REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 478 OF 2015

(*Arising from the decision and decree of Hon. Obura (Mrs) in Nairobi (Milimani)*

CMCC No. 5420 of 2011 delivered on 11th September 2015)

(CORAM: F. GIKONYO J.)

MUTUA MUASYA .....APPELLANT

Versus

MEERA CONSTRUCTIONS LIMITED ..... RESPONDENT

JUDGMENT

[1] The appellant was the plaintiff in the trial court and sued the respondent for general and special damages for injuries he sustained while working for the appellant. On 11th September 2015 the trial court dismissed the suit with costs to the respondent. The appellant being aggrieved by the said decision filed his appeal and cited eighteen (18) grounds which may be collapsed into two:

a) ***THAT the learned magistrate misdirected herself on the evidence and the applicable law***

b) ***THAT the learned magistrate erred in finding that the appellant had failed to prove his case on a balance of probability***

Submissions

[2] The appeal was canvassed through written submissions. The appellant submitted that the court should set aside the judgment of the trial court and award him general damages of Kshs. 300,000/- as he has proved his case on a balance of probability. He affirmed that indeed he was an employee of the respondent at the material time of the accident. That the medical report from Kenyatta National Hospital dated 26th April 2011 was of no probative value as it did not indicate the date of injury. He relied on the case of **Henry Binya Oyla v Sabera O. Itira [2011] eKLR**. The appellant was to call the doctor but both parties agreed to produce the medical report by consent. Therefore, failure to call the doctor does not open it to the learned trial magistrate to disregard the report. Thus the trial magistrate erred in fact and law in dismissing their case.

[3] The respondent submitted that the appeal lacks merit and ought to be dismissed. The appellant failed to prove that he was an employee of the defendant or that he was injured in the course of duty on the material day. Thus, the trial court found against the appellant on liability and dismissed the suit with costs; which finding should not be disturbed. They relied on the case of **Ephantus Mwnagi vs Duncan Mwangi Wambugu [1984] eKLR** and **Mwanasokoni v Kenya Bus Services Ltd [1984] eKLR**.

Duty of court

[4] As first appellate court; I should evaluate the evidence and come to own conclusions except I am reminded that I neither saw nor heard the witnesses. See**: SELLE & ANOTHER vs. ASSOCIATED MOTOR BOARD COMPANY LTD. [1968] EA 123**. In this exercise, the court is not beholden or compelled to adopt any particular style. What must be avoided however is mere rehashing of evidence as was recorded or trying to look for a point or two which may or may not support the finding of the trial court. Of greater concern should be to employ judicious emphasis and alertness, have an eye for symmetry or balance (where legally permitted) and an ear for subtleties of evidence adduced so as not to miss the grace and power of the testimony of witnesses and the applicable law. Such is a style that insists on simplicity in writing and keeping as close as possible to the words used in the testimony recorded. Ultimately, little difficulty or none at all will be experienced in making the overall impression of the evidence, facts and the law applicable in sheer clarity and directness. I shall so proceed.

ANALYSIS AND DETERMINATION

[5] **PW1 Mutua Muasya** told the court that he was an employee of the defendant. That on 25th November 2010 he was at work in Westlands where they were constructing a house. He was alone at the 1st floor balcony when he heard screams from other workers. Suddenly, an iron bar which had been fasted on the 4th floor fell on him. It hit him on the left arm and back. He regained consciousness and found himself at Kenyatta National Hospital where he was treated and discharged. He has not healed and cannot carry heavy blocks with his left arm.

[6] After the close of the plaintiff's case the defendant did not call any witness.

[7] The issues of determination before this court are:

a) Whether the appellant was at all material times an employee of the respondent?

b) Whether the appellant was injured on 25th November 2010 while in the course of his duties for the respondent?

c) Whether the respondent was liable?

d) Whether the appellant is entitled to damages?

[8] The appellant must prove that he was at all material times an employee of the respondent. The appellant stated during cross-examination that he relied on his insurance form to show that he worked for the respondent. After perusal of the said form. I note that the form is neither signed nor dated. The form is under the letterhead of Tausi Assurance Company Limited. It is not possible to ascertain from the form the person who authored it or verify its contents.

