REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL NO. 46 OF 2016

BETWEEN

VITALIS JUMA ODERA ……..…...………...……...……………..……...………. APPELLANT

AND

SINOHYDRO COMPANY LIMITED ……………………………..…………….. RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. Adika, SRM dated

20th June 2016 at the Chief Magistrates Court at Kisumu in

Civil Case No. 493 of 2012)

JUDGMENT

1. Before the subordinate court, the appellant claimed that he was employed by the respondent as a driver operating a tipper lorry. He alleged in the plaint that on 3rd October 2012, while delivering sand, he was injured when the door to the lorry broke and injured his right-hand fingers. He claimed damages for negligence from the respondent.

2. The defendant denied that the appellant was its employee or that he was injured while working for it. In the alternative, it contended that if the appellant was injured in the course of employment, he voluntarily assumed the risk or that he was substantially to blame for the accident.

3. After hearing the case, the trial magistrate dismissed the appellant's case on the ground that he failed to prove that he was the respondent's employee. It is this judgment that has precipitated this appeal based on the memorandum of appeal dated 5th June 2016

4. The appellant's case is that the trial magistrate erred in law and fact in holding that the appellant was not the respondent's employee despite the appellant tabling sufficient evidence. He faulted the trial magistrate for failing to find that the appellant was not injured in the course of employment despite overwhelming evidence. Counsel for the appellant, Mr Ngala, submitted that the appellant had proved its case on the balance of probabilities since his case was not controverted. He urged the court to allow the appeal, find in favour of the appellant and award damages.

5. Mr Ojuro, learned counsel for the respondent, supported the findings of the trial court. He submitted that the evidence placed before trial court to prove employment could not be deciphered as it was written in Chinese hence the trial magistrate was right to conclude that the appellant had not proved it case to the required standard.

6. The primary role of the first appellate court is to re-evaluate the evidence before the trial court and then determine whether the conclusions reached by the learned trial magistrate stand while making allowance for the fact that it neither heard or saw the witnesses testify (see ***Selle v Associated Motor Boat Co.*** **[1968] EA 123** and ***Kenya Ports Authority v Kuston (Kenya) Limited*** **[2009] 2 EA 212**).

7. The appellant (PW 1) testified that on 3rd October 2012, he was taking murram to Nyamasaria. In the course, of dumping the murram, he tried to offload it by using the automatic button but it was not working, so he resorted to offloading it manually. As he was opening the door, he was injured on his two last fingers. He was treated at Aga Khan Hospital for the injuries and later examined by Dr Okombo (PW 2) who produced the medical report. The appellant also produced an Employee Attendance Record to support his case. The respondent did not call any witness.

8. As to whether the appellant was an employee, the trial magistrate held as follows;

> *[I] have not seen any evidence that the plaintiff was employed by the defendant apart from his averments that he was so employed. It is the plaintiff who claimed that he was employed therefore the onus to prove the same was on him. … For this court to award against the defendant it must be shown that the injury occurred while the plaintiff was in the employment of the defendant.*

9. I agree with the appellant's counsel that there was sufficient evidence that the appellant was employed by the respondent. First, the appellant testimony on oath was not controverted by contrary evidence. Second, the produced an employee attendance record which, though it was in Chinese, was clearly titled in English, *"SINOHYDRO EMPLOYEE ATTENDANCE RECORD."* The document bore that appellant's name, Identity card, PIN, NHIF and NSSF numbers. The trial magistrate did not consider this document which constituted sufficient evidence that the appellant was an employee was employed by the respondent. I therefore find and hold that the trial magistrate erred in dismissing the appellant's claim because he was not an employee.

