REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 139 OF 2016

RAJAA STONES LIMITED.....APPELLANT

VERSUS

GEORGE KIMANI KINUTHIA.....RESPONDENT

(Being an appeal against the judgment of the Chief Magistrate's Court at Thika) Delivered on 18/2/2016 in Thika CMCC No. 509 of 2011 by Hon. Onsarigo RM)

JUDGMENT

1. By an undated Plaint filed on 19/08/2011, the Respondent herein sued the Appellant claiming compensation for injuries he allegedly sustained on 24th February, 2011 while in the course of his lawful duties as a result of the unsafe system of work. The accident allegedly occurred as the Respondent was loading stones into a lorry some of which fell on his left leg causing him to sustain serious injuries.

2. The Appellant filed its Defence denying any liability for the accident. In particular, the Appellant denied that the Respondent was its employee

3. The matter proceeded to a full hearing. At the conclusion of the trial, the trial court found the Appellant 100% liable for the accident. On quantum, the court entered judgment as follows:

a. General damages Kshs. 300,000/=

b. Special damages Kshs. 3,000/=

Total Kshs. 303,000/=

4. The Appellant is dissatisfied with the lower Court's judgment and has preferred the present Appeal. In its Memorandum of Appeal, it has listed ten grounds of appeal as follows:

"a) The Learned Trial Magistrate erred in law and fact in finding that the plaintiff had proved his case on a balance of probability when there was no such proof.

b) The Learned Trial Magistrate erred in law and fact in finding that the Respondent was an employee of the Appellant whereas no evidence had been adduced to that effect and the plaintiff had failed to prove that he was an employee of the Appellant as was required of him.

c) The Learned Trial Magistrate ignored or totally disregarded the evidence by the defendant particularly of the master roll/the register of employees tendered in evidence and instead relied on presumed evidence and thereby arrived at a wrong decision.

d) The Learned Trial Magistrate erred in law and fact by failing to properly scrutinize and evaluate the evidence tendered by the Appellant and thereby arrived at a wrong decision.

e) The Learned Trial Magistrate erred and in law and fact in shifting the burden of proof to the Appellant when it had no such burden to discharge.

f) The Learned Trial Magistrate erred in finding that the Appellant had not provided a safe system of working and particularly did not provide gloves to the plaintiff and hence failed to comprehend that the plaintiff could ignore the

safety precautions and loading did not create any unusual danger to the Respondent, which he did not fully appreciate and thereby arrived at a wrong decision.

g) The Learned Trial Magistrate erred both in law and fact in making an award on liability which was not supported by facts and evidence. The award on quantum was against the weight of the evidence before the court and without any consideration to the submissions of the Appellant whilst. That notwithstanding, the award on quantum is unreasonably too high taking into consideration the nature of soft tissues injuries allegedly suffered by the plaintiff.

h) The Learned Trial Magistrate erred in awarding General and Special damages in the sum of Ksh. 303,000/= despite absence of prove that the plaintiff was an employee of the Appellant and thus was not entitled to damages sought.

i) The Learned Trial Magistrate also failed to comprehend that the plaintiff could have been injured elsewhere, in the circumstances.

j) The Learned Trial Magistrate erred in law in failing to take cognizance of the case of the case laws put to him in the submissions of the Appellant and thereby arrived at a wrong decision".

5. The Respondent's case, as it emerged at the trial was that he was employed as a loader at the Appellant's company and that he was injured on his right hand by falling stones. He testified that he was taken to Thika Level 5 hospital and was issued with a treatment card. He was also examined by doctor Kung'u who prepared a medical report. He blamed his co-workers for not arranging the stones properly. He also stated that he was not provided with gloves. In cross examination he stated that he was not issued with an employment letter and had no application letter to show that he applied for the job. When re-examined he confirmed that he was employed as a casual.

6. PW2 George Kung'u is the doctor who examined the Respondent and prepared his medical report. He stated that the Respondent had sustained a fracture of the radius. On examination the Respondent complained of pain on the fracture site. His assessment was that the Respondent sustained grievous harm.

7. Agnes Wanjiku (DW1) testified for the Appellant. She testified that the Respondent does not appear in the company's master roll, that the loaders are contracted by the buyers of the stones and the Appellant had no association with the loaders. That they provide letters of employment to their employees and issue them with salary vouchers. She further testified that the Appellant's business was cutting stones and therefore never engaged the loaders. In cross examination, she stated that the employed casual workers are paid using petty cash voucher and the master roll.

8. The appeal was canvassed by way of written submissions. The Appellant submitted that to succeed, the Respondent had to prove that he was injured while engaged on duties assigned in the course of his employment with the Appellant. It was submitted that the burden of proof lay solely with the Respondent. It was the Appellant's submission that the evidence given in court was that the Respondent was a loader at the Appellant's company but did not produce the employment documents. On the other hand, DW1 testified that due procedure had to be followed during employment and a master roll is kept and had to be signed by all employees and that the loaders were separately hired by the Appellant's clients.

9. In the circumstances, the Appellant submitted that court could only rely on the evidence produced. The Respondent did not produce any evidence to show that he was employed by the Appellant and thus failed to prove a duty of care to him and its breach. Finally, the Appellant submitted that the lower court disregarded the evidence produced by the Appellant and also shifted the burden of proof to the Appellant.

10. The Respondent submitted he was a casual worker and was not issued with an employment identification card and therefore could not produce the same during trial. It was also submitted that the assertion by the Appellant that the Respondent was not its employee because his name was missing in the master roll should be rejected. Because, the master roll was in the Appellant's custody thus likely to be tampered with. It was contended that the Appellant during trial failed to show the safety measures instituted by the company. The Respondent submitted that the general damages awarded are justified as the Respondent sustained a fracture of the mid- shaft radius as opposed to soft tissue injury as claimed by the Appellant.

11. This court has considered the evidence adduced at the trial and submissions on this appeal. A first appeal is in the nature of a hearing. The first appellate court is therefore obligated to re- evaluate the evidence and draw its own conclusions, but in doing so to bear in mind that it did not have the opportunity to hear or see the witnesses – see **Peter v Sunday Post Limited [1958] EA 424; Selle and Anor v Associated Motor Boat Company Limited and others [1968] EA 123.**

12. The Court of Appeal in **Wareham trading as A.F Wareham** and **2 others v Kenya Post Office Savings Bank [2004] 2KLR91**, set out the duty of the plaintiff in the adversarial system by stating that:

> **"[W]e are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings and the issues of fact or law framed by the parties or the court on the basis of those pleadings pursuant to order XIV of the Civil Procedure Rules. And the burden of proof is on the plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden should fail."**

13. The Respondent's case was built upon three key pleaded facts; namely his employment with the Appellant as a loader, his injury while at work on 24th February, 2011 and for which the Appellant was to blame. These facts were disputed in the defence filed by the Appellants.

14. During the trial, the Appellant merely stated that he was employed with the Appellant as a loader, was on duty at an undisclosed place on 24th February 2011, and was injured on his arm when stones fell on the arm. That he blamed his co-workers for failing to arrange the stones properly and his employer for not providing him with gloves. He also called one Dr. George Kungu (PW2) who stated that the Respondent had sustained a fracture to the right arm. The Respondent had no record or document to confirm his employment with the Appellants.

15. The Appellants on their part tendered records of persons employed by them on the material date which did not include the Respondent, DW1 stating categorically that the Respondent was not an employee of the Appellant in the material period. That all employees were issued with employment letters and paid through the company's payroll.

16. The trial magistrate, rather than seek proof by the Respondent on his allegations, instead shifted the burden on the Appellants to disprove the Respondent's bare assertions. The trial magistrate observed inter alia that the failure by the Appellant to furnish petty cash voucher evidence was *"Prejudicial to their own case"*.

The magistrate proceeded to ignore the dearth of evidence by the Respondent on the issue. Besides, he did not mark any exhibits save those tendered by PW2.

17. In my view, it is surprising that the Plaintiff's exhibits on record bear exhibit marks which do not correspond with the testimony of the Plaintiff/Respondent. Likewise, it is not clear from the testimony of DW1 whether the Muster Roll referred to in her statement was treated as an exhibit. Even so, the trial magistrate referred to it in his judgment, suggesting that the same may have been tampered with and therefore could not be taken as credible evidence.

18. In their submissions the Respondents advocates have reiterated and defended this line of reasoning, in clear disregard of the provisions of Section 107 of the Evidence Act. For my part, having reviewed the scanty evidence tendered by the Respondent, I fully agree with the Appellants that the Respondent did not discharge burden of proof on a balance of probabilities that he was an employee of the Appellant in the material period.

19. The Respondent's evidence as to the occurrence of the accident is equally dismal. He merely stated that some stones fell on him because other workers did not arrange them in a proper manner. There are no details as to the position or location from which the stones fell and precisely how the co-worker's alleged shoddy arrangement occasioned the falling of the stones. The testimony of the Plaintiff is vague and scanty. It is not clear how wearing of gloves could have protected his hand from falling stones.

20. Despite this scanty description of the accident, the trial magistrate stated in his judgment that:

> **"Carrying of stones is a manual activity that was in the control of the Plaintiff. His major grouse was that the defendant has not issued him with gloves which could have come in handy in such circumstances"(sic).**

21. From these statements it seems that the trial magistrate had concluded that the Respondent's injuries resulted from or were sustained during the activity of carrying stones by the Respondent.The judgment does not refer to the actual manner in which the Respondent alleged the accident occurred beyond stating that there was a falling of stones. This brings me to the injuries alleged by the Respondent. In the plaint, the Respondent averred that he injured his left leg when stones, fell on it from a lorry onto which he was loading stones. This version was not explicitly repeated in his evidence.

22. But quite apart from the fact that Respondent did not describe the pleaded scenario as completely in his evidence, the Respondent claimed in his testimony and that by PW2 that he sustained injury to right arm, not the left leg as pleaded. It was not open to the Respondent to give evidence in respect of an injury quite different from that pleaded in his plaint. These discrepancies escaped the trial magistrate, who on the face of it was determined to find liability for the injuries asserted by the Respondent in his evidence.

23. The judgment of the court below is against the weight of evidence and cannot stand. The Respondent failed to establish his case to the required standard and the court misdirected itself by going out of its way to salvage it by all means including shifting the burden of proof upon the Appellants.

24. The appeal is allowed in its entirety and the judgment and decree in the court below are set aside. This court substitutes therefore an order dismissing the suit with costs to the Appellant. The Appellant is also awarded the costs of this appeal.

DELIVERED AND SIGNED AT KIAMBU THIS 21st DAY OF SEPTEMBER, 2018.

In the presence of:

For the Appellants - Wambugu holding brief for Ms Waititu

For the Respondent - No appearance

Court Clerk - Nancy

.....

C. MEOLI

JUDGE