



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 141 OF 2003

JOHN MBUTA.....APPELLANT

- V E R S U S -

BOSKY INDUSTRIES LIMITED..... RESPONDENT

(An appeal from the judgment of SRM Hon. Ougo given on 21st February 2003 in the Chief Magistrate's Court Civil Case No. 2720 of 2001)

JUDGEMENT

1. John Mbuta, the appellant, herein filed a compensatory suit against Bosky Industries Ltd, the respondent herein, before the chief magistrate's court for the injuries the appellant allegedly sustained while working in the respondent's premises. The suit was heard by Hon. Ougo (Mrs) the then Senior Resident Magistrate. In the end the learned Senior Resident Magistrate dismissed the suit. Being aggrieved by the dismissal order, the appellant preferred this appeal.

2. On appeal, the appellant put forward the following grounds in his memorandum.

1. The learned magistrate erred in law and fact by not finding that the appellant failed to prove his case on a balance of probabilities as required by the law.

2. The learned magistrate erred in law and fact by not finding the respondent negligent and/or in breach of the contract of employment with the appellant.

3. The learned magistrate erred in law and fact by admitting and considering the 1st and 2nd defence witnesses' evidence.

4. The learned trial magistrate erred in law and in fact by failing to analyze the evidence placed before her in a keen and judicial manner and hence exercised her discretion erroneously while dismissing the suit.

5. The learned magistrate's supposed award for ksh.150,000.00 was inordinately low that it was erroneous.

3. When the appeal came up for hearing the appellant's counsel successfully applied to have the appeal disposed of by written submissions. At the time of writing this judgment, the appellant was the only party who had filed submissions.

4. I have re-evaluated the case that was before the trial court. I have further considered the submissions

filed by the appellant. The appellant argued in his submissions grounds 1, 2 and 3 together since they all relate to the appeal against liability. It is the submission of the appellant that he testified to the effect that the boiler was faulty and was repaired at around noon and burst at around 4.00pm on the same day being 6th September 1999. The appellant blamed the respondent for the faulty boiler and also accused it for failing to issue him with protective clothing. He also claimed that there was no preventive guard on the boiler that would have stopped the steam from burning him. The respondent's witness (DW1) told the trial court that there was a report of a spoilt valve and further confirmed that the steam from the boiler could actually burn. DW1 stated that the appellant had been issued with protective clothes although the same could not prevent burns from taking place. The respondent through the second witness (DW2) confirmed that the accident occurred but he blamed the appellant for its occurrence. The learned Senior Resident Magistrate considered the evidence from both sides. She eventually stated that she did not believe the plaintiff's evidence. It is the submission of the appellant that the learned trial Senior Resident Magistrate introduced evidence which were never tendered by the appellant to dismiss the appellant's case. The appellant took note of the fact that the trial magistrate is quoted to have made a finding that the allegation stating that the boiler burst was not pleaded. It is submitted that this was an erroneous finding and in contrast to the contents in paragraphs 6 of the plaint. In short, the appellant argued that he had tendered evidence showing on a balance of probabilities that the respondent was negligent and that it had breached the statutory and contractual duty. He stated that the employer (respondent) did not provide the appellant with a safe working environment. The recorded evidence shows that the learned magistrate believed the evidence of the respondent. In fact she formed the opinion that the two witnesses (Dw1 and DW2) did not exaggerate their evidence to the detriment of the appellant. The trial magistrate did not believe plaintiff's story that the boiler burst but was persuaded by the respondent's evidence that the appellant hit the valve to the steam and as a result it came off. She also opined that the appellant ought to have known the risks that come with the job. She also stated that the appellant had been warned of the dangers of hitting the valve. The learned magistrate further pointed out that the allegation that the boiler burst was not pleaded in the plaint. The learned trial magistrate also stated that the respondent's witnesses (DW1 and DW2) were able to convince her that the appellant was supplied with safe and adequate equipment for his use. I have on my part re-evaluated the evidence presented before the trial court. The recorded evidence show that the appellant stated that he got injured when the hot water container burst and poured hot water on him. The appellant informed the trial court that he reported the faulty boiler which was repaired before he resumed his duty of ironing clothes. He denied hitting the valve. The appellant also said he was not supplied with an overall to protect him. Zachary Bwala (DW2) was the only eye witness. He told the trial court that on the material day, he worked with the appellant. He said he saw the appellant's iron box hit the boiler valve and immediately the steam came out and poured on the appellant thus injuring him. He said he had to cut open the appellant's overall. Both the appellant and DW2 confirmed that they were warned not to hit the boiler valves. DW2 stated that the boiler was never faulty and that no repair was done. After a critical examination of the evidence tendered by both sides, I am convinced that the learned trial Senior Resident magistrate came to the correct decision to dismiss the suit. I am satisfied that there was credible evidence tendered by the respondent's witnesses that the appellant was supplied with protective gear in form of an overall.

5. The appellant further accused the trial magistrate for failing to take into account the unchallenged evidence of the witness.

6. There was also credible evidence showing that both workers i.e the appellant and DW2 were warned in advance not to hit the boiler's valve. There was also reliable and believable evidence of DW2 showing that the appellant is the one who hit the boiler's valve thus causing hot steam to pour out hence burning him. The respondent cannot in the circumstances be blamed for the accident. The appellant was the author of his misfortune.

7. In ground 5, the appellant complained that the respondent's witnesses were present in court when the appellant and his witnesses testified. He was of the view that his case was prejudiced. The record shows that the trial magistrate took note of the presence of the respondent's witnesses while the appellant's case was going on. She found them to be truthful witnesses. On my part, I am satisfied that the trial magistrate properly and correctly determined the issue. I find that the appellant's case was not prejudiced.

8. The appellant also complained that the proposed award of ksh.150,000 was inordinately low. I have reconsidered the proposals put forward to the trial magistrate by both sides. I have also considered the nature of injuries suffered and comparable case law. I find the proposal on damages made by the trial magistrate to be commensurate with the injuries and comparable cases. I find no merit in the appeal as against quantum.

9. In the end, I find no merit in the appeal. It is dismissed in its entirety with costs to the respondent.

Dated, Signed and Delivered in open court this 25th day of November, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent