"On the claim for general damages for the injuries sustained in the course of employment, the court found no evidence had been submitted in support thereof and dismiss the claim. I find it rather unfortunate that the plaintiff decided to lodge a fresh suit before this court on the same subject matter knowing very well that the very claim had been considered and rejected by the Employment and Labour Relations Court. The plaintiff conveniently failed to disclose to this court that there had been a previous suit involving the same parties over the same cause of action. The plaintiff was represented by the same firm of advocates in the previous suit so he must be aware of it. I know that the defendant has not raised the issue but that is neither here nor there. This is a reported decision of a superior court and no evidence is required to prove it. It is a matter of which the court can and should take judicial notice. The issues of liability and quantum of damages were duly considered and determined in the previous suit. It therefore goes without saying that the plaintiff's suit is resjudicata and is for dismissing."**

3) The appellant being dissatisfied with the trial court's decision was prompted to file an application for review dated 16th May 2017. The motion was opposed by the respondents who relied on the replying affidavit of the 1st respondent. Hon. D. W. Mburu heard the application and proceeded to dismiss it vide its ruling of 16th June 2018.

4) It was pointed out by the learned Principal Magistrate in the aforesaid ruling that the appellant had stated that the issue touching on damages for the injuries sustained by the appellant was never dealt with nor determined by the Employment and Labour Relations court.

5) It was however pointed out that the appellant failed to avail to the trial court a copy of the pleadings which were filed before the Employment and Labour Relations court. The learned Principal Magistrate referred to a copy of the judgment of the Employment and Labour Relations as indicating that the appellant had sought for

a. Ksh.138,090/=

b. Certificate of service

c. Costs of the claim and interest

d. *General damages for the injuries sustained while on duty*.

6) It was also pointed out that one of the issues which was determined by the Employment and Labour Relations court is the question as to whether the claimant's injury was caused by his negligence. The learned Principal Magistrate also noted that the aforesaid court stated that no evidence was submitted in support of the claim for general damages for the injuries sustained in the course of employment.

7) The trial magistrate came to the conclusion that the Employment and Labour Relations court determined the issue of general damages for the injuries sustained in the course of employment and therefore the suit was resjudicata therefore he found no merit in the application for review and proceeded to have it dismissed.

8) The appellant being further aggrieved, filed this appeal to challenge the dismissal order and put forward the following grounds:

i. THAT the learned trial magistrate erred in law and fact by dismissing the appellant's suit and application for review in the lower court when he misapprehended the facts and arrived at a wrong decision.

ii. THAT the learned trial magistrate erred in law and fact in finding that CMCC 7812 of 2015 was res judicata in view of Industrial Court Cause no. 1013 of 2013.

iii. THAT the learned trial magistrate erred in law and fact in failing to consider that the decree in the Industrial Cause No. 1013/13 was for full terminal benefits as follows:

a. 3 months salary in lieu of notice ksh.18,200.00

b. Leave for 39 months of ksh.44,352.00

c. 3 years of service pay of ksh.29,250.00

d. General damages for unlawful termination ksh.234,000.00

e. Underpayments of ksh.20,000.00

BUT, DID NOT ADDRESS THE ISSUE OF BODILY INJURIES SUSTAINED BY THE APPELLANT.

iv. The learned trial magistrate erred in law and fact in failing to note that the case before him was for work injuries sustained by the appellant at the respondent's premises which had not been dealt with by the Industrial Court.

v. The learned trial magistrate erred in law and fact in failing to award the appellant damages for a fractured leg despite the weighty overwhelming evidence in court, medical reports and other supporting documents.

9) When this appeal came up for hearing, learned counsels appearing in the matter recorded a consent order to have it disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also considered the rival written submissions and the authorities supplied.

10) It is apparent from the judgment that the learned Principal Magistrate considered the evidence of the appellant. He noted that the appellant had stated that he was initially employed by the 2nd respondent as a **"casual"** and later promoted to serve as a mason and that he was not issued with a letter of appointment. The learned Principal Magistrate further noted that the appellant had claimed that he was earning ksh.650/= per day which was paid weekly as ksh.3,700/= .

11) It was also stated that the appellant had told the trial Principal Magistrate that on 23.4.2013, he was assigned the duties of a foreman at the 2nd respondent's site to mount scaffolding and to put up a wall. It is noted that the appellant had claimed that the scaffold which he was using broke making him to fall on a cemented floor thus sustaining injuries stated on the plaint.

12) The appellant is said to have alleged that the 2nd respondent did not provide him with a safe working environment and was not afforded safety precautions nor properly trained for the tasks. It is also noted in the judgment that all the relevant medical documents were produced in evidence.

13) The learned Principal Magistrate also took into account the evidence presented by one Julius Ogolla (DW1) on behalf of the respondents against the appellant's claim. It is noted that DW1 stated that the 2nd respondent provided its employees with safety and precautionary devices, garments, attire and tools but the appellant neglected to use as per the regulations. DW1 is further quoted to have stated that the appellant was not the 2nd respondent's employee but was instead an independent contractor and that he was paid on a weekly basis for the sake of convenience.

14) The trial Principal Magistrate stated in his judgment that DW1 confirmed that the accident actually occurred and that the appellant sustained injuries but he however blamed the appellant for being negligent.

15) Upon considering the evidence, the learned Principal Magistrate came to the following conclusions: **First**, that there was no evidence showing that the appellant was an independent contractor. **Secondly**, that the appellant was an employee of the 2nd respondent and was therefore lawfully present at the 2nd respondent's premises. **Thirdly**, that the respondents owed the appellant a duty of care in its premises under Section 6 of the Occupational Safety and Health Act, 2007.

Fourthly, that the appellant filed a similar claim before the Employment and Labour Relations court (E.L.R.C). That the appellant's claim before the Employment and Labour Relations court arose out of the same accident of 23.4.2013. **Fifthly**, that the claim for general damages for the injuries sustained while on duty was dismissed for lack of evidence.

16) Though the appellant put forward a total of seven (7) grounds of appeal, it s apparent that the main issue posed to this court to determine is whether the suit before the trial court was resjudicata. It is the submission of the appellant that the trial Principal Magistrate erred when he failed to appreciate that ELRC did not address the issue of bodily injuries sustained by the appellant and that the claim before the E.L.R.C related to unlawful termination and not injury.

17) The appellant further argued that ELRC did not pronounce itself on the injuries because the appellant never submitted on them. It is the further submission that the issue of resjudicata was not even raised in the respondent's defence hence both parties should have been invited to address the court over the issue.

18) The respondents on the other hand averred that the trial Principal Magistrate correctly determined the suit to be resjudicata.

19) The doctrine of resjudicata is clearly spelt out in Section 7 of the Civil Procedure Act as follows:

> **"No court shall try any suit or issue in which the matter directly and indirectly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."**

20) In the case of **Philes Nyokabi Kamau =vs= Industrial & Commercial Development Corporation (2017) eKLR** the Court of Appeal restated the ingredients of resjudicata inter alia as follows:

> **"the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially in issue between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be between the same parties, or parties under whom they or any of them claim, litigating under the same title; and lastly that the court or tribunal before which the former suit was litigated was competent and determined by suit finally."**

21) Having perused the judgment of E.L.R.C in the case of **Julius Wafula Chebi =vs= Gibon Akifuma & Another (2014) eKLR** it is clear that the claim of damages for the alleged injuries suffered by the appellant at the 2nd respondent's site was considered and dismissed on the basis that no evidence was produced to prove the claim.

22) The learned Principal Magistrate took time to critically examine the judgment of the E.L.R.C and came to the conclusion that the aforesaid court dealt with and determined the issue of general damages for the injuries sustained in the course of employment. It is also clearly stated by the trial court that the appellant was requested to avail to the trial court copies of the pleadings he filed before E.L.R.C but he curiously failed to do so. An inference can be made to the effect that he failed to supply those pleadings because they were prejudicial to his case.

23) It is clear to this court that the issue touching on the claim based on the tort of negligence before the trial court was pleaded, heard and determined on its merits before the Employment and Labour Relations court. The matter arose from the same cause of action and involving the same parties.

24) The learned Principal Magistrate came to the correct decision therefore he cannot be faulted. Parties cannot be allowed to litigate in piecemeal. If such a practice was allowed to continue, there will be no end to litigation. In the end, I find that the doctrine of res judicata was properly invoked.

25) Consequently, this appeal is ordered dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 25th day of October, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent