REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 74 OF 2016

PETER ONYANGO OCHIENG.....APPELLANT

VERSUS

CEMENT CENTRE LTD.....RESPONDENT

(Being an Appeal from the Judgment in Kisumu CMCC NO.91 of 2013 delivered on behalf of Hon. A. Odawo (R M) by Hon. J. Ngarngar (CM) on 7th July 2016)

JUDGMENT

Peter Onyango Ochieng ***(hereinafter referred to as appellant)*** sued **Cement Centre Ltd** ***(hereinafter referred to as respondent)*** in the lower court claiming damages for injuries allegedly suffered on 16th 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 it with costs.

In a judgment delivered on **7th July 2016,** the learned trial Magistrate found that the appellant had not proved his case on a balance of probability, and dismissed it with costs to the respondent.

The Appeal

The Appellant being dissatisfied with the lower court's decision preferred this appeal and filed a Memorandum of Appeal dated 19th September 2016 which set out 5 grounds of appeal to wit:-

1) The Learned Magistrate erred in law and in fact in dismissing the suit when there was clear evidence that the appellant had proved his case against the respondent ion a balance of probability

2) The Learned Magistrate erred in law and in fact in determining the suit based on evidence evaluated on a standard that is beyond the standard permitted in civil cases

3) The Learned Magistrate erred in law and in fact in failing to appreciate the seriousness of the nature and extent of the injuries sustained by the appellant based on the evidence on record

4) The Learned Magistrate erred in law and in fact in considering and taking into account issues that were not placed before her for determination and reluying on extrinsic evidence and issues not before her as to occasion a travesty of justice to the appellant

5) **The Learned Magistrate occasioned a travesty of justice ny misapprehending the law and facts placed before her and failing to take into account the submission placed before her by the appellant**

SUBMISSIONS BY THE PARTIES

When the appeal came up for mention on 30.5.17; the parties' advocates agreed to canvass it by way of written submission which they dutifully filed.

Appellant's submissions

It was submitted for the appellant that although the trial court had found that he was an employee of the respondent, the court went ahead to dismiss appellant's case although he had proved he was injured at his place of work.

Respondent's submissions

The respondent's counsel submitted that the respondent's daily attendance register and muster roll produced as evidence showed that appellant was not an employee of the respondent.

The evidence

Appellant told the trial court that he was working as a casual loader when he was injured on the right small finger. He blamed the respondent for not providing him with gloves.

The respondent's witness produced a muster roll and daily attendance register of the respondent's regular employees and it did not contain appellant's name. He conceded that the respondent used to employ casual employees whose records he did not have because he was not in charge of casual employees.

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

Analysis and Determination

This being a 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 cited by the appellant where Sir Clement De Lestang (V.P) stated that:

> ***"An appeal to this Court from a trial by the High Court is by way of retrial 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 this 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 demeanor of a witness is inconsistent with the evidence in the case generally''.***

Issues for determinations

1. **Was appellant an employee of the respondent?**

Plaintiff testified he was a casual employee of the respondent and that he was not issued with an employment letter. As stated herein above, DW1 conceded that respondent had casual employees whom he did not know and whose records he did not have because he was not in charge of that section. The

respondent did not call their officer that was in charge of casual employee and appellant's evidence has therefore not been controverted. On a balance of probability, I therefore find that the appellant has established that he was a casual employee of the respondent.

2. **Was appellant injured while working for the respondent?**

Plaintiff maintained that he was injured while working for the respondent. DW1 testified that only first aid would be given for an injury such as the one that the appellant claims to have suffered. Although DW1 informed court that the respondent kept a register of all injuries that occurred in its premises, the said register was not produced. This court makes an inference that the only reason that the register of injuries was not produced was because it could have been adverse to the respondent's case. This court also makes a conclusion that the appellant has on a balance of probability established that he was injured while working for the respondent. .

3. **Liability**

Appellant blamed the respondent for not providing him with gloves a fact that was not controverted. According to a leading text by **Winfield and Jolowicz on Tort by W. V. H Rogers, 14th Edition, London Sweet & Maxwell** at page **213** the learned authors have given the following opinion:

> ***"If a worker is injured just because no one has taken the trouble to provide him with an obviously necessary safety devise, it is sufficient and in general satisfactory to say that the employer has not fulfilled his duty".***

Further, pages 215-216 states *inter alia* that:

> ***"The employer must take reasonable care to provide his workers with the necessary equipment and is therefore liable if any accident is caused through the absence of some item of equipment … He must also take reasonable care to maintain the plant and equipment in proper condition, and the more complex and dangerous that machinery, the more frequent must be the inspection."***

From what is analyzed above, I find that the appellant discharged his burden of proof under section 107(1) of the Evidence Act and proved that the respondent was negligent for not providing him with gloves. Consequently, the respondent is hereby found liable at 100%.

4. **Quantum**

Plaintiff pleaded that he was injured on the right small finger. Upon examination by Dr. Okombo on 24.8.13, appellant had a 0.5 cm scar on the right middle finger. Appellant asked for Kshs. 180,000/- and cited ***Nku HCCC No. 7/06 Sher Agencies Ltd v Felix Musumba*** in which plaintiff were awarded 180,000/- for injuries to arms and feet.

Respondent offered Kshs. 40,000/- and cited ***Crown Foods Ltd v Emily Wangui [2011] eKLR*** where the plaintiff was awarded Kshs. 40,000/- for wound on the leg and ***Kaimosi Tea (K) Ltd v Thomas Busolo Esiye [2011] eKLR*** where plaintiff was awarded Kshs. 65,000/- for painful wound on the left leg.

The appellant suffered less a serious injury compared to the injuries in the cases cited by both parties. In assessing damages as is the norm, the court will consider comparables to arrive at an opinion bearing in mind the principles set out in making considerations in appeals of this nature. In **Stanley Maore & Geofrey Mwenda at Nyeri Civil Appeal No.147 of 2002** the Court of Appeal relied on the authority of **Kemfro Africa Limited t/a Meru Express Services Gathogo Kanini A. Jubia and Olive Lubia [1982 – 88) 1 KAR 727** at page 730 where Kneller J. A said:

> ***"The principles to be observed by the appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that, it must be satisfied that either that 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."

I have considered that the cited decisions are 11 and 6 years old considering the lapse of time, I find that the trial magistrate's decision of assessing the proposed damages at Kshs. 60,000/- was in tandem with the previous decided cases of similar nature and was therefore exercised judicially.

In the result the appeal is allowed to the extent that the order dismissing the appellant's case is set aside and substituted with an award of Kshs. 60,000/ general damages. The appellant shall have costs of the appeal and of proceedings in the lower court.

DATED AND DELIVERED THIS *21st* **DAY OF** *September,* **2017**

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Clerk Felix

Appellant N/A

Respondent Mr Omondi holding brief Onsongo