REPUBLIC OFKENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 73 OF 2015

BETWEEN

WEST SUGAR CO. LTD.....APPELLANT

AND

HARUN NAMBERE INZERA.....RESPONDENT

(Being an appeal from the judgment and decree of the HON. M.L Nabibya SRM given on 27th August, 2015 in Butali PMCC No. 116 of 2013)

J U D G M E N T

Introduction

1. The appellant was the defendant while the respondent was the plaintiff in the case before the Senior Resident Magistrate's court at Butali being PMCC No. 116 of 2013. The Judgment in the said case led to this appeal. The appellant had been sued for negligence and breach of duty of care to the respondent as a result of which the respondent was severely injured when a log of wood fell on his leg. The trial court found that the appellant was wholly liable for the accident that occurred on the 2.7.2013 and awarded Ksh130,000/= general damages to the Respondent.

The Appeal

2. It is against this back drop that the appellant filed the memorandum of appeal. The appeal is premised on the following grounds:-

1. The learned trial Magistrate erred in fact and [law] in arriving at a finding that the Appellant was liable for the accident in the absence of any proof linking the appellant to the accident or proof that the appellant was the owner of the motor vehicle.

2. The learned trial Magistrate erred in fact in arriving at a finding that the appellant was liable for the accident and/or the respondent's injuries when there was no evidence of negligence at all on the part of the appellant

3. The learned trial magistrate erred in law and in fact in shifting the burden of proof to the defendant contrary to the law.

4. The learned trial magistrate failed to appreciate sufficiently or at all that the evidence tendered in favour of the plaintiff was contradictory and could not warrant judgment in his favour

5. The learned trial Magistrate erred in fact and in law in finding that the plaintiff had proved his case on a balance of probability.

6. The learned trial Magistrate erred in fact and in law in ignoring the pleadings and the submissions of the defence.

7. Without prejudice to the foregoing and any admission for liability, the damages awarded were inordinately excessive in the circumstances for the soft tissue injuries sustained by the respondent.

3. REASONS WHEREFORE, the appellant prays that the appeal be allowed, judgment and decree of the trial court set aside and in its place judgment be entered for the appellant, dismissing with costs the respondent's case in the subordinate court.

Submissions

4. Counsel for the parties agreed to have the appeal herein disposed of by way of written submission. From the record it is only the

appellant's advocates M/S Ogejo Olendo & CO. who filed their written submissions.

5. The appellant in his submissions categorized grounds 1, 3, and 6 together, grounds 4 and 5 together but argued ground 2 and ground 7 separately.

6. The appellant denied knowledge of the Respondent as a worker of the company. According to the Human Resource Manager, Mr. Mechumo, who testified as DW1, he did not know the respondent nor was an accident ever reported to him on the 2.7.2013. He claimed that the sick sheet issued by the respondent was a forgery and that he had reported the forgery to the police vide OB NO. 35/7/5/2014. DW1 also produced casual payment listing daily which showed that on the material day the respondent was not working for the company.

7. As for the vehicle that was involved in the accident, being motor vehicle registration No. KBR 585H, DW1 testified that upon conducting a search, it was found the said motor vehicle belonged to one Wambura Simon. The vehicle was a Toyota Carina Salon car and not a truck as alleged. The appellant submitted that the respondent did not adduce any evidence to show that he had been working with them nor did he call any friend as a witness for that matter. It was further submitted for the appellant that the Respondent did not produce contrary evidence to rebut the appellant's claim that he has never owned motor vehicle registration number KBR 585H.

8. On ground 2, the appellant submitted that there was no evidence that the alleged driver (respondent) was in the appellant's company premises, and that he was working for the appellant on the day in question. It was further submitted that the learned trial Magistrate erred in fact and in law in finding the appellant liable for the accident in the circumstances

9. On grounds 4 and 5 the appellant submitted and maintained that the respondent did not adduce sufficient evidence to show that he was injured within the appellant's premises on that day or that an accident occurred. The appellant also submitted that the respondent did not even prove that it was the appellant's motor vehicle that was involved in the accident.

10. On ground 7, the appellant submitted that although the respondent prayed for damages, he had not proved or given the basis for the grant of those damages; in other words he had not proved the alleged loss. The appellant submitted that there was no fracture, no hospitalization and no disability as a result of the alleged accident.

11. As this is a first appeal this court is duty bound to re-evaluate and analyse the evidence on record and the submissions that were before the subordinate court and make its own conclusions in the matter, only giving allowance for the fact that it neither saw nor heard the witnesses who testified during the trial. For the above proposition see **Selle – vs – Associated Motor Boat Company [1968]EA 123 at page 126**.

The Respondent's Case

12. By the plaint dated 24th July, 2013, the respondent claimed that he was an employee of the appellant and was working as a cane loader. According to the plaint, it was a term of the contract of employment that the appellant was to take all reasonable measures for the safety of the respondent while the respondent was engaged upon his work. The respondent claimed that on the 2.7.2013 while he was working and due to the negligence of the appellant he was seriously injured. He particularized the negligence by the appellant and also particulars of injuries.

13. In his evidence the respondent who testified as PW1 at the trial, stated that on the 2.7.2013 he reported for duty at 12.00am and he was assigned to fix a trailer to the tractor KBB 515 H and trailer ZC 2600. While fixing the same the driver reversed the tractor which hit the trailer and as a result the Respondent was injured. He claimed that he was taken to the company hospital. He produced his employment card No. 357(PEX1). He was examined by Dr. Aluda on 19.7.2013 and he produced the report PMFI 3(a) and (b) a demand letter sent by his advocates as PEX4 and later he was examined by Dr. Oketch the Company doctor. He blamed the appellant company for the accident for failing to ensure his safety.

14. PW2 Dr. Samuel Aluda confirmed that he examined the respondent on 9.7.2013. He observed that the Respondent was injured while on duty on 2.7.2013. The injuries sustained according to him were blunt trauma to the right kidney area and the right leg. These injuries were healing. He also looked at treatment notes from West Kenya Sugar PEx2 which showed that the respondent had suffered soft tissue injuries. This testimony by Dr. Aluda marked the close of the Respondent's case.

Appellant's Case

15. The appellant filed their defence on 12.08.2013. In the defence they denied the allegations in the plaint and put the Respondent to strict proof thereof. They denied that there was an accident on the 2.7.2013 as a result of which the Respondent suffered injuries. They maintained that they were not negligent in any way or at all and specifically denied the particulars of negligence set out by the respondent. They averred that if at all the accident occurred it was solely authored by the Respondent. The appellant enumerated the respondent's negligence/contribution.

16. Three witnesses testified for the defence. DW1 Michael Misiko Mechumo the Human Resource and Administration Manager told the court that on 02.7.2013 the Respondent was not present at work and no accident report was received on this day. He also testified that he did not issue any sick sheet to the Respondent and when referred to PEX2, he denied that he was the one who signed the said document. He also denied issuing the said sick sheet. He also noted that it was a forgery which was the subject of a police report vide OB 35/7/5/2014.

17. DW2 Eliud Munyovi Macholi the transport manager West Kenya Sugar Co. testified and said that motor vehicle No. KBB 585 H was owned by one Wambura Simon. He produced a copy of the search certificate. "DExhibit 2" to confirm the same.

18. DW3 Albert Okalo Ayumba a tractor driver at the appellant's company testified that on 2.7.2013 he was on duty with other drivers. He

claimed that he did not know the Respondent and could not tell if he was on duty or not. DW3 further testified that tractor KBB 516H was not in his pool and no accident concerning the same was reported on this day and that the company had never owned the tractor KBB 516H. DW3 produced daily records from 02.07.2013-13.07.2013 which were marked as Defence Exhibit 3.

Trial Court's Judgment

19. In its judgment the trial court found that there was no doubt that the respondent was an employee of the appellant and was on duty on the 2.7.2013. The Court disqualified the evidence of DW3 because he had sat in court when DW1 was testifying. She found the appellant 100% liable for the accident and went ahead to award general damages of Kshs.130,000/= with special damages of kshs.1,500/=.

