REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL DIVISION

CIVIL APPEAL NO. 43 OF 2015

BETWEEN

MICHAEL BUSAKHALA LUTA………..APPELLANT

AND

WEST KENYA SUGAR CO. LTD………RESPONDENT

(Being an appeal from the judgment and decree by Hon. T. Kwambai, RM delivered on 30.04.2015 in Butali SRMCC No. 207 of 2013 – Michael Busakhala Luta –vs – West Kenya sugar Co. Ltd.)

J U D G M E N T

Introduction

1. The appellant was the plaintiff in Butali SRMCC number 207 of 2013 in which he sued the respondent for both general and special damages in respect of injuries suffered by himself from an accident which allegedly occurred on 24.06.2011. The appellant averred that he suffered swelling and tenderness of the left ankle and also sustained a dislocation of the left ankle as a result of an accident which occurred by reason of the respondent's breach of common law and/or statutory duty of care and terms thereof while the appellant was lawfully engaged in his duties as an employee of the respondent. The appellant attributed the accident to the respondent's negligence which resulted in injury and/or loss to the appellant.

2. In its defence dated 15.01.2014, the respondent denied the appellant's allegations and in particulars denied that the accident alluded to by the appellant ever occurred on 24.06.2011 or at all. The respondent also denied all the particulars of negligence attributed to it by the appellant. It also denied that it had been served with the requisite notice. The respondent asked for dismissal of the appellant's suit with costs.

Judgment of the learned trial magistrate

3. After a careful analysis of the evidence on record, the submissions and the law the learned trial court reached the conclusion that the appellant had not proved his claim against the respondent on a balance of probabilities and proceeded to dismiss the suit with costs to the respondent.

4. As to damages, the learned trial magistrate stated that if the appellant had succeeded in his claim, he would have awarded a sum of kshs.120,000/= in general damages and special damages of kshs.1,500/=.

The Appeal

5. Being dissatisfied with the judgment of the learned trial magistrate, the appellant brought this appeal on the following grounds;-

1. The learned trial magistrate erred in fact and or in law in dismissing the appellant's suit.

2. The learned trial magistrate erred in fact and or in law in finding that the appellant's case had not been proved on a balance of probability as required by law.

3. The learned trial magistrate erred in law and or fact in finding that the appellant was required to call an eye witness to prove his case.

4. The learned trial magistrate erred in law and fact in finding that the appellant was injured and [yet] proceeded to dismiss the appellant's case.

5. The learned trial magistrate erred in law and fact in failing to find that the appellant's evidence established liability against the respondent,

REASONS WHEREFORE, the appellant prays for orders that;-

a. The order dismissing the appellant's case be set aside and in lieu of the judgment be entered in favour of the appellant against the respondent.(sic)

b. The Honourable court to re-determine the issue of liability and assess damages

c. Costs of the appeal

d. Any other or further relief that the Honourable court may deem fit to grant.

6. As this is a first appeal, this court is expected to subject the entire evidence to a fresh analysis with a view to reaching its own conclusion in the matter. It is only after this fresh and exhaustive revaluation of the evidence that this court can say whether or not the findings and conclusions of the learned trial court can be supported. In this regard, I am guided by the principles set out in the case of *Peters – vs- Sunday post Ltd [1958] EA 424 page 429* where the court said:-

> "it is a strong thing for an appellate court to differ from the finding on a question of fact of a judge who tried the case and who had the advantage of seeing and hearing the witnesses."

7. In essence, in carrying out this appellate jurisdiction of reconsidering and evaluating the evidence afresh, this court must bear in mind the fact that it does not have the opportunity to see and hear the witness who testified during the trial. The role of the appellate court can be equated to that of the doctor who performs a post mortem examination following the death of a victim whose assailants he neither saw nor heard.

8. I now move to set out the case for appellant and for the respondent.

<u>The Appellant's case</u>

9. The appellant testified as PW1 and stated that prior to the accident he had worked for the respondent as a general worker for about 14 years. He further testified that on the day in question, and as he and another off loaded iron rods from one of the respondent's lorries, one of the rods fell and injured him on the left leg. He was taken to the respondent's hospital at Rotary. He did not produce any treatment notes on grounds that the company hospital retained the same. Later appellant was taken to Kakamega medical clinic where he was seen, and about three months thereafter he visited Dr. Aluda at Eldoret. Dr. Aluda's medical report together with the receipt were marked PMFI 3 and 4 respectively. The receipt was for kshs.1,500/=. It was appellant's evidence that he held the respondents responsible for the accident because it failed to supply him with safety boots. He also averred that he and his colleague were

understaffed by doing the work of six people, and that the combined effect of the two reasons led to him being injured.

10. PW2 was Susy Inyangala of Kakamega Medical Clinic in Kambi ya Mwanza. She dispensed only pain killers to the appellant. Dr. S. I Aluda testified as PW3. He said he examined the appellant on 21.09.2013 following the injury suffered by the appellant on 24.06.2013. According to Dr. Aluda the appellant suffered injuries on the left ankle which was swollen and tender and further suffered dislocation of the left ankle joint.

