REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 158 OF 2005

GACHAGUA SAWMILLS LTD……..APPELLANT

VERSUS

JOEL NJUGUNA KAMANGA……..RESPONDENT

JUDGMENT

The appellant (Gachagua Saw Mills Ltd) was sued by Joel Njuguna Kamanga (Respondent) who claimed to be its employee and who in the cause of his work sustained soft tissue injuries while putting logs into a breakdown machine. The incident was blamed on the appellants negligence where the respondent sought general and special damages.

After hearing the trial magistrate entered judgment in favour of the respondent against the defendant at 100% liability General damages were awarded at Ksh. 40,000/= and special damages at Ksh. 2000/=. The respondent was also awarded costs and interest.

The respondent being aggrieved by the findings filed an appeal stating that :-

(a)The respondent's claim was not proved and the Trial Magistrate erred in holding that appellant was 100% liable.

(b) The Trial Magistrate misdirected herself in evaluation of the oral and erred in finding that the appellant was 100% liable.

(c)The trial magistrate erred by disregarding and discrediting the award and documentary evidence by the appellants witnesses, particularly the Muster roll, in deciding the issue of liability.

(d) The Trial Magistrate relied on the wrong principle's to arrive at his judgment especially on the award from damages.

The respondent told the trial court that he was a casual worker at the appellants Saw Mills having secured employment in January 2004.He used to "***unload logs and place them on a small cell and take for splitting***" The task was performed alongside two other workers.

On 7/2/2005 while on day shift which begun at 3.30pm, he suffered an injury on the left hand thumb, while performing his tasks. He went to hospital and was treated as an out-patient. The appellant's manager took away his treatment card, and thereafter the respondent stopped working.

The appellant blamed the respondent for the accident saying

(a)The operator of the breakdown machine failed to inform them that he was moving the machine.

(b) They were understaffed as only two of them were working at the table, instead of four.

(c)He was not issued with gloves.

The respondent insisted that he had been very careful while performing his work, which on cross examination he said he had done for 1 ½ months. He was also categorical that as an employee he had signed the payroll on 7/2/2004. It was his evidence that he was working with one Onsabwa.

Dr Kiamba (PW 1) who examined the respondent found that the respondent suffered a compression of the right thumb which injury was not a permanent disability. The respondent's supervisor Patrick Mbugua Muiruri (DW 1) insisted that the respondent was not working at their saw mill, and he produced the master Roll showing names of all the employees — the respondent's name was not among them — the name closest to the respondent "being John Njuguna" further, whereas the respondent claimed to have been injured on 7/4/2004, which was a Saturday, DW 1 told the trial court that the mill works only for five days, and does not operate on Saturdays. In addition to this, whenever a worker got injured, such an incident would be recorded in the inquiry book, the Respondent's name did not feature in that record. In this regard the Trial Magistrate noted as follows:-

"The dates were not there in the book shown in the plaintiff, today, I can see dates.... "

The Trial Magistrate in her judgment noted that although the respondent's name did not appear in the Muster Roll and the other purported workers did not sign the master roll, it was significant that its maker was not availed. Further that the respondent had no control over the said Muster Roll, and failure to have his name entered therein could not be held against him. She thus found that

"The plaintiff has proved his case to the required standard. I find the defendant 100% liable"

On quantum, the Trial Magistrate considered the damages proposed and the decided cases referred to, but was of the view that the respondents injuries were more grave and deserved an award of Ksh.40,000/- as general damages. Dr Kiamba had produced a receipt showing he charged Ksh. 2000/= to prepare the medical report.

This appeal was disposed off by way of written submissions. The appellants counsel submitted that the Trial Magistrate placed the burden of proof on the appellant, and relied on the wrong principle of law, to discredit the appellant's award and documentary evidence. A reference is made to Section 107 of the evidence act which provides that: -

"Whoever desires any court to give judgment to any legal right or liability dependant on the existence of facts which he asserts, must prove that those facts exist"

Counsel argued that it was the respondents duty to show that at the time of the alleged incident, he was an employee of the appellant, that he was injured in the course of his employment and the appellant was liable for the injuries. It was counsels contention that respondent did not have any documents to prove he was an employee of the appellant and that burden of proof lay with him once the appellant produced the Muster Roll which did not have the respondents name among its workers then it was the duty of the respondent to lead evidence to discredit the appellant's conclusion. It was pointed out that:-

(a)The respondent would not even name his colleagues or supervisor or at work or clerk who allegedly administered first aid on them nor the manager who allegedly took away his treatment card.

(b) The respondent failed, to explain how he suffered injuries on Saturday yet the Appellant operated only on Monday's to Fridays.

It is also submitted that whereas in the pleadings, the respondent claims to have suffered injuries to the right hand thumb as does the medical report, the respondent insisted in court that the injuries were to his left hand thumb - which means he did not prove his injuries.