20. Regarding the subject motor vehicle, the learned trial magistrate stated in her judgment that *"although it is true that the registration number produced in court shows it belongs to a different class of motor vehicle and owner, that does not, on a balance of probability exonerate the defendant from the fact that the trailer was the one that hit the plaintiff. From the record, there is all indication that the incident was within the company premises and even the plaintiff was treated at the company clinic (as per PEX2). It's also clear that a tractor and the trailer were involved, it's the trailer that hit him. So if the registration is availed in court did not belong to any of the defendant tractors it would still be the duty of the defence to prove that the trailer ZC 2600 did not belong to them but they failed. Am satisfied that the plaintiff was injured and he was treated at the company clinic after being hit by a company trailer*."

Determination

21. The main issue for determination in this appeal is whether or not the trial magistrate erred on matters of fact or law, or whether she was entitled to arrive at the conclusion she did. It is worth noting that this court as an appellate court will not normally interfere with a trial court judgment on a finding of fact unless the same is founded on wrong principles of fact or law as was by the court of Appeal in **Selle & another – vs – Associated motor Boat Co. Ltd & Another [1968] EA 123:-**

> "A Court of Appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusions"

22. From the above decision which echoes section 78 of the Civil Procedure Act, it is clear that this court is not bound to follow the trial court's findings if it appears that either the trial court failed to take into account particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.

23. Evaluating the evidence as a whole, PW1 testified on oath that he was employed by the appellant as a cane loader and his supervisor was one Albert Okalo. He produced his employment identity card which showed his employment number as being 357(see PEX 1). This card was no challenged by the appellant or his counsel. For this therefore I have no doubt that the Respondent was an employee of the Appellant.

24. From his testimony PW1 stated that on the 2.7.2013 he reported for duty at 12.00am though I wonder I am wondering whether this is the time when official business in a factory begins. Could this be the reason why he was not registered as having been on duty that day because he came late, or could it also be the reason he was asked to fix the trailer to the tractor because he came for duty too early? These questions have not been answered but I choose to believe that on this particular day 2.7.2013 the respondent reported for duty at the stated time.

25. Having said the above, I also find that there was an accident on the 2.7.2013 and this occurred at the yard of the defendant appellant. Why I say so is because of PW1's statement where he states that he was "*fixing the trailer to the tractor at the company yard*" After the accident he was taken to the company hospital then to Kabras Hospital Bikhu Clinic. There were treatment notes to confirm this. He was also examined by the company's doctor one doctor Oketch.

26. From the foregoing, it is not disputed that the Respondent was an employee of the appellant and that he was injured while on duty at the appellant's premises. What is in dispute is whether the appellant was injured while in the course of his duties as an employee of the appellant and whether the accident is attributed to the negligence of the appellant.

27. 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. "Halsbury's Laws of England, 4th Edition at Para 662)

28. It has been submitted by the appellant that the tractor KBB 585H did not belong to them but to another person but they failed to show proof ownership of the said trailer ZC 2600. I see some mischief in the appellant's denial of ownership. They ought to have brought out records for both the tractor and the trailer instead of providing registration particulars of a salon car as they want the court to believe.

29. The respondent testified of a tractor and not a salon car. By bringing records of a salon car, the appellant is not exonerated at all because it is common knowledge that tractors are the ones used to carry sugar cane and not salon cars. Therefore grounds 1, 3 and 6 of the memorandum of appeal cannot stand. I am satisfied that the respondent proved his case on a balance of probability. I choose to believe the respondent on the issue that he was injured while engaged on an assignment given to him by the appellant and at the appellant's premises.

30. Having stated that the respondent had proved that he was an employee of the appellant company and that the accident occurred at the company's yard, ground 2, 4 and 5 of appeal cannot stand.

31. On the issue of quantum of damages, I find that the learned trial magistrate was guided by authorities well researched by counsel before making the award. I find no reason to interfere with the same.

32. The appeal is therefore dismissed with costs to the respondent

Orders accordingly.

Judgment delivered dated and signed in open court at Kakamega this 20th day of April,2018

RUTH N. SITATI

JUDGE

In the presence of:

M/s Chanzu(absent) for Plaintiff/Respondent

Miss Achieng (present) for Defendant/Appellant

Erick …Court Assistant.