10. Unfortunately, and despite dismissing the claim, the trial magistrate did not make a finding on the issue on negligence and damages. It is proper, even in such cases, for the trial court to express its views on the merits of the case. This principle was expressed in the ***Selle*** **(Supra)** case by **Sir Clement De Lestang, VP** as follows:

> *It is however unfortunate that the learned Judge did not assess the damages as the case will now have to go back for that to be done. It is always advisable for a Judge of first instance to decide all the issues raised in the case before him so that further expenses to the parties and further delay may be avoided in the event of the Court of Appeal having to adopt the course which we must adopt in the present case. Had this been done it would not have been necessary to send the case back to the High Court for damages to be assessed thus increasing the large costs which the parties have already incurred …*

In the same case *Law, JA.,* expressed himself thus on the issue;

> *It is always desirable, in a suit for damages, for the trial Judge to make a finding as to the amount to which he thinks the plaintiff would be entitled if successful, even though he gives judgment for the defendant. Much time and expenses can be avoided if this course is followed …*

11. This court therefore has two options; to remit the matter back to the trial court for determination or to proceed with determination based on the evidence on record. In my view, the latter option meets the demands of justice since the original suit was filed five years ago, and all the evidence and submissions are on record.

12. From the evidence, there is no doubt that an accident took place but the proof that an accident took place is not enough to establish negligence. The plaintiff must show a causal link between the negligence and injury. As Visram J., held in ***Statpack Industries v James Mbithi Munyao*** **NBI HCCA No. 152 of 2003 [2005]eKLR**,

Coming now to the more important issue of "causation", it is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily a result of someone's negligence. An injury per se is not sufficient to hold someone liable for the same.

13. The appellant's case set out in para. 5 of the plaint was that, *"[W]hen the Plaintiff was opening the door of the lorry (tipper) so as to tip the sand and in the process of the Plaintiff opening the door, the door got broken and hit the Plaintiff's right hand fingers…"* In his testimony, the plaintiff explained that because the automatic mechanism was not working he had to resort to the manual process. He stated that, *"I now resorted to use a bar to operate it when I got hurt on the last two fingers by the door."* The appellant's testimony is inconsistent with the pleading. He merely told that court he got hurt while using a bar to open the door. He did not explain or state that the door got broken or how the door was defective to the extent that it injured him as stated in the plaint. In short, the appellant did not discharge his burden of showing that the respondent's defective door was the cause of his injury. It is trite law that the evidence must support the pleading and in this respect, I find that the plaintiff failed to prove its case.

14. Turning to the issue of damages, the appellant was injured on his ring and little fingers of the right hand. Dr Okombo (PW 2), who examined the appellant on 19th October 2012, confirmed that presence of injuries and noted that the appellant complained of pain in the right little finger and numbness and pain of the right ring finger. His opinion was that the appellant had not fully recovered at the time of examination and that he required physiotherapy and pain killers. He classified the degree of injury as harm and assessed the degree of incapacity at 5%.

15. The appellant submitted that a sum of Kshs. 180,000/- as general damages was sufficient compensation. He relied on the case of ***Elijah Mwangi Kanunga v Socfinaf Company Ltd*** **NBI HCCC No. 307 of 2001 (UR)** where a sum of Kshs. 250,000/- was awarded in 2004 for what the judge found to be severe injuries. He also cited the case of ***James Gaturu Kimani v Kamanga Wairegi*** **NBI HCCC No. 4133 of 1991 (UR)** where the plaintiff suffered head injuries and an injury to the left knee and was awarded Kshs. 150,000/- in 1997.

16. The respondent submitted that Kshs. 70,000/- was adequate compensation. It relied on the case of ***Kipkebe Limited v Dismas Nyangau Omayio*** **[2011]eKLR** where the plaintiff suffered a cut injury on his third left finger when the knife he was using slipped and cut his third left finger. He was awarded Kshs. 70,000/- in 2011.

17. Considering the injuries suffered by the appellant, I find the decisions cited by the appellant reflect more serious or severe injuries while the case cited by the respondent is more relevant. Noting that no two cases are alike and that a claimant is entitled to fair and reasonable compensation, I would assess general damages at Kshs. 90,000/-.

18. In view of the decision I have reached on liability, I must dismiss the appeal. I make no order as to costs as the appellant succeeded in part.

DATED and **DELIVERED** at **KISUMU** this **28th day of February 2017.**

D.S. MAJANJA

JUDGE

Mr Ngala instructed by Ngala Awino and Company Advocates for the appellant.

Mr Ojuro instructed by Otieno, Yogo, Ojuro and Company Advocates for the respondent.