



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

H.C.C.A 218 OF 2013

JOHN MUTHAMA MULONZI.....APPELLANT/APPLICANT

VERSUS

ASSOCIATED BATTERIES LTD.....RESPONDENT

(Being an appeal from the Judgement and Decree of the Principal Magistrate's Court at Mavoko by Hon. T.A Odera (PM) in Civil Case No. 343 of 2012 dated 10th October 2013)

(Before E. Ogola J)

JUDGMENT OF THE COURT

1. The Appellant herein being dissatisfied with the Judgment and decree delivered by the learned magistrate **Hon. T. Odera in Mavoko Court**, has preferred this appeal citing the following grounds:-

- i. The learned trial magistrate erred in law and in fact in dismissing the Appellant's claim with cost in absence of any evidence rebutting his evidence on record.**
- ii. The learned magistrate erred in law and in fact in disregarding the Appellant's evidence on the Respondent's negligence despite the Respondent admitting indeed that the Plaintiff was injured in its company.**
- iii. The learned trial magistrate erred in law and in fact in finding that the Respondent was not negligent in absence of any evidence on record and more so relying on defence evidence which had no support unlike the Plaintiff's evidence.**
- iv. The learned magistrate erred in law and in fact in finding that the Plaintiff was not an employee of the Defendant in absence of any evidence rebutting his evidence on record.**
- v. The learned magistrate erred in law in fact in disregarding both the Appellant's and Respondent's pleadings and submissions on liability and quantum and misdirecting herself on the case law used by the Plaintiff.**

2. The background to the appeal is that the Appellant who was the Plaintiff in the trial court was a casual labourer in the Respondent Company which was the Defendant in the trial court. The Plaintiff filed a case seeking damages for injuries suffered while he was allegedly working as a casual worker for the Defendant. The Plaintiff pleaded and testified as the sole witness to the effect that he was injured on his foot by an axe while he was cutting a plastic battery when the axe slide from his hands and caused him

the injury. He was rushed to **Athi River Medical Clinic** for first aid after which he was put on lighter duties by the Defendant. He blamed the Defendant for not providing him with protective gear. The Appellant had prayed for:-

- **Special damages Kshs.1,000/=**
- **General damages for pain and suffering**
- **Costs of the suit**
- **Interests**

3. The Defendant did not adduce evidence as they had not complied with **Order 7 Rule 5 (b) and (c)** of the **Civil Procedure Rules** by not filing a list of witnesses. Despite lack of evidence or witnesses by the Defendant, the trial court dismissed the Applicant's case on grounds that:-

- **The Plaintiff did not prove that he was employed by the Defendant as a casual worker or otherwise at the time of the accident.**
- **That the Plaintiff had the sole control of the axe and so was the sole author of his injuries.**
- **That the risk the Plaintiff involved himself in was foreseeable since he had done it for 6 months and he had not been instructed on the work.**

4. The learned magistrate then dismissed the Plaintiff's case but observed that had he found for the Plaintiff he would have awarded damages of Kshs.80,000/=.

5. The Appellant urges the above grounds of appeal and prays that:-

a. The appeal be allowed.

b. The judgment delivered on 9th October 2013 and the resultant decree be set aside, vacated and or replaced.

c. The Respondent do pay the Appellant costs of the appeal and costs of the suit in Mavoko PMCC No. 343 of 2012.

6. With the leave of the court parties filed submissions to the appeal which I have carefully considered together with the grounds of appeal. The issues I raise for determination are as follows:-

- Whether the Plaintiff failed to prove his case in the trial court.**
- If he did, what amount of damages would be appropriate?**

7. On the issue of proof of case, it is to be noted that the Plaintiff's suit was defended by the Defendant, who denied employing the Plaintiff. The Defendant also denied the occurrence of the accident, as they did deny negligence, injuries and demand notice. The Defendant also pleaded *volentil non fit injuria*. The first issue is whether the Plaintiff was working for the Defendant as a casual worker or otherwise. The trial magistrate found that the Appellant was indeed injured, and was attended to at **Athi River Medical Services** according to Plaintiff Exhibit No. 3. It was the Plaintiff's evidence that first aid was administered to him at the Defendant Company, and then he was taken to **Athi-River Medical Clinic** by the Supervisor of the Defendant. Now, the issue which arises is whether the Defendant would administer first aid to a person who is not their employee, and then thereafter take him to hospital. It may as well be so. However, the evidence of the Appellant is that he was at the time employed by the Defendant, and that is indeed why they administered first aid and took him to hospital. In his testimony the Plaintiff had raised a *prima facie* case that he was employed by the Defendant, and it was now upon the Defendant to rebut the same by providing evidence to the contrary. The Defendant did not do that, as they did not call any evidence. The finding by the trial court that the Appellant was not employed by the Defendant was therefore erroneous. The Defendant did not lead any evidence to deny the same. The trial court was also at fault to find that because the Plaintiff did not have a letter of appointment he was not employed by the Defendant. What then was the Appellant doing at the Defendant's premises? The Defendant's denial in its defence is general and mere denial which in absence of cogent testimony was not enough to absolve

the Defendant from liability.

8. Further the Plaintiff produced evidence (Exh. No. 2) that he was put on light duty as recommended by the doctor, and treatment card and notes. These were not idle evidence to be dismissed without any contrary testimony from the Defendant.

9. The other finding of the magistrate was that the Appellant was the author of his misfortunes as he had the control of the axe which caused his injuries. This finding was also not well founded. The Appellant was lawfully employed and contracted to cut a plastic battery with an axe. This is a job he had done for 6 months. He could be an expert on it, but his expertise could not rule out any injuries. However, it must be shown or proved that the resultant injury was caused or contributed to by the negligence of the Defendant. The trial magistrate absolved the Defendant from any negligence without hearing their evidence. Did the Defendant provide the Plaintiff with adequate protective gear? The Plaintiff's evidence was that non was provided, while the Defendant kept silent. The Plaintiff was injured on the right foot. This means that if he had on gumboots or other protective gear the injury could have been avoided or minimized. It is strange logic that the trial court absolved the Defendant from any liability. In my view this is a case of negligence by the Defendant for failure to provide protective gear. But the Plaintiff also contributed to the injuries in the sense that this was a job he had done for six months and he ought to have taken greater care of himself. The provision by the Defendant of protective gear would be meant to keep the Plaintiff safe from accidental injuries which may ensue due to fatigue and other reasons including the negligence of the Plaintiff since he is a human being and is using tools which may cause injury at any time. In this regard it is the finding of this court that the Defendant was liable at 70% and that the Plaintiff contributed to his own injuries at 30%.

10. As for general damages I think the assessment of the trial court of Kshs.80,000/= was reasonable. I will not interfere with the same.

11. In the upshot the judgment of the court is as follows:-

- a. The appeal is allowed.
- b. The Defendant is found liable to the Plaintiff at 70% liability.
- c. General damages Kshs.80,000 at 100% liability.
- d. Interests at court rates on above as from the 9th October 2013.
- e. Costs of this appeal and of the trial suit shall be paid by the Defendant with interest thereon at court rates.

That is the judgment of the court.

Dated and delivered at Machakos this 12th day of October 2016.

.....

E. OGOLA

JUDGE

In the presence of:

Mr. Mutua Makau for the Appellant

M/S Njuguna for the Respondent

Court Assistant – Mr. Munyao