REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 44 OF 2014

BONIFACE OJIAMBO KODOLI ………………………...….... APPELLANT

VERSUS

GRAIN BULK HANDLERS LIMITED ……………….…….. RESPONDENT

(An appeal from the judgment of Hon. D. Wasike, R.M. delivered on 31st March, 2014 in Mombasa SRMCC No. 915 of 2010)

JUDGMENT

1. The appellant Boniface Ojiambo Kodoli being aggrieved by the Judgment of Hon. D. Wasike filed a memorandum of appeal on 14th April, 2014 raising the following grounds of appeal:-

(i) That the Learned Trial Magistrate erred in law and in fact in finding that no evidence was given by the Plaintiff/Appellant to show the connection or causal link between the alleged accident and the Defendant/Respondent's negligence;

(ii) That the Learned Trial Magistrate erred in law and in fact in failing to find that the fact of the Plaintiff/Appellant and his co-employees being hurried through their work by their supervisor, an employee of the Respondent, and the fact of bags of maize falling from their positions and in the process injuring the plaintiff was in itself evidence of negligence against the Defendant/Respondent;

(iii) That the Learned Trial Magistrate erred in law and in fact in finding that the Plaintiff/Appellant failed in his evidence to prove what he had pleaded thereby impliedly raising the burden of proof to that of beyond reasonable doubt instead of deciding on the requisite standard of proof on a balance of probabilities;

(iv) That the Learned Trial Magistrate erred in law and in fact in finding that the plaintiff's evidence did not disclose what caused the accident;

(v) That the Learned Trial Magistrate erred in law and in fact in dismissing the plaintiff's suit and requiring each party to bear their own costs; and

(vi) That the Learned Trial Magistrate erred in law and in fact in assessing general damages for pain, suffering and loss of amenities at Kshs. 90,000/= had the plaintiff been successful. The appellant contends that the said assessment is too low and not commensurate with the injuries

sustained by the Appellant.

The appellant prays for the following orders:-

(a) That the Judgment of the lower court dismissing the appellant's suit be set aside;

(b) That Judgment be entered in favour of the appellant as against the respondent by holding the respondent wholly liable for the injuries sustained by the appellant;

(c) That the award of general damages for pain, suffering and loss of amenities be enhanced to reflect a fair assessment commensurate with the injuries sustained by the appellant;

(d) That costs of the appeal and those of the trial suit be awarded to the appellant.

DUTY OF THE FIRST APPELLATE COURT

As has been said time and again, the duty of the first appellate court is to analyze and re-evaluate the evidence adduced before the lower court and come to its own independent decision while bearing in mind that it has neither seen nor heard the witnesses who testified. This duty was well stated by the Court of Appeal in **Selle vs Associated Motor Boat Company Limited [1968] E.A.123** where it stated that:

> ***"An appeal to this Court from a trial by the High Court is by way of re-trial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case general."***

This court will undertake its duty and apply the law to the facts in determination of this appeal.

2. PW1, Boniface Ojiambo Kodoli (the appellant) testified in the lower court that on 9th August, 2009, at Grain Bulk Handlers Limited at Shimanzi, the respondent company, he was putting sacks on persons who were carrying them. As he stood on a stack of maize facing outwards, 5 sacks from other persons who were bringing them down fell on his left leg which got injured on the left knee. He stayed there for 2 hours and then his colleagues took him to Coast General Hospital. He reiterated that other people were bringing down the sacks and that is when 5 of them fell on him. He stated that he informed a supervisor by the name of Mr. Okwiri who did nothing about it. As he was unable to walk, he took a Tuktuk (auto rickshaw) to hospital where he was treated as an outpatient. He identified the book with treatment notes for 9th August, 2009, which was marked as PMFI-1.

3. The appellant blamed the respondent for the accident for failing to take due regard of how the staff were working. In his view, the work needed care and for the people to work slowly but they were being forced to work very fast so that they (respondent) could get more money. He added that the sacks were heavy and needed careful handling. On his part, he was careful. The sacks fell because of being rushed (to work). He testified that their names were written on a plain paper and they were not given any document. The appellant testified that their payments were made on a daily basis and he had worked for the respondent on and off for about 6 months. His Advocate referred him to Dr. Ajoni Adede who examined him and prepared a medical report on 10th November, 2009, which he identified as PMFI-2. He paid Ksh. 2,000/= as per the receipt marked PMFI-3. He produced the demand letter as plf. exh 4. He prayed for special and general damages.

4. On cross-examination, the appellant stated that he was employed as a casual labourer at the respondent company, where he worked at the warehouse/store. He stated that Mr. Okwiri would take their identity

cards and open the gate for them to go in but they were never given any papers. They used to sign on a piece of paper where their names were written. He reiterated that 5 sacks fell on him, and not 1 sack.

5. PW2 was Doctor Ajoni Adede who testified that he examined the appellant on 10th November, 2009 after (he sustained) a work injury on 9th August, 2009. He observed that the appellant had a blunt object injury on the left knee. He was initially treated at Coast General Hospital where x-rays were done. PW2 found that the appellant's left knee was tender and with reduced movement. The X-ray showed no bone injury. Based on the treatment notes from Coast General Hospital, PW2 concluded that the plaintiff had suffered soft tissue injuries. He was expected to recover fully with no residual disability. PW2 produced the medical report dated 10th November, 2009 as plf. exh. 2, a receipt for Kshs. 2,000/= dated 10th November, 2009 as plf. exh 3, a receipt dated 19th July, 2013 for Kshs. 3,000/= as plf. exh. 5 and treatment notes as plf. exh. 1.

6. The respondent called its defence witness, Catherine Nduku Mwema who testified as DW1. She informed the court that she had worked as a Personnel and Registration Officer for 9 years at the respondent company. She testified that her work involves general employee welfare including keeping of records. She stated that employees clock-in when they report to work and clock-out every day. She indicated that she files the reports generated, which have all the names of the employees of the respondent as well as their time of clocking in and out.

7. She referred to the clocking-in, clocking-out report of 21st July, 2009 to 20th August, 2009. She indicated that there were 147 employees, but the appellant was not one of them in accordance with her register. She stated that the respondent does not employ casual labourers at all. She produced the analysis report as D. exh. 1.

8. On cross-examination, DW2 stated that the respondent handles maize and wheat in bulk but does not take casuals to offload these. This was however not indicated in the respondent's defence. She stated that D. exh. 1 was a total analysis report but not a total complete list of employees. The report did not state that it excludes management or casual employees. She stated that in making an analysis one can pick a section of the employees.

9. On re-examination, DW1 explained that while compiling the analysis, they include all employees except management.

10. The Hon. Magistrate duly analyzed the evidence adduced before her and applied the law to the facts. It was her finding that the appellant failed to show the causal link of the defendant's alleged negligence that led to the his injury. She also held that negligence was not proved on the part of the respondent and therefore dismissed the suit.

ANALYSIS AND DETERMINATION

The issue for consideration is if the appellant proved the causal link between the accident and the respondent.

11. When highlighting his submissions, Mr. Alwenya for the appellant referred the court to paragraph 5 of the plaint which contains the cause of action and particulars of injuries. He further submitted that although the respondent denied having employed the appellant, the Hon. Magistrate found that he was so employed. In Mr. Alwenya's view, the respondent therefore owed a duty of care to the appellant. He further stated that the appellant testified that the bags needed careful handling but they were being rushed to work. It was submitted that the accident happened as a result of lack of care on the part of the respondent's supervisors thus a causal link had been established. It was further submitted that the appellant was injured by one of the 5 bags that were released by the appellant's co-worker. Mr. Alwenya prayed for the appeal to be allowed and for damages at the sum of Kshs. 200,000/= to be awarded. He submitted that the test laid out in the case of **Statpack Industries vs James Mbithi Munyao**, Nairobi Civil Appeal No. 152 of 2013, on causal link had been established. Counsel submitted that the balance of proof was on a balance of probability, not reasonable doubt.

12. On his part, Mr. Ajigo, Counsel for the respondent submitted that the appellant was inconsistent in his evidence by stating that he was injured by 5 sacks, yet in paragraph 5 of the plaint, he made mention of being injured by one sack. In the Counsel's view, the causal link was not proved, as the fact of being hurried to work is not evidence of negligence and this was the finding of the Hon. Magistrate. On the issue of quantum, Counsel submitted that Ksh.50,000/= would be adequate compensation. He however prayed for the appeal to be dismissed.

13. Although the appellant in the plaint averred that 5 sacks rolled and one injured him, this was at variance with his evidence in court that 5 sacks rolled and fell on his leg thus injuring him. The departure of his evidence in chief from his pleadings does not however vitiate the fact that he was injured at his place of work. As Counsel for the appellant submitted, the burden of proof in this case is on a balance of probability not proof beyond reasonable doubt.

