REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO.109 OF 2012

BETWEEN

MUMIAS SUGAR COMPANY LIMITED……APPELLANT

AND

STEPHEN MAKOKHA ……..……..RESPONDENT

(Being an appeal from the judgment and decree of SRM, Butere Law Courts in Civil Suit No.228 of 2010 delivered on the 15/11/2012 by Hon. E.S. Olwande)

JUDGMENT

Introduction

1. The respondent herein was the plaintiff in the Court below. He filed suit against the appellant seeking general and special damages plus costs and interest as a result of an accident which allegedly occurred on 03/09/2007 while he was cutting cane in a field at Imanga. The respondent held the appellant liable in negligence for failing to take all reasonable precautions for the safety of the respondent while he (respondent) was engaged upon his work as a cane cutter and not to expose him to risk of injury which the appellant and its agent ought to have known and taken reasonable measures to ensure that the respondent was safe. Particulars of negligence, breach of contract and/or statutory duty were set out in paragraph 6 of the plaint. The respondent also said he suffered a cut wound on the left thumb.

2. The appellant denied the respondent's allegations vide its statement of defence dated 13/11/2009 and filed in Court on 18/11/2009. The appellant denied that it was the respondent's employer and also denied the occurrence of the alleged accident. In the alternative and on a without prejudice basis, the appellant averred that if any accident occurred, then the same was wholly caused or substantially contributed to, by the respondent. The appellant set out particulars of the respondent's alleged negligence in paragraph 6 of the defence. The appellant prayed for the dismissal of the respondent's case.

The Respondent's Case

3. The respondent testified as PW1 and stated that as he cut cane in a field at Imanga a piece of iron that was in the cane cut him on his left thumb. A first aider who worked for the appellant and was on duty in the same field attended to him awaiting further treatment at Butere District Hospital. The respondent was however not taken for treatment as expected but he made his own arrangements and went to Butere District Hospital for treatment. Later the respondent saw Dr. Andai who prepared a medical report. The same was produced as PExhibit 3 (a). The respondent

paid kshs.3500/= for the report. The pagment receipt was produced as Pexhibit 3 (b).

4. PW2, Bernard Were Kadima the First Aider supported the respondents assertions that he was injured while cutting cane in a field at Imanga on the material day. PW2 stated that he was notified of the accident by the Field Assistant/headman by the name David Nanyuma. When he went to the scene, he found the respondent who had an injury on his left thumb. After attending to the respondent, he informed the field supervisor one Mr. Nabwera about the incident. During cross examination, PW2 stated that he thought the respondent had been injured by a panga, though he did not try to find out what had actually caused the injury.

The Appellant's Case

5. The appellant's side of the story was given by the Harvesting and Transport Manger, Samson Mangwana, who testified as DW1. His testimony was that no accident occurred to the respondent as alleged or at all. While admitting that employees usually got injured, he stated that on the material day he did not receive any report of the respondent's injuries. He also disputed the allegation that PW2 was the appellant's First Aider but was a Code Representative but he could not say if both PW2 and the respondent were working in the same code on the material day, and he stated further that if any accident occurred, he would normally be informed. During cross examination DW1 admitted that the respondent had worked as a cane cutter for a long time with the appellant and that he was an experienced cane cutter. DW1 also admitted that he did not have an accident register and as such he could not say whether or not the respondent had been involved in the alleged accident.

Judgment of the learned Trial Magistrate

6. After carefully going through the evidence and the law the learned trial Magistrate considered each of the 6 issues agreed upon by the parties and reached the conclusion that indeed the respondent was employed by the appellant. That an accident occurred on 03/09/2007 involving the respondent and that the respondent suffered a big injury on his left thumb. The learned trial Magistrate also reached the conclusion that from the circumstances surrounding the case, the appellant was 70% negligent while the respondent was 30% negligent. On quantum the learned trial Magistrate awarded kshs.120000 general damages, kshs.3500/= proved specials plus costs.

The Appeal

7. The appellant felt aggrieved by the entire judgment and filed this appeal on 26/11/2012. There are 9 grounds of appeal, the main complaints being that the learned trial Magistrate erred in law and fact by treating the evidence and the submissions superficially and thereby coming to the wrong conclusion. The appellant also complained that the learned trial Magistrate erred in law and fact by failing to appreciate that the respondent had failed to prove his case against the appellant on a balance of probabilities.
8. This is a first appeal and as stated by the Courts in **Peters –vs- Sunday Post Ltd [1957] EA 424 and Selle –vs- Associated Motor Boat Co. Ltd and others [1969] EA 123**, this Court is under a duty to reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in the matter, only bearing in mind the fact that it does not have the privilege of seeing and hearing the witnesses.

9. **Submissions**

The appellant's submissions are dated 3/11/2014 and filed on 4/11/2014. On liability it was submitted that the respondent's testimony as to how the alleged accident occurred was uncorroborated and further that there was contradiction between the evidence of the respondent and that of his chief witness, PW2, as to what may have cut the respondent. it was also submitted that through Exh D1, the appellant proved that the appellant carried out its mandate of ensuring the safety of the respondent's.

