REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 208 OF 2012

VEGPRO (K) LIMITED..................................... APPELLANT

VERSUS

SAMUEL MWANGI NDUNG'U.................... RESPONDENT

(Being an appeal from the Judgment of the Hon. R a Onganyo (Mrs) Senior Principal Magistrate delivered on 12th April, 2012 in Milimani CMCC No. 3766 of 2006)

J U D G M E N T

1. Samuel Mwangi Ndungu, the Respondent herein, filed a compensatory action against Vegpro Kenya Ltd, the Appellant herein for the injuries he sustained on 13th November, 2004 while in the employment of the Appellant before the Chief Magistrate's court vide the Plaint dated 26th April, 2006. The appellant filed a defence to deny the Respondent's claim. Hon. R. A Oganyo, the learned Senior Principal Magistrate heard the suit and in the end she gave judgment in favour of the Respondent in the sum of Ksh.207,000/- plus costs and interest.

2. The Appellant being aggrieved filed this appeal and put forward the following grounds: -

> ***i) That the learned magistrate erred in law and in fact in awarding General damages of Ksh.200,000/- which award was unwarranted in light of the evidence adduced in particular the defendant's exhibits on record.***
>
> ***ii) That the learned magistrate erred in law and in fact in not finding in favour of the Defendant.***
>
> ***iii) That the learned magistrate erred in law in not taking into account entirely the submissions of the Appellant.***
>
> ***iv) That the learned magistrate erred in law in awarding interest from the date of filing suit.***
>
> ***v) That the learned magistrate's finding and decision were against the weight of the evidence adduced.***
>
> ***vi) The learned magistrate erred in law in not taking into account the fact that the plaintiff was not on duty at the alleged date of occurrence of the cause of action.***

3. When this appeal came up for hearing, learned counsels appearing in the matter recorded a consent order to have the appeal disposed of by written submissions. The Respondent was the only party who had filed submissions at the time of writing this judgment.

4. I have re-evaluated the case that was before the trial court. I have also taken into account the written submission on record. Though the Appellant put forward a total of six (6) grounds of appeal, those grounds revolve the twin issues touching on liability and quantum.

5. On liability, it is the submission of the Appellant that the learned Senior Principal Magistrate erred in finding the Appellant liable yet the evidence tendered by the Respondent did not establish the claim. It is also stated that the trail magistrate did not take into account the fact that the Respondent was not on duty on the material day when the accident occurred. It was also argued that the Appellant's submissions were not considered.

6. The Respondent was of the submission that the Appellant's witnesses were not at the scene of the accident, which befell the Respondent on 12th November, 2004. It was pointed out that the witnesses summoned by the Appellant gave evidence relating to what took place on 13th November, 2004 as opposed to 12th November, 2004 when the accident, the subject matter of this appeal occurred. In other words the Respondent is of the submission that the appellant failed to controvert the evidence tendered by the Respondent in support of this action, therefore, the appeal should be dismissed.

7. I have carefully looked at paragraph 5 of the Plaint and it is clear that the Respondent expressly stated that he was injured on or about 13th November, 2004 while in the employment of the Appellant. He claims that heavy crates fell on him thus causing him serious injuries. In paragraph 5 of the defense, the Appellant denied all the allegations made in paragraph 5 of the plaint. It would appear the appellant denied the occurrence of the accident on the aforesaid dates and the particulars of negligence.

8. In his evidence, the Respondent (PW 2) was consistent that he got injured on 13th November, 2004 while in the Appellant's premises while carrying a crate of crana beans. PW 2 also pointed out in cross-examination that his name appeared in the shift for 13th November, 2004 and denied having gone to work on 14th and 16th November, 2004.

9. The Appellant summoned Enos Owino Owuondo (DW 1) who inter alia produced in evidence a wage sheet for 14th and 16th November, 2004 indicating that the Respondent was on duty and actually received payment of wages as a loader. DW 1 denied witnessing the accident which happened on 13th November, 2004 . DW 1 claimed that if the Respondent was injured on 13th November, 2014, he could have first visited the Appellant's nurse at the company's clinic. DW 1 also stated that the Respondent signed for payments of 12th and 13th November, 2004 and yet those who got injured are not supposed to get full payment and therefore, the Respondent signed the wage sheet because he was not injured.

10. John Muribi Mwangi (DW 2) gave evidence similar to that of DW 1. DW 2 told the trial court that any accident is always reflected in the register.

11. Jane Musavi Omuchiri (DW 3), the Appellant's nurse told the trial court that she was the company's Health and Safety Manager. She stated that she would document any incident of injury and would attend to the injured or make a referral to hospital for further treatment. DW 3 clearly stated that the Respondent's name does not appear in the register of those injured from 12th November, 2004 onwards.

12. The learned Senior Principal Magistrate considered the competing evidence and came to the conclusion that the list of employees for both shifts of 12th November, 2004 do not indicate the time period for each shift paid and therefore came to the conclusion that the Respondent had established that he got injured in the night of 12th and 13th November, 2004.

13. After a careful re-evaluation of the evidence, I have come to the conclusion that the learned Senior Principal Magistrate fell into error. The evidence of DW 1, DW 2 and DW 3 are consistent that the Respondent's name appeared n the list of persons who received his wages on 14th and 16th November, 2004. The Respondent's assertion that he left work on 13th November, 2004 appears to be doubtful when compared with the consistent evidence of DW 1, DW 2 and DW 3. There was no evidence that DW 1, DW 2, and DW 3 had any grudge against the Respondent.

14. Had the learned Senior Principal Magistrate taken time to critically analyse the evidence, she would have come to the conclusion that the Respondent had failed to prove that he was injured on 13th November, 2004. The Respondent attempted to produce treatment notes purportedly given to him by Kenyatta National Hospital but that attempt was thwarted by the defense, who objected the production of such documents.

15. Learned counsels made submissions on whether or not the Respondent would produce the treatment notes but that issue was not seriously addressed in the judgment of the learned Senior Principal Magistrate when the Respondent was recalled to produce the treatment notes. The issue was left hanging, therefore, the treatment notes were merely marked for identification purposes but were never produced as exhibits in evidence. Those treatment notes were of no evidential value.

16. It is also apparent from the evidence tendered by the Respondent that he did not visit the Appellant's clinic. The accident was not recorded in the Appellant's register. The Respondent too failed to summon a witness who worked with him the night or the day he was injured. It was incumbent upon him to summon such witnesses in view of the fact that the appellant right from the beginning had indicated in its defense that it was contesting the assertion that the Respondent got injured on 13th November, 2004.

17. After a critical analysis of the evidence on record, I have come to the conclusion that the Respondent failed to prove that he got injured on 13th November, 2004 while working for the Appellant. Consequently, the Respondent failed to establish liability on the part of the Appellant on a balance of probabilities. The appeal as against liability is found to be without merit.

18. On quantum, the Appellant is of the submission that the award of Ksh.200,000/- was unwarranted in light of the evidence adduced. The Respondent pointed out that on quantum, the appellant did not make any submission. The Respondent stated that the award was commensurate with the injuries he sustained.

19. I think the question raised on appeal is whether or not the award should have been made in the first place. The Appellant is categorical that there was no evidence to support the award. The recorded proceedings show that the Respondent heavily relied on the medical report prepared by Dr. Theophilus Wangata which was produced as an exhibit in evidence. A careful perusal of the medical report will reveal that Dr. Wangata did not examine the Respondent but instead relied on the treatment notes from Kenyatta National Hospital and previous medical reports which were never produced as exhibits in evidence. The medical reports and records Dr. Wangata relied on in preparing his medical report were not admitted in evidence. His report, therefore, is of no evidential value and cannot and could not have been used to establish the nature of injures the Respondent sustained.

20. With respect, I am persuaded by the Appellant's submission that there was no basis to make the award the learned Senior Principal magistrate gave.

21. In the end, this appeal is allowed. Consequently, the order entering judgment in favour of the Respondent is set aside and is substituted

with an order dismissing the suit with costs to the Appellant. The Appellant to also have costs of this appeal.

Dated, signed and delivered at Nairobi this 16th day of August, 2018.

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J K SERGON

JUDGE

In the presence of

.... *for the Appellant*

.... *for the Respondents*