The respondent's credibility is questioned as it emerged in the course of the hearing that the respondent had sued the appellant in Nakuru CMCC No. 967 of 2004 alledging that he had been injured on the right thumb on 6/2/2004 and if that is the position then the court ought to have taken judicial notice that logs are heavy and lifting them require more than one man, and the use of both hands, so if he got injured on 6/2/2004, then it cannot be that he resumed work and was able to lift logs the next day on 7/2/2004. Counsel referred to several past decisions which have held that the onus of proof of injury at work lies on the plaintiff and the plaintiff must address evidence as to what happened unless it is a case of res ipsa loquitor.

In opposing the appeal, the respondents counsel argues that the appellant is liable as it failed to provide the respondent with protective gear, and the machine operator was incompetent. It is his contention that the appellant, failed to provide a safe working environment, and urges this court to uphold the judgment.

As regards rejection of the appellants documentary evidence, counsel submits that this was proper and it has been held in the past much as Sokoro Saw Mills Vs Grace Nduta Ndungu HCCA No. 99 of 2003,

that :-

> ***"Muster Rolls and accident book being documents which were unilaterally prepared by the master, with no input by the servant, could not be considered to be factual, in the face of the evidence".***

As for the damages awarded, it is argued that the same is reasonable bearing in mind the importance of the thumb. This being a first appeal, I have re-assessed and re-evaluated the evidence tendered before the trial court. Secondly, an appellate court will not ordinarily interfere with the trial court's findings/decision unless it can be shown that:-

(a) The trial Magistrate applied the wrong principles of law.

(b) The decision was not based on evidence adduced at the trial.

(c) The damages awarded were excessively high or inordinately low.

As regard the principles of law - it is a tested and confirmed position that the burden of proof lies on the one who is seeking orders in their favour - in this case the respondent who bore the burden of proving that he was (a) an employee (b) suffered injury while on duty (c) The appellant was negligent in failing to provide safety gears, and a safe working environment. Indeed section 107 of the evidence act supports that position. This is fortified by case law - See Henderson Vs Henry E Johness & sons [1970] A C which stated

> ***"In an action for negligence, the plaintiff must allege, and has the burden of proving that the accident was caused by negligence on the part of the defendants ..... The formal burden of proof does not shift .... "***

This was echoed in the case of ***Eastern Produce (K) Ltd Vs Wilson Martin Bett [2006] eKLR HCCA 94 of 1994 (Eldoret)*** which held that the onus of proof of injury at work, lies on the plaintiff, and it is not enough for the plaintiff to merely state that he was employed by the defendant. In as far as deciding to rely on the documents presented by the defence, I cannot fault the trial magistrate. She may not have given a detailed reason for the rejection, but one significant observation she made was that the maker of the Muster Roll did not testify - so that it was difficult to verify whether plaintiffs affirmed names had been omitted by error. The issue was well considered in the Gachagua Saw Mills Vs Grace Nduta Ndungu (supra) and I adopt that reasoning to the extent that the Muster Roll and injury books are

documents unilaterally prepared by the employer without right from the employee.

It is not so much the lack of information from the documents, but what other evidence did the respondent offer to prove he was an employee of the appellant? He could not name even one person under whom he worked- not the clerk or manager, nor could he give full names of the people he worked with. He mentioned one Onsabwa, whose details he could not give beyond floating the name in court.

Secondly the applicants evidence was that "the operator of the breakdown moved before I had taken a way the log. It fell on me. I was injured on left thumb on the nail".

A party is bound by his pleadings, and where there is contradiction in the evidence , then the trial court must resolve that contradiction and give reasons why it is resolving in favour of the person relying on that contradiction. That did not happen here. The respondent's case by his pleadings and evidence by Dr Kiamba was that he sustained injuries on his right thumb, yet in court he maintained that the injury was on his left thumb. This is confirmed by the fact that the respondent filed another case claiming that a day before this incident, he had injured his right thumb. The question that arises is would this be a case of double claim, since there was no attempt by respondents counsel to explain this anomaly as to which thumb was injured.

Further if the respondent was injured on the right thumb on 6/2/2004 then, was he in a state to come and carry on with work on 7/2/2004? This scenario raised reasonable doubt which in my view ought to have been resolved in favour of the appellant. I hold and find that the Trial Magistrate's decision was not founded by the evidence presented at the trial, and indeed the trial magistrate did not pay heed to legal principles in arriving at his decision.

Consequently the claim was not proved and it follows that the award for general damages and special damages must and is hereby set aside.

The appeal is allowed with costs to the appellant.

Written and dated this 30th day December 2014 at Bungoma

HON. H OMONDI

JUDGE

Delivered and dated this 28th day of January 2015 at Nakuru.

JUDGE

In the presence of

Ms. Rubia for appellant

Mburu h/b kisila for respondent

David court clerk.