



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL APPEAL NO. 100 OF 2010

PAUL OLUOCH OMINDE APPELLANT

VERSUS

KENYA POWER & LIGHTING CO. LTD RESPONDENT

(An Appeal from the Judgment and Decree of the Resident Magistrate Honourable J. OWITI (RM) in Eldoret CMCC No. 740 of 2005 dated 15.4.2011)

JUDGMENT

1. This appeal arises from the judgment and decree of the lower court in Eldoret CMCC No. 74 of 2005. The appellant who was the plaintiff in the suit had sued the respondent (then the defendant) seeking to be paid both general and special damages on account of injuries he sustained on 10th April, 2005 when he fell off a ladder while working as a painter in the respondent's premises.
2. In his plaint dated 6th June 2005, the appellant blamed the defendant, its agents or servants for his injuries claiming that the accident in which he was injured was occasioned by their negligence and or breach of their contractual or statutory duty. He set out the particulars of the alleged negligence or breach of statutory duty as failure to maintain a safe work system; exposing him to an unsafe work environment and failing to provide him with adequate protective clothing or at all.
3. In its response, the respondent filed a statement in defence in which it denied all the allegations made against it in the plaint *in toto* and put the appellant to strict proof thereof. In the alternative and without prejudice to the denial of liability, the respondent averred that if the accident occurred as alleged, it was caused either solely or partly by the appellant's negligence in that he failed to use protection given to him; failed to heed to instructions given to him; putting himself into danger he knew or ought to have known and by failing to take adequate or any measures for his safety.
4. After hearing the appellant's claim and considering all the evidence tendered before the lower court, the learned trial magistrate apportioned liability between the parties in the ratio of 50:50%. She also awarded the appellant damages in the total sum of Kshs.91,500 less 50% contributory negligence, costs of the suit and interest.
5. The appellant was aggrieved by the trial court's decision on liability. He proffered the instant appeal relying on three grounds of appeal which can be condensed into only one ground; that the learned trial magistrate erred in law and fact in apportioning liability between the appellant and the respondent in the ratio of 50:50%.
6. Both parties agreed that the appeal be prosecuted by way of written submissions. Those of the appellant

were filed on 14th July, 2015 while those of the respondent were filed on 17th August, 2015.

7. This being a first appeal to the High Court, it is an appeal on both facts and the law. As the first appellate court, I am enjoined to revisit and re-evaluate the evidence presented before the trial court and make my own independent conclusions regarding whether or not the decision of the trial court should stand. In undertaking this task, I should be careful to remember that unlike the trial court, I did not have the advantage of seeing or hearing the witnesses. The duty of a first appellate court has been re-iterated in a long line of authorities which also spell out the mandate of an appellate court. It will suffice to cite just two of them.

In Sumaria & Another Vs Allied Industrial Limited (2007)2 KLR I the court of appeal held as follows;-

“A court of Appeal would not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principle in reaching the finding he did”.

Similarly, in the case of ***Peters V Sunday Post Limited (1958) E.A.***, the court held as follows;-

“whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight of bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide”.

8. The common thread running through the above authorities is that an appellant court can only interfere or reverse a decision made by the trial court if it is satisfied that the decision was not based on any evidence or it was based on a misapprehension of the evidence or was based on wrong legal principles.

9. I have considered the grounds of appeal, the rival submissions made by the parties and the authorities cited. I have also carefully considered the evidence presented before the trial court. Having done so, I find that it is not contested that the appellant was employed by the respondent at the material time as a painter on casual basis; that the respondent through its supervisor assigned a ladder to the appellant to use in his work; that the appellant fell off the ladder, landed on the first floor of the building he was working on and sustained an injury on his head.

10. What is seriously contested is whether the accident occurred as a result of the defendant’s breach of its contractual or statutory duties or whether the defendant, or its servants or agents solely caused the accident by their negligence and lastly whether the appellant negligently contributed to its occurrence and if so, to what extent? These are the issues which in my view this court is called upon to determine.

11. In his evidence before the trial court, the appellant testified that on 10th April, 2005, the respondent’s supervisor gave him a ladder which was 20 metres high to use while painting its buildings which were flats (Apartments). He inspected the ladder and found that it was fit for use but then he noted that it was rusty. He asked his supervisor for a replacement which request was declined. He later realized that the ladder was faulty when he fell and sustained injuries. He blamed the defendant for his injuries for not providing him with protective devices like a helmet and a safety belt.

12. To counter the appellant’s case, the respondent called one witness – its Human Resource and Administration Manager. In his evidence, DW1 admitted that he did not witness the accident. He confirmed that the appellant had not been provided with any protective gear as according to him, protective devices were only given to permanent employees and not casual labourers; that the casual labourers were supposed to provide their own protective gear and that they had been made aware of that condition. They were also given instructions by the supervisor regarding what to do in the course of their work.

13. While making her finding on liability, the learned trial magistrate stated as follows:-

“Both PW1 and the Defendant knew the risks involved in the nature of work PW1 was performing. PW1 undertook to perform the work without a Helmet yet he knew it was necessary protective gear/clothing to him while painting higher buildings. He had worked for the defendant without a helmet while painting its premises or contracted to do so he assumed the risks involved.

DW1 on the other hand failed to controvert the evidence of PW1 especially by failing to call the supervisor on site and the person who was holding the ladder as witnesses. DW1 therefore exposed the plaintiff to work in a risky environment on 10/4/2005 hence breached its duty of care to PW1. Both the Defendant and plaintiff are held liable for the mishap of 10/4/2005 in the ratio of 50%:50% respectively.”

14. In my considered view, the learned trial magistrate failed to properly and carefully evaluate the evidence presented before the trial court and consequently arrived at an erroneous decision on the issue of liability. The evidence adduced by the appellant when considered as a whole clearly shows that when using the ladder provided by the respondent, he did not assume any risks regarding his safety. He testified that before using the ladder, he had inspected it and found it “fit to climb up and down” meaning that he had ascertained that it was strong enough to hold his weight and that it was safe for use. He contradicted himself in his evidence when he claimed that he had been assigned a faulty ladder to work with. In his evidence on re-examination, the appellant stated that he could not have known that the ladder was defective but he did not lead any evidence to demonstrate that the said ladder had in fact been defective. I say so because the plaintiff did not allege that the reason for his fall was because the ladder broke or malfunctioned in any way. The appellant’s case appears to be that he slipped and fell from the ladder as he was painting the respondents buildings. He however denied that the fall was occasioned by his negligence. He maintained that he had been diligent in his work.

15. The appellant blamed the respondent for his injuries mainly on grounds that the respondent failed to provide him with protective gear like a helmet and a safety belt to use in his work. The respondent through DW1 did not deny this claim by the appellant. According to DW1, protective gear was only provided to its permanent employees and not to the casual workers like the appellant. He claimed that the casual labourers were expected to use their own protective gears and that they had been notified of that requirement. This claim by DW1 was not substantiated by either documentary or any other evidence and it appears to have been disputed by the appellant when in his evidence he asserted that he had requested to be provided with a helmet which request was declined by his supervisor. The appellant would not have requested for a helmet if he was aware that he was supposed to provide his own protective gear.

16. It is trite that an employer has a statutory and common law duty to provide its employees with a safe working environment and to take reasonable precautions to mitigate or lessen the risk of any foreseeable injury to its employees. This duty would entail providing not only a safe working system but also provision of protective gear to the employees engaged in work that was inherently dangerous. This duty in my view extends to employees engaged on casual basis unless there was evidence that they were independent contractors whose terms of engagement included a provision that they were to provide their own safety and other equipment for use in the work they were contracted to do. There was no such evidence in this case.

17. Though the appellant testified that he was an experienced painter, the respondent having assigned him the work of painting on heights should have provided him not only with proper equipment to use in his work like a well serviced and functional ladder but also with protective gear to cushion him from injuries in case he lost balance and fell off the ladder in the course of his work. The provision of a helmet given the nature of work the appellant was engaged to do was necessary to ensure that he worked in safety. It could have prevented him from sustaining the kind of injury that he sustained in this case. I find that in failing to provide the appellant with a helmet, the respondent breached its statutory duty of care and was therefore liable for the appellant’s injuries.

18. In this case, the respondent pleaded contributory negligence on the appellant's part. The respondent did not however adduce any iota of evidence to support the particulars of contributory negligence attributed to the appellant. The respondent failed to call its supervisor in support of its case to tell the court which instructions the appellant failed to obey if any or how he allegedly contributed to the accident. The finding by the trial court that the appellant substantially contributed to the occurrence of the accident was not therefore based on any evidence and was a misdirection on the part of the learned trial magistrate. The trial magistrate appears to have confused the principle of contributory negligence with the defence of volenti non fit injuria which was not even pleaded by the respondent in this case.

19. In view of the foregoing, I have come to the conclusion that the trial court erred in law and fact in making a finding on liability in the ratio of 50:50. Had there been evidence that the respondent had provided the appellant with a helmet which for any reason the appellant failed to wear when executing his duties, different considerations would have applied. But given the evidence on record, it is my finding that the appellant proved on a balance of probabilities that the respondent was wholly liable for the injuries he sustained on the fateful day. In the circumstances, I find merit in the appeal and I accordingly allow it. I consequently set aside the finding of the trial court on liability and substitute it with a finding in favour of the appellant against the respondent at 100%.

20. As there was no challenge on the quantum of damages, the amount awarded by the lower court in the sum of Kshs. 91,500 will remain undisturbed save that it will not be subject to any contribution by the appellant. The amount will attract interest at court rates from today until payment in full. The appellant shall have costs of the suit in the lower court as well as costs of this appeal.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 19th day of May, 2016

In the presence of:

Miss Sitienei holding brief for the firm of Hamilton, Harrison & Mathews for the Respondent,

No appearance for the Appellant

Naomi Chonde – Court clerk