14. Save for Mr. Okwiri who used to facilitate the entry of the workers into the warehouse, there is no evidence that there was a supervisor who was in charge of ascertaining that the sacks in issue were safely being handled as the workers undertook their duties in the warehouse. It is clear in my mind that if there had been proper supervision of the workers in the manner in which the sacks of maize were being handled, the accident herein would not have occurred. In the plaint filed on 12th April, 2010, the appellant in paragraph 5 outlined the particulars of the respondent's negligence. It is my finding that the particulars outlined in paragraphs 5 (c), (d) (e) and (f) were proved by the evidence of the appellant.

15. It is evident that the appellant was not the author of his own misfortune. The injury he sustained arose in the course of his duty at the respondent's warehouse. I fail to see how the respondent can escape liability when the warehouse where the appellant was working belonged to it, the sacks of maize that were being handled belonged to it and if they were not, they were in its custody. The appellants co-workers who released the sacks of maize that caused the appellant's injury were been employed by the respondent. It is not material that the appellant did not see the person who released the sacks and how they went rolling down before injuring him. It was the appellant's evidence that he was facing outwards thus he had his back to the sacks of maize. What is material and from where I draw the causal link is that the work that was being done was to the benefit of the respondent and that the co-workers who released the sacks that fell and injured the appellant were in the warehouse undertaking work assigned by the respondent.

16. In the case of **Wilson vs Tyneesie Window Clearing Co.** [1958] 2QB 110 at 123-124, Parker L.J. stated thus:

> ***"I think this case is a very good example of the difficulties that one gets into in treating the duty owed at common law by a master to his servant as a number of separate duties …. It is no doubt convenient, when one is dealing with any particular case, to divide that duty into a number of categories, but for myself, I prefer to consider <u>the Master's duty as one applicable in all circumstances, namely, to take reasonable care for safety of his men …. Or to take reasonable care to so carry out his operation as not subject those employed by him to unnecessary risk</u>***." (emphasis added)

17. The appellant testified that they were being rushed to do the work and that is where the respondent fell short in maintaining the duty of care of that it owed to its servant, the appellant. The act of 5 sacks rolling down right into the path of the appellant shows that there was negligence in the manner the work was being done. As a result of the said shortcoming, I find the respondent negligent and liable for the injuries that the appellant sustained.

18. It is my finding that the Magistrate properly dismissed the defence evidence as the report that was produced did not capture all the persons that were working at the appellant's company when the accident occurred. She found that although DW1 stated that there were 147 employees, she produced a clock-in, clock-out log of 133 employees. The said log could therefore not be used as conclusive proof of the non-employment of the appellant. The Hon. Magistrate however misdirected herself in applying the principle of causal link to the facts before her and reached the wrong conclusion.

19. The Counsel for the appellant sought general damages of Kshs. 200,000/- whereas Counsel for the respondent is of the view that damages of Kshs. 50,000/- would be adequate. The Learned Magistrate on considering decided cases relied upon by Counsel on record was of the view that if the appellant had been successful, she would have awarded him general damages of Kshs. 90,000/-.

20. On my part, I have considered the decisions in ***Peter Kahugu & another v Ongaro,*** High Court, Nairobi, Civil Appeal 676 of 2000 [2004] eKLR, where the plaintiff suffered soft tissue injuries and an award of Kshs 80,000 was made. In ***Mumias Sugar Company Limited v Julius Shibia,*** High Court Kakamega, [2015] eKLR, the court reduced the general damages for multiple soft tissue injuries to Kshs 100,000/-. I hereby take into account the inflationary trends since the time the foregoing cases were decided and when that the appellant herein was injured in the year 2010. I also take into account that Judgment herein was delivered in the year 2014. Having taken those factors into consideration, I enter Judgment in favour of the appellant as against the respondent for the sum of Kshs.150,000/-. I also award the appellant special damages at the sum of Kshs. 5,000/- was pleaded and proved. I award costs of the case in the lower court and this appeal to the appellant. Interest at court rates is also awarded to the appellant.

DELIVERED, **DATED** and **SIGNED** at **MOMBASA** on this **24th** day of **March, 2017**.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Alwenya for the appellant

No appearance for the respondent

Oliver Musundi - Court Assistant