REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 597 OF 2008

SAJ CERAMIC LIMITED.....APPELLANT

VERSUS

ROBINSON MONGARE.....RESPONDENT

(An appeal from the original judgment and ruling of Hon. Miss. Ireri in Milimani RMCC No. 4738 of 2007 on 2nd October, 2008)

JUDGMENT

1. This appeal has been filed on the following grounds:-

i. The learned magistrate failed to give any reasons for holding the Appellant 90% liable for the Respondent's injury which had been denied.

ii. The learned magistrate erred in law in failing to make any assessment of the evidence adduced before her and the submissions filed.

iii. The learned magistrate failed to appreciate the Appellant's denial that the Respondent was injured as alleged.

iv. The learned magistrate erred in law and in fact in awarding an excessive amount of damages.

2. The Respondent filed Milimani RMCC No. 4738 of 2007 against the Appellant seeking recovery of damages from an alleged industrial accident. The Respondent's claim was that he sustained a crush injury to the right foot while he was in the course of employment with the Appellant and attributed liability to the Respondent. He particularly testified that on 8th February, 2007 he and two other colleagues were arranging tiles into a wooden pallet. While he went to pick a pallet, one slipped and hit him on the leg. He stated that the pallets were over-stacked; that he did not expect an accident to occur. Attributing liability to the Appellant, he told the court that the pallets should not have been over-stacked and small threads should have been removed prior to him handling the pallets and that he should have been supplied with new boots since the ones he had were old. He received first aid treatment from one Onesmus Kivuva and later went to Athi River Medical Services where he was treated for several days. He was given 11 days off duty and sick off but had not fully recovered from the injury at the time he testified since he was still experiencing pain. The Respondent produced two medical reports in support of his claim to injuries. These had been prepared by Dr. Kiama dated 14th May, 2008 and by Dr. R. P. Shah dated 3rd October, 2007.

3. The Appellant filed a statement of defence and denied the Respondent's claim. In evidence, George Munguti (DW1) who was the Respondent's colleague testified that he was working together with the Respondent on the material night. He stated that he did not witness the Respondent getting injured but that the Respondent did inform him of the occurrence of the accident but they continued to work throughout the night. He told the court that the pallets were not so heavy. On cross-examination, he stated that he was about 15 metres away from the Respondent and he did not know whether the Respondent was injured neither did he believe he was injured. He testified that the pallets were between 10kg to 13 kg. He agreed that it was possible for the pallets to stick together. DW1 maintained that he was only informed of the accident after it had occurred.

4. Joshua Nzioka Mule (DW2) who was the supervisor testified that he was never informed of the accident yet he was the Respondent's immediate supervisor. He said that the Respondent only went to hospital later. That the Respondent's shoe could not have been torn since the workers had been issued with new boots and coats in January of the year in question. On cross-examination he maintained that the Respondent did not inform him of the accident but he learnt of it from a Mr. Karimi and that the Respondent did record a statement with the Personnel Manager. He was unaware how the Respondent obtained a sick sheet. That no letter dated 9th February, 2006 was issued to the Respondent but admitted that it was possible for one to be treated without a referral letter.

5. Upon hearing the matter the trial magistrate entered judgment in favour of the Respondent against the Appellant in the following terms:-

1. Liability: 90:10

2. General Damages: 130,000/-

3. Special damages: 1,500/-

Total award after apportionment KSh. 118,350/- plus costs and interest @ court rates till payment in full."

6. On the first two grounds, the Appellant cited Order 21 Rule 4 of the Civil Procedure Rules and submitted that it is upon a judicial officer to give a basis of how he/she arrives at a particular decision. It was submitted that the failure by the trial magistrate to give reasons for her decision was a fatal error since it contravened the provisions of Order 21 Rule 4. To buttress this argument, the Appellant quoted an excerpt from **Ochieng v. Amalgamated Saw Mills (2005) 1KLR 151** as follows:-

"The trial magistrate abdicated his judicial responsibility in failing to set out the points for determination and the reasons for his decision. A judicial officer may be right or wrong in his final decision, but either way, he is under a duty to state in writing the reasons which made him arrive at a particular decision. In my view, any purported judgment that does not contain the essential ingredients of a judgment as required under Order XX Rule 4 is not a judgment and an appellate court would most likely set it aside. An aggrieved party who has a