10. Concerning quantum, Counsel for the appellant submitted that an award of Kshs.50,000/= would be sufficient compensation to the respondent. Counsel urged the Court to allow the appeal with costs.
11. The respondent on the other hand submitted that the appeal lacks merit as the respondent had discharged the burden of proving his case against the appellant on a balance of probabilities. Further that the appellant had failed to prove the allegations of negligence leveled against the respondent.

12. **Analysis and Determination**

I have now carefully reconsidered and evaluated the evidence afresh. I have also carefully considered the judgment of the learned trial Magistrate as well as the rival submissions. I shall now proceed to put the grounds of appeal in context, taking the respondents and appellant's evidence into account. What is important here is that unless the conclusions reached by the learned trial Magistrate have no basis in law or unless the learned trial Magistrate based her conclusions on wrong principles, this Court will be slow in overturning the judgment of the learned trial Magistrate. There is therefore need for caution on the part of this Court in deciding whether or not to overturn the judgment of the learned trial Magistrate.

13. I shall deal with the grounds of appeal on the basis of the two issues raised by the appellant namely liability and quantum. On the issue of liability the appellant's Counsel submitted that the respondent's contention that he was cut by an iron sheet that was big was not corroborated. That PW2, who went to the aid of the respondent did not testify about this iron sheet and that in the circumstances, the respondent must have cut himself with the cane knife which was exclusively in his control. Counsel further submitted that the medical report shows that the respondent sustained a cut wound to his left thumb occasioned by a cane knife. That in light of such evidence, the respondent is wholly to blame for the accident in which he was injured.
14. I have myself carefully considered the medical report prepared by Dr. Charles Andai of Lubinu Medical Clinic. In the segment on "Medical History". Dr. Andai states "on 03.09.07, the above named while harvesting sugarcane at Imanga plot No.39 sustained a cut wound to his left thumb occasioned by a cane knife. He was treated ……..". I have not found any evidence tendered by the appellant during the trial that the respondent was cut by his own panga. Dr. Andai's comment which appears to have been lifted from some other document was not corroborated by evidence adduced by the appellant to controvert the respondent's allegation of what cut him on his left thumb. I also must point out that the issue of the size of the iron sheet that cut the respondent was the trial Court's own opinion which arose from the evidence of PW2 who stated that when he got to the site, he found the respondent bleeding. In my considered view the opinion of the trial Court should not be taken as evidence. It would also have been prudent for the appellant to adduce evidence showing the difference between a cut caused by a cane knife and an iron sheet. Such evidence would have assisted both the trial Court and this Court in determining whether indeed the cut wound on the respondent's left thumb was caused by a cane knife or an iron sheet. I say no more on this point.

15. The appellant also contends in its submissions that the appellant did all in its mandate to ensure the safety of the respondent and or to lessen the danger attendant to the respondent's line of duty. The appellant relies on the following passage from the evidence in chief of DW1:-

"The cane cutters are usually trained and given instructions manual at the time of recruitment …… This is for their own safety while undertaking their duties. If the plaintiff was injured by an object on the ground……it means that he did not follow the instructions in the manual and as such I blame him."

16. What I can say about this testimony by DW1 is that it is a general statement. There is no evidence by way of a register, showing that the respondent was one of the cane cutters who had received training by the appellant, so there can be no assumptions on the training given to the respondent. In the same way DW1 failed to produce a register for accidents, he did not produce a register for

training of its cane cutters. In any event, what the respondent alleged by way of particulars of negligence and breach of contract and/or statutory duty is that the appellant failed to provide safe working conditions and did not provide adequate protective devices such as gloves. If indeed the respondent had had protective gloves the chances of being injured as described would have been minimized.

17. In the circumstances, I find and hold that the respondent's evidence on the fact and mode of injury is not controverted. I am also satisfied that the apportionment of liability by the trial Court cannot be faulted and I will therefore not disturb it.
18. The second issue raised by the appellant is one of quantum. According to the appellant, an award of kshs.50,000/= would be considered sufficient compensation to the respondent. Though the respondent's submissions do not make any specific reference to the quantum of damages, it is submitted that the appellant's complaint is aimed of frustrating the respondent from harnessing the fruit of successful litigation.
19. The principle to be applied by this Court in determining whether or not to interfere with quantum of damages is that the appellate Court will only interfere if the damages awarded are either so low or so high as to represent a totally erroneous estimate of the damage suffered of if the award is based on wrong principles. I have carefully read the trial Court's judgment on this issue and I am satisfied that the Court's reasoning which led to the award was well founded. She considered a number of authorities and the submissions made by Counsel before reaching her conclusion. I therefore dismiss the appellant's complaint on quantum.

Conclusion

20. In the final analysis, I find and hold that this appeal both on liability and quantum has no merit. The same is hereby dismissed with costs to the respondent.
21. Orders accordingly.

Judgment delivered, dated and signed in open Court at Kakamega this 15th day of June 2016.

RUTH N. SITATI

J U D G E

In the presence of:

Mr. G.P Omondi – absent - for Appellant

Miss Simiyu h/b for Namatsi - for Respondent

Mr. Okoiti - Court Assistant