11. From Dr. Aluda's testimony, the only injury suffered by the appellant was a dislocation of the left ankle joint which resulted in swelling and tenderness.

12. During cross examination, Dr.Aluda stated that when the appellant went to see him he (appellant) did not avail any X-ray films but added that he relied on the medical chits from Kakamega. Dr. Aluda also confirmed that by 21.09.2013, the appellant's injuries had completely healed. The injury was classified as soft tissue injury. Dr. Aluda produced the report he prepared as Peexh.3, while the receipt for kshs.1,500/= was produced as PExhibit 4, The appellant then closed his case.

<u>The Respondent's Case</u>

13. The only witness called by the respondent was Mr. Michael M. Mechumo, the Human Resource and Administration Manager of the respondent company. He testified as DW1and explained that his duties included recruitment, selection of staff, management of salaries and benefits for staff, employment relations (disciplinary) industrial relations, occupation and safety of health issues as well as security among other duties.

14. In his evidence in chief, DW1 testified that the respondent company was expected to provide protective gears to its staff such as shoes, helmets, ear mutts and gloves among others.

15. On what happens in case of an injury to an employee DW1 stated that the injured employee would be taken to hospital by the company as provided under section 34 of the E.A Act. He also testified that on appointment, every employee is issued with an appointment letter. DW1 denied that the appellant was injured on respondent's premises, contending that if the appellant had been injured in the alleged circumstances, he would have reported the accident to the director, of occupational safety and health at Kakamega. He asked the court to dismiss appellant's suit. That marked the close of the respondent's case.

<u>Submissions</u>

16. This appeal proceeded by way of written submissions. Parties filed and exchanged their respective submissions. I have carefully read through the same together with the authorities provided by the respondent. The gist of the appellant's submissions is that the appellant proved his case on a balance of probability as required by law and that the trial court therefore erred in dismissing the appellant's case.

17. For the respondent, it was contended that the appellant's appeal is an afterthought solely intended to introduce the aspect of gambling in litigation. I will say more about the submissions during the analysis.

<u>Analysis and Determination</u>

18. I shall deal with the grounds of appeal on two broad fronts as set out by the respondent. I note that the appellant urged the grounds of appeal as one. He also did not cite any supporting authorities, but that does not mean that his submissions are of any less weight.

> **a. Whether the learned trial magistrate erred in law and fact in dismissing the appellant's case.**

19. I have carefully reconsidered and evaluated the evidence afresh and find that the appellant did not support his claims that upon being injured on 24.06.2013, he went for treatment of the respondent's clinic. A part from Dr. Aluda's report, the appellant did not product he initial treatment notes to confirm where he had been treated soon after the accident and whether he sought such treatment in accordance with company policy. Although Dr. Aluda testified that he relied on those initial treatment notes when he examined the appellant on 21.09.2013, those notes were not produced in evidence.

20. Further, and according to the testimony of PW2 Susan Inyangala, when the appellant went to see her, he did not tell her where he worked and at what place he was injured. In my considered view, these were critical details which the appellant was required to give if his case against the respondent was to stand.

21. As was persuasively held in the case of ***Eastern Produce (K) LTD. – vs – James Kipketer Ngetich – Eldoret HCCA no 85 of 2002*** failure to produce evidence of initial treatment notes casts some doubt on the appellant's case, and was fatal to the overall outcome of the appellant's case.

22. Further, the appellant did not lay before the trial court evidence to prove that indeed he was an employee of the respondent. The lack of this crucial evidence complied with lack of evidence to show that he appellant was treated at the respondent's clinic/hospital as the first point of call after the alleged injury meant that the appellant did not establish any nexus between his injuries and the respondent as an employer. The appellant did not therefore prove his case against the respondent on a balance of probability.

b. Whether the learned magistrate erred in law and fact in failing to establish liability against the defendant/respondent.

23. This issue covers grounds 3 and 5 of the appellant's Memorandum of Appeal. All I can say on this issue is that the appellant did not place any documentary evidence before the trial court to confirm (i) that he was an employee of the respondent and (ii) that he had been injured while on the respondent's premises and (iii) that he was treated at the respondent's clinic/hospital soon after the injury and before visiting Dr. Aluda on 21.09.2013. Without proving the above three points, the appellant could not have proved his case against the appellant on a balance of probability.

Conclusion

24. The upshot of all the above is that the appellant's appeal lacks merit and is accordingly dismissed with no orders as to costs.

It is so ordered.

Judgment delivered, dated and signed in open court at Kakamega this 20th day of December, 2017

RUTH N. SITATI

JUDGE

In the presence of;-

M/S Mwinamo Lugonzo (absent)for Appellant

Mr. Nyambane (present)for Respondent

Polycap Court Assistant