REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 38 OF 2007

TUFFSTONE LIMITED .... APPELLANT

VERSUS

NICHOLAS MAKAU .... RESPONDENT

JUDGEMENT

1. Nicholas Makau, the Respondent herein, sued Tuffstone Ltd, the Appellant herein, before the Resident Magistrate's Court, Gatundu claiming damages for the injuries he sustained while working for the Appellant while supervising the loading of building stones onto a lorry. In the plaint filed before the subordinate court, the Respondent averred that he fell down from the lorry after sliding and fractured his left tibia and fibula. He also suffered a dislocation of the left ankle joint. The Appellant denied the Respondent claim by filing a defence in which it blamed the Respondent for solely injuring himself for exposing himself to the risk of danger and negligently working without the regard to the regulations and standing instructions. The suit was heard by Hon. Lorot, the then learned Resident Magistrate who in the end pronounced judgement in favour of the Respondent in the sum of ksh.250,000 as general damages and kshs2000 as special damages. Being dissatisfied the Appellant preferred this appeal.

2. On appeal, the Appellant put forward the following grounds in its memorandum:

1. ***THAT the learned trial magistrate erred in law and fact when he failed to consider the evidence on record and particularly the Appellant's/defence's evidence on record and particularly the Appellant's/defence's evidence and submissions on liability together with legal authorities submitted by the defence in support thereof thus arriving at a wrong decision.***
2. ***THAT the learned trial magistrate erred in law and fact when he held evidence of injury as proof of negligence against the Appellant while there was no proof of negligence against the Appellant.***
3. ***THAT the learned trial magistrate erred in law and fact when he failed to appreciate and/or analyze the pleadings and the evidence adduced before the court thus arriving at a wrong decision.***
4. ***THAT the learned trial magistrate erred in law and fact when he failed to consider the Appellant's evidence and exhibits produced indicating that the Plaintiff/Respondent duly signed out of work at 4.49pm on the material day and that the accident took place at the office barrier far away from the place of work where it was alleged, the accident took place.***
5. ***THAT the learned trial magistrate erred in law and fact when he relied on the Plaintiff's/Respondent's evidence against the Defendant's/Appellant's evidence on wrong basis.***
6. ***THAT the learned trial magistrate erred in law and fact when he held the Defendant/Appellant at 100% liability without any justification whatsoever.***
7. ***THAT the judgement was against Order XX Rue 4 of the Civil Procedure Rules.***

3. When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed by written submissions. At the time of writing this judgement, only the Respondent was the only party who had filed his submissions. Though the Appellant put forward a total of seven grounds of appeal, those grounds may be summarised to four namely

   First, that the learned Resident Magistrate erred when he failed apportion liability on the part of the Respondent.

   Secondly, that the Appellant's defence was not considered.

   Thirdly, that the trial Resident Magistrate failed appreciate thefact that the accident occurred outside the Appellant's premises hence it could not be categorised as industrial accident.

   Fourthly, the judgement was no prepared according to the provisions of Order XX rule 4 of the Civil Procedure Rules.

4. In the first ground, the Appellant was of the view that liability should have apportioned in the circumstances of this case. The Respondent did not address his mind over this issue in the written submissions. I have re-evaluated the evidence tendered before the trial court. It is the evidence of the Respondent (PW1) that on 31.12.2003 he went to the field to supervise the loading and signing deliveries. He stated that the climbed onto a lorry to check on the loading. He stated that he slipped while climbing down the lorry to sign the delivery. PW1 fell down and broke his leg. He blamed the Appellant for not fitting the lorry with a ladder despite having reported the same to their immediate supervisor. The witness summoned by the Appellant namely Charles Kinyanjui (DW1) claimed the Respondent may have been injured outside the Appellant's premises after checking out. He however confirmed he did not witness the accident neither did he know where the Respondent signed the clock card. DW1 merely relied on the clock card to infer that the Respondent left the Appellant's premises earlier. The Appellant's witness did not tell the trial magistrate whether or not the lorry where the Respondent had specifically pleaded that the lorry he was assigned to supervise loading of stones did not have a ladder. The Appellant denied that particular allegation but failed to summon a witness to controvert the Respondent's evidence. I am convinced that the Respondent was assigned to supervise the loading of stones on a lorry which had no ladder. It is true that the Respondent knew that the lorry had no ladder then he was bound to take due care to avoid getting injured. The evidence the Respondent tendered shows that he first climbed onto the lorry safely but he tripped and fell down while climbing down. In my view the Respondent is not to blameless. He contributed to his injury. With respect, I agree with the Appellant that the learned Resident Magistrate ought to have apportioned liability. After re-evaluating the evidence I am convinced that the Respondent shoulder 20% while the Appellant shoulders 80% liability.

5. In the second ground it has been argued that the trial Resident Magistrate failed to consider the Appellant's defence. This ground is also closely related to the third ground in which the Appellant avers that the Respondent got injured outside the Appellant's premises hence this cannot be regarded as an industrial accident. The Respondent has argued that he was injured in the course of duty and within the Appellant's premises and within working hours. I have examined the judgement of the learned Resident Magistrate. It is clear to me that the leaned Resident Magistrate considered the evidence of the Appellant's witness. The trial magistrate cannot therefore be faulted. The question is whether or not the accident occurred outside the Appellant's premises. The evidence of D.W.1 shows that the Respondent reported to work at 8.05am and left work at 4,49pm. The evidence of the Respondent show that he got injured at 4.30pm. The Appellant's witness (D.W.1) confesses that he did not witness the accident since he was in the quarry at the time of the accident. DW2 heavily relied on the clock card to infer that the Respondent was injured outside the Appellant's premises. DW1 could not however ascertain where the clock card was filled and signed. It is clear to me that the clock card shows that by 4.30 pm the Respondent was still within the Appellant's premises hence the accident should be regarded as an industrial

accident. I find grounds 2 and 3 to be without merit.

6. The last ground to be argued is to the effect that the judgement does not conform the manner a judgment should be written under Order XX rule 4 of the Civil Procedure Rules now Order 21 rule 4 of the Civil Procedure rules 2010. The aforesaid provides that judgements in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for the decision. I have critically examined the judgement of the trial court and I am satisfied that though the judgement is not precise as required under Order 21 rule 4 of the Civil Procedure Rules, the same meets the basic requirements of writing and formatting a judgment. I find no merit in this ground. The Appellant has not appealed against quantum hence I will not make a decision on it. In the end this appeal is partially succeeds on apportionment of liability. Consequently the order making the Appellant 100% liable is set aside and is substituted with an order directing the Appellant to shoulder 80% and the Respondent to shoulder 20% liability.

7. I am also convinced that the appropriate order on costs on appeal is to order that each party meets its own costs.

8. For the avoidance of doubt this court makes the following orders.

i. The Respondent is to awarded kshs.252,000

   Less 20% contribution of   .... Kshs. 50,400

   Net Kshs.201,600

II) Cost of the suit.

Dated, Signed and Delivered in open court this 18th day of March, 2016.

J. K. SERGON

JUDGE

In the presence of:

.... for the Appellant

.... for the Respondent