REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 242 OF 2008

SOCFINAF CO. LTD..APPELLANT

V E R S U S

PAUL MUTHAMA KABUE............................RESPONDENT

(Being an appeal from the judgement of Hon. Mrs. Nyakundi Senior Resident Magistrate delivered on 22nd April 2008 in Thika Civil Case no. 228 of 2005 before the Chief Magistrate's court.)

JUDGEMENT

1. Paul Muthama Kabue, the respondent therein filed an action against Socfinaf Co Ltd, the appellant herein, before the Chief Magistrate's Court, Thika, in which he sought to be paid damages for the injuries the respondent sustained while in the course of the employment of the appellant. The suit was heard and determined in favour of the respondent vide the judgment of Hon. F. Nyakundi, learned Senior Resident Magistrate delivered on 22/4/2008. In the aforesaid judgment the respondent was awarded ksh.100,000/= as general damages plus ksh.1,500/= being special damages. The appellant was made to shoulder 70% liability while the respondent would shoulder 30%. Being aggrieved by the aforesaid decision, the appellant preferred this appeal.

2. On appeal, the appellant put forward the following grounds:

> ***1. The learned trial magistrate erred in both fact and in law by not recognizing the fact that the respondents claim was premised in negligence and as such unsustainable having been filed outside the limitation period (3 years) prescribed by the Limitation of Actions Act.***
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> ***2. The learned trial magistrate erred in both fact and in law by not recognizing the fact that the respondents claim against the appellant was not contractual.***
>
> ***3. The learned trial magistrate erred in both fact and in law by failing to appreciate that the respondent had not pleaded and/or proved any specific particulars of breach of contract on the part of the appellant and or its employees, servants and or agents arising from the alleged incident.***
>
> ***4. The learned trial magistrate erred in both fact and in law by completely ignoring the appellant's advocates submissions to the effect that the respondents claim herein was stature barred.***
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> ***5. The learned trial magistrate erred in both fact and in law by completely ignoring and refusing to follow the decision of the High Court in the case of JOSEPH MURAI KAMAU VS MAWARA INVESTMENTS LTD NBI HCCA NO. 188 OF 2003 which was cited to her by the appellants***

advocates in their submissions.

6. The learned trial magistrate erred in both fact and in law by failing to appreciate that the respondent had not proved that he was injured in the course of duty on the material day as alleged.

7. The learned trial magistrate erred in both fact and in law by failing to appreciate that the evidence tendered by the appellant overwhelming proved that the respondent was not injured in the course of duty as alleged or at all.

8. The learned trial magistrate erred in both fact and in law by not appreciating that the appellants exhibits particularly the defence Exhibit 1 (field book) and defence exhibit 2 (wages book) clearly proved that the respondent was not on duty on the material day and as such could not have been injured in the course of duty as alleged.

9. The learned trial magistrate erred in both fact and in law by not appreciating that the respondents testimony was uncorroborated while the appellant witnesses gave evidence which corroborated each other.

10. The learned trial magistrate erred in both fact and in law by ignoring the fact that the respondents description of the injuries he suffered contradicted those which were set out in the medical report and treatment notes he produced in evidence to support his case.

11. The learned trial magistrate erred in both fact and in law by finding the respondent liable against the weight of the evidence tendered.

12. The learned trial magistrate erred in both fact and in law by failing to recognize that the circumstances of the alleged incident as given by the respondent in his testimony could not in law lead to a finding of liability in negligence, breach of statutory duty and/or breach of contract against the appellant.

13. The learned trial magistrate erred in both fact and in law by failing to realize that from the circumstances of the accident as alleged by the respondent in his testimony he (the respondent) was wholly to blame for the alleged accident.

14. The learned trial magistrate erred in both fact and in law by completely ignoring the decision of Justice Kimaru in the case of WILSON NYANY VS SASINI TEA & COFFE LTD – KERICHO HCCA NO. 15 OF 2003 which was cited to her by the appellants advocates in their written submissions.

15. The learned trial magistrate erred in both fact and in law by completely ignoring the doctrines of precedent and stare decisions.

16. The learned trial magistrate award of general damages is so manifestly excessive in the circumstances as to amount to an erroneous estimate of the loss suffered by the plaintiff.

3. When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have too considered the rival submissions. Though the appellant put forward a total of 16 grounds they may summarised to three main grounds vizly:

First, whether or not the respondent’s claim was time barred by statute of limitation at the time of filing the action.

Secondly, whether or not the respondent was injured while in the course of the employment of the appellant and whether the appellant is liable.

Thirdly, whether or not the award on damages is exhorbitant.

4. On the first question as to whether or not the action was filed out of time. It is the evidence of the respondent that he was injured on 14.1.2000 while in the course of his duty in the appellant's premises at Ruiru. It is pointed out that the suit was filed on 23rd February 2005 more than 5 years from the date of the accident. It is the submission of the appellant that under Section 4(2) of the Limitations of Actions Act the respondent was required to file his suit within three years from the date of the accident. Therefore, it is the appellant's argument that the learned Senior Resident Magistrate erred when she failed to consider the question touching limitation. The respondent on the other hand is of the view that the claim being based on the contact of employment the action was filed before the lapse of 6 years from the date of the accident. There is no dispute that the respondent has specified that the accident occurred on 14.1.2000 and the action was filed on 23rd February 2005. After a careful consideration of the rival submissions, I am persuaded by the appellant's argument. The action is purely on tort and therefore the action should have been filed within three years from the date when the cause of action arose. The issue touching on the issue as to whether or not the action was time-barred was raised in the appellant's defence and in the submissions filed before the trial court. However the issue was given a blackout in the judgment of the trial magistrate. With respect, the learned Senior Resident Magistrate erred when she treated the action as if it was based on contract. On this ground the appeal must succeed.

5. The second issue which arose for determination is the question as to whether or not the respondent was injured while in the course of the employment of the appellant and within its premises. The trial court found that the respondent was injured while in the course of the employment of the appellant. I have re-evaluated the evidence tendered before the trial court over this issue. The respondent testified claiming he got injured while in the course of employment of the appellant on 14.1.2000. The respondent appears to have filed a request for particulars as to what time the accident occurred. In response to the request, the respondent merely stated that the matter of evidence to be adduced at the trial. In the amended statement of defence, the appellant averred that the respondent attended the appellant's clinic very early in the morning before reporting on duty and complained of a strained leg. In other words, the appellant alluded that the respondent did not suffer in the course of the appellant's employment. The appellant tendered the evidence of Peter Kang'ethe Wanyoike (DW 1) who informed the court that the respondent did not report on duty on the material day. His name nor number did not appear in the list of the appellant's employees in the field books who were allocated duties. Everline Kadeya Adalo (DW 2), the appellant's field clerk produced the appellant's wage sheet indicating that the respondent was marked sick (s) on the material day therefore he came to the appellant's premises when he was already sick and was therefore not allocated duties. Mary Wanjiru Karanja(DW 4) the appellant's nurse on duty claimed she saw the respondent at the appellant's clinic on the material day at 7.00am and treated him for sprain in the ankle. The appellant's witnesses corroborated their evidence. I am convinced that the respondent did not sustain an injury while in the employment of the appellant. The other piece of evidence which is crucial in this appeal is that of the respondent. The respondent avers that he got injured while he was demonstrating how to trim and prune tree branches. He stated that he hit a dry piece of wood making it to slip from his hand and it cut him on the leg near the ankle. This piece of evidence contradicted the medical report which indicated that the respondent slid and fell down from stairs.

6. It is clear from the evidence presented before the trial court that the respondent got injured outside the appellant's premises hence the appellant cannot be held liable.

7. The appellant argued that the award on damages was manifestly excessive hence it amounts to an erroneous estimate. There is no dispute that the respondent was awarded kshs.101,500 being general and special damages. The aforesaid figure was subjected to 30% contribution. Having considered comparable awards on near similar injuries, I find the award not excessive.

8. In the end, and on the basis of the above grounds, the appeal is allowed. Consequently, the order entering judgment in favour of the respondent is set aside and is substituted with an order dismissing the suit with costs to the appellant.

Dated, Signed and Delivered in open court this 19th day of October, 2017.

J. K. SERGON

JUDGE

In the presence of:

.... for the Appellant

.... for the Respondent