[9] In law, a signature or some form of substantiated endorsement and date will cloth a document with validity. The fact of being an employee of the Respondent was disputed and so he bore the burden of proving this fact by way evidence. Employment is not a matter about which the court can take judicial notice. Even though the appellant was a casual worker with no any formal documentation he had other ways of proving that he was an employee. Here I have in mind calling witnesses who were at work with him on the material day or showing proof of payments or through discovery and so forth. Mere claim that he was an employee of the Respondent is not enough. Under **the Evidence Act** burden of proof was on the appellant of which he did not discharge. As a result, I find that the Appellant did not prove that he was an employee of the Respondent at the material time. The trial magistrate did not err in finding that Appellant was not an employee of the respondent.

[10] I should now determine, whether the Appellant was injured in an accident on 25th November 2010 in the premises of the Respondent. To prove this the appellant produced an attendance card (***PExh.1***), discharge summary (***PExh.2***), receipt (***PExh.3***) and Dr. Wokabi's report and receipt (***PExh.4 (a) and (b)).*** According to ***PExh. 3*** which are receipts from Kenyatta National Hospital they are dated 25th November 2010. From the hospital's medical report dated 26th November 2011 it states that the appellant has a history of falling object from above and had pain on left shoulder. It does no state the date of the injury neither does it state how it occurred. At the bottom it indicates an OB No as 26/06/05/2011. More startling information; Dr. Wokabi's report dated 4th October 2011, begins by stating that the injuries sustained were from a road accident. He then examines him for injuries that were sustained at work.

[11] The appellant submitted that in spite of the contradiction I have noted, the parties consented to the production of the report. He argued that the trial magistrate admitted that there could have been a typing error or a mix up in the manner the appellant sustained the injuries. He took the view that the trial court ought to have taken judicial notice that Dr. Wokabi mostly prepares medical reports relating to road traffic accident and this was merely a mix up. Either way, he stated that there were pieces of medical evidence on record and testimony of the appellant that indicated he was injured while at the construction site.

[12] The receipts produced by the appellant shows that he was at Kenyatta National Hospital on 25th November 2010. The hospital's report dated 26th November 2011 states that the appellant has a history of a falling object from above and had pain on the left shoulder. The two documents do not state how the injury was occasioned. They do not answer the question at issue. As stated in the case of **Nandi Tea Estate Limited vs. Eunice Jackson Were [2006] eKLR** that

"The existence of the injury and her being attended at Nandi Hills Hospital on the said date is not proof that the injuries were sustained at her place of work."

[13]The appellant produced Dr. Wokabi's report which carries substantial contradictory information; at one point it states that the injuries were occurred through a road traffic accident; at another place that the injuries were sustained at a workplace. These contradictions were not explained by the appellant or through other credible documents. The Appellant merely stated in the submissions that the court should take judicial notice of the fact that Dr. Wokabi mostly deals with road traffic accident matters which explains the mix-up.

[14] The law is clear on which facts the court should take judicial notice of under **Section 60 of the Evidence Act** and this is not one of them. It should be understood that, although parties consented to the production of the report it was the appellant's obligation to explain the disparate positions on his injuries. The report was admitted with the contradictions and should be taken as such especially in the absence of satisfactory explanations to reconcile the contradictions. It should be noted that admission of the report did not obliterate the contradiction. In addition, in spite of him being alone on the balcony at the time of the incident as alleged he stated that he fainted when he was hit and was taken to the hospital by the company vehicle. It was not his claim that he was alone in the entire construction. He nevertheless called no witness on this issue. These omissions and contradictions only help to obscure his claim that he was injured at the premises or workplace belonging to the Respondent. No witnesses who would have ascertained the appellant's averments. On this, see what was stated by the Court of Appeal in **Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & another [2014] eKLR** that:

> **"It is a firmly settled procedure that even where a defendant has not denied the claim by filing of 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**."
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> **Consequently, I find that the appellant failed to prove to the court that the injuries he sustained and was attended to at Kenyatta National Hospital were sustained at his place of work.**

[15] **As the Appellant has failed to prove that he was an employee of the Respondent or that he was injured at the premises of the Respondent, the respondent is not liable for the injuries sustained by the appellant. Accordingly, I find that the Appellant failed to prove his case against the Respondent on a balance of probabilities. The appellant failed to discharge his legal burden of proof. In the premises,** the trial magistrate did not err when she concluded that the appellant's claim had no merit. Consequently, the appeal is dismissed with costs.

Dated and signed at Nairobi this 15th day of October 2019

F. GIKONYO

JUDGE

Dated, signed and delivered in open court at Nairobi this 24th day of October 2019

L. NJUGUNA

JUDGE