REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 400 OF 2011

MULTIPLE HAULIERS (E.A) LTD..... APPELLANT

-V E R S U S –

GEORGE MUSAU KYALO .....RESPONDENT

(Being an appeal against the judgment of R.A. Onganyo (Mrs), Principal

Magistrate delivered in Nairobi, in CMCC No. 5242 of 2007 on 28th day of July 2011)

JUDGEMENT

1) George Musau Kyalo, the respondent herein, filed an action before the Chief Magistrate's, Court Milimani Commercial Court, Nairobi, against Multiple Hauliers (E.A) Ltd the appellant herein, claiming both general and special damages for the injuries he suffered on 20.9.2004 while working as a mechanic at the appellant's premises while dismantling a clutch. The appellant filed a defence denying the respondent's claim. The suit was heard and determined in favour of the respondent by Hon. R. A. Oganyo learned Principal Magistrate. Being dissatisfied, the appellant preferred this appeal.

2) On appeal, the appellant put forward the following grounds in its memorandum of appeal :

> ***1. THAT the learned trial magistrate erred in law and in fact in failing to find that the respondent had not adduced satisfactory evidence to establish and/or prove his case against the appellant on a balance of probabilities.***
>
> ***2. THAT the learned trial magistrate erred in law and in fact in holding that the respondent was injured at work on the 20th September 2004 in the absence of supportive evidence and in failing to consider the appellant's submissions in this respect and in awarding damages to the respondent on that basis.***
>
> ***3. THAT the learned trial magistrate erred in law and in fact in finding that the appellant paid the plaintiff's bills incurred at Kenyatta National Hospital when there was no evidence to support this or at all.***
>
> ***4. THAT the learned trial magistrate erred in law and in fact in failing to address the issue of liability and in not giving the reason for finding in favour of the respondent on liability.***

3) When the appeal came up for hearing, learned counsels appearing in the matter recorded a consent order to have the appeal disposed of by written submissions.

4) I have re-evaluated the case that was before the trial court. I have also considered the rival submissions of learned counsels. At the trial the respondent presented the evidence of two witnesses while the appellant summoned one witness in support of their cases. It is the evidence of the respondent that he got injured on 20.9.2004 while in the course of employment of the appellant as a mechanic. The respondent stated that he got injured in the finger while dismantling a clutch in the appellants garage. Upon getting injured the respondent avers that he reported the incident to the foreman who in turn gave him first aid before being referred to the hospital. The foreman is said to have taken him to Avenue hospital where he was referred to Kenyatta national hospital where the respondent was treated. The respondent stated that he was stitched at Kenyatta National Hospital and discharged. The stitches were later removed in a private clinic in Lunga Lunga. The respondent said that he blames the appellant for failing to supply him with protective gears and for allowing him to use a fork lift which was not working. The appellant through the evidence of Peter Agumba Awour stated that the respondent was not in the list of those employees who were injured on 20.9.2004 and his name did not appear in the appellant's records, therefore he was not injured. Upon taking into account the evidence from both sides, the learned Principal magistrate concluded in her judgment that the letter written to the appellant to settled the respondent's bills by Kenyatta National Hospital confirmed that the respondent was injured in his place of work.

5) The appellant put forward four grounds of appeal. Those grounds revolve around the question as to whether the appellant was liable and if yes what is the appropriate quantum.

6) On liability, the appellant is of the submission that the respondent had failed to present credible evidence to prove that he was injured as a result of the appellant's negligence. The recorded evidence shows that the respondent has alleged that he was injured while repairing a clutch in the appellant's garage. The respondent also argues that he was not supplied with protective gears while working as a mechanic for the appellant. He also complained that he was given a faulty forklift that day. The respondent claimed he was given trainees to assist him fix the clutch. The issue to be determined is whether or not the respondent discharged the burden of proof. A careful perusal of the decision of the learned Principal Magistrate will reveal that the respondent got injured while in the course of employment. However, the question is whether the respondent established that while in the course of employment, the appellant played a role in the accident. At the back of mind, it is believable that indeed the respondent was an employee of the appellant. In my humble opinion that the respondent was enjoined to prove that the accident occurred at the appellant's premises and that the same occurred due to the negligence or omission of the appellant. The recorded evidence merely state that the respondent was not given protective gear and the forklift given was faulty. I have critically examined the evidence tendered by the respondent to establish liability against the appellant and I find no credible evidence of negligence on the appellant's part. The respondent did not state what sort of protective gear was required to be supplied to him by the appellant. There is also no credible evidence that the alleged forklift was faulty. The respondent miserably failed to attach liability to the appellant. The learned principal magistrate erred when she stated that the respondent was injured in the appellant's premises.

7) A person can be injured in another person's compound but such a person must discharge the burden of proof as against the employer and or the owner of the premises. In this case I find that the respondent had failed on a balance of probabilities to establish liability against the appellant.

8) The second issue to be considered is the question touching on quantum. The learned Principal Magistrate formed the opinion that a sum of kshs.90,000/= is sufficient as compensation for an injury on the right finger. It would appear from the grounds of appeal that the appellant did not intend to appeal against the award on damages. Since this court has not been invited to determine the question on quantum I decline to make a determination on the same.

9) In the end, I find the appeal as against liability to be meritorious.

Consequently the order finding the appellant liable is set aside and is substituted with an order dismissing the suit with costs. Costs of the appeal is awarded to the appellant.

Dated, Signed and Delivered in open court this 31st day of March, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent