REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 109 OF 2014

VICTOR ONYANGO AKATCH.…….…….....…….APPELLANT

VERSUS

ZHONGHAO OVERSEAS CONSTRUCTION ENGINEERING LTD ...……..RESPONDENT

(Being an Appeal from the Judgment of Hon. A.A.Odawo in

Kisumu CMCC NO.151 OF 2013 delivered on 7th October 2014)

JUDGMENT

Victor OnyangoAkatch ***(hereinafter referred to as appellant)*** sued **Zhonghao Overseas Construction Engineering Ltd** ***(hereinafter referred to as respondent)*** in the lower court claiming damages for injuries allegedly suffered on 17th November 2012 while the appellant was lawfully working for the respondent.

The defendant/appellant filed a statement of Defence and denied the claim and urged the court to dismiss the respondent/plaintiff's claim with costs.

In a judgment delivered on**7th October 2014,**the learned trial Magistrate**found that the appellant had not proved his claim and**dismissed claim with costs.

The Appeal

The Appellant being dissatisfied with the lower court's decision preferred this appeal and filed the Memorandum of Appeal dated 21st October 2014 which can be summarized into 5 grounds that:-

1. The Learned Magistrate erred in her appreciation of the evidence in the case before her by finding that no evidence of injury was produced by the appellant when infact there was overwhelming evidence of injury produced and admitted on the record

2. It was a grave error on the part of the learned trial magistrate to believe without question the assertion in EXH D1that there was no accident reported to the respondent on 17.11.12 while at the same time disbelieving the appellant's testimony to the effect that upon being injured, his supervisor threw him out of the respondent's premises and refused to cater for his medication

3. The Learned Magistrate erred in both law and fact by failing to draw an adverse inference over the respondent's failure to call as a witness their supervisor at the time of the accident more so in the light of the fact that the appellant had contended that the said supervisor

kicked him out of the premises upon his injury

4. It was a tremendous misdirection on the part of the trial magistrate to find and hold that there was no evidence of negligence or breach of statutory dutyon the part of the respondent when there was on record uncontroverted testimony to the effect that the appellant's working surface was slippery and no proper foot ware or harness to avoid falling from a height was provided

5. The quantum of damages proposed by the learned trial magistrate is very much on the lower side regard being had to the nature of the injuries suffered by the appellant

SUBMISSIONS BY THE PARTIES

Appellant's submissions

When the appeal came up for hearing on 21.3.17, the respondent's counsel did not attend court although service had been effected. Mr. Onyango, advocate for the appellant urged court to draw an adverse inference on the part of the respondent since its supervisor who allegedly refused to record the appellant's injury and also chased him out of the factory after the accident was not called as a witness. He submitted that the appellate was denied justice because he had no money to go to hospital on the date he was injured.

The evidence

The appellant stated thaton 17.11.12; he was fixing metal about 4 to 5 metres off the ground when he slipped and fell injuring his left leg. He stated that he reported the matter to his supervisor who chased him out of the factory. That on the same date; hewas treated at Wema Clinic with painkillers. That when the pain subsisted; he went back to Wema Clinic on 24.11.12 and was issued with treatment notes PEXH. 3 and was referred to JaramogiOgingaOdinga Teaching and Referral Hospital were an X-ray confirmed a fracture on the right leg. That he went back to Wema Clinic where a plaster of*paris* was applied on his leg.

Analysis and Determination

This being the first appeal, it is my duty under section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of **Selle v Associated Motor Boat Co. Ltd (1968) EA 123** where **Sir Clement De Lestang** stated that:

> ***"This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had 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 demeanor of a witness is inconsistent with the evidence in the case generally (Abdul HammadSarif v Ali Mohammed Solan (1955, 22 EACA 270)."***

I have perused the entire record of appeal and considered the submissions by appellant's counsel. I note that the appeal revolves around both liability and quantum which I shall consider as hereunder.

The learned trial magistrate found as a matter of fact that the appellant was an employee of the respondent at the material time. The learned trial magistrate also found that the appellant was not injured firstly on the ground that he did not go to hospital immediately, and secondly on the ground that no accident was recorded on the respondent's accident register DEXH. 1.

As stated herein above, the appellant explained his failure to get treatment notes on 17.11.12 and that clarification should have been accepted. On the other hand, the appellant explained that he reported the accident to a supervisor who failed to register the accident and instead chased him out of the factory. The said supervisor was not called as a witness. The learned trial magistrate should have found that by the defendant failure to call the supervisor, the standard of proof in civil cases (on the balance of probabilities) has been attained by the plaintiff and that the appellant had proved that he was injured on 17.11.12 while working for the respondent.

The final issue for determination is whether the accident is attributable to the negligence of the respondent.

In **HALSBURY'S, LAWS OF ENGLAND, 4TH EDITION,** it is stated at paragraph 662 (p. 476) as follows:-

> ***"The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal connection must be established."***

In **Boniface MuthamaKavita v Carton Manufacturers Limited 2015] eKLROnyancha J** observed that:

> ***"The relationship between the appellant and the respondent as employer and employee creates a duty of care. The employer is required to take all reasonable precautions for the safety of the employee, to provide an appropriate and safe system of work which does not to expose the employee to an unreasonable risk.***

The principle of law emerging from the above authorities is also applicable to the facts of this case and I shall apply accordingly. The appellant pleaded that he sustained injuries due to the negligence of the respondent. The particulars of negligence and breach of statutory duty are pleaded at paragraph 6 of the plaint.

For the appellant to succeed in his claim, he has to prove any one or more of the particulars of negligence and breach of statutory duty pleaded as against the respondent, and to show that he was also not negligent in the performance of his duties.

The appellant stated that, "***I was fixing metal about 4 to 5 metres off the ground and in the process, I slid and fell and my leg got entangled".*** The trial magistrate rendered herself as follows: "***What exactly did the defendant do or omit to do that caused the plaintiff to slide***?" She went further and stated***"I am not satisfied that the plaintiff has proved his case on a balance of probabilities against the defendant".***

From the evidence on record, I find that the appellant indeed failed to disclose the correct and exact particulars of what caused him to slide. He similarly did not state whether the accident was one that was reasonably anticipated by the respondent to put corrective measures to avoid injuries to its employees. In my considered view, it was not within the powers and control of the respondent to anticipate or foresee that the plaintiff would slide. A party can only warn or put corrective measures in place when there is inherent danger which can be reasonably anticipated.

The Court of Appeal in **KiemaMutuku –Vs- Kenya Cargo Handling Services Ltd (1991) 2 KAR 258** held that our law has not reached the age of liability without fault.

In the current case, I find that the learned trial magistrate's finding that the plaintiff's claim had not been proved on a balance of probability was soundly grounded on the law and facts and I find no reasonable cause to interfere with it.

On quantum, the only injury that was pleaded and supported by evidence is fracture to the right leg. The appellant's counsel submitted that the sum of Kshs. 200,000/- proposed by the learned trial magistrate was very much on the lower side.

In an appeal on quantum, the principles upon which this court should proceed are those stated in the case of **Kemfro Africa Limited T/A Meru Express Service, GathogoKaniniVsA. M. M. Lubia& Another.[1998]eKLR**.

> ***"…. It must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."***

Dr. Okombo's report PEXH. 4 shows that appellant had 9 days after the accident not recovered ad he assessed permanent incapacity at 20%. The appellant had prayed for Kshs. 300,000/- and had cited **James GathairuNjoroge v Sam MuiririNjuguna&Another HCCC 6323 of 1990** in which plaintiff was awarded Kshs. 250,000/- for:

- potts fracture right ankle
- Fractures of right 4th and 5th ribs
- Spiral fracture of right tibia

The respondent had offered Kshs. 119,445/- and in this regard cited ***IddOmollo Sat &Anor V George OtienoOdiraKisii HCCA 129 of 2003*** in which plaintiff's award of Kshs. 119,445/- for fracture of left hip bone was upheld. The case cited by the appellant has more serious injuries while the one cited by the respondent has no similarity to the injuries suffered by the appellant.

I have reviewed the entire record of trial and the judgment passed regarding the proposed assessment of damages and I find no error that would invite this courts interference with the discretion as exercised. I find no merit in the grounds of appeal impugning assessment of proposed general damages and I dismiss the same as not disclosing an inordinately low award as to be disproportionate to the evidence on injuries suffered.

In the end and for the reasons given on the assessment above, the appeal is dismissed in it's entirely. The respondent shall have costs of the appeal and the proceedings in the lower court.

DATED AND DELIVERED THIS 28TH DAY OF APRIL 2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Clerk Felix

Appellant No Appearance.

Respondent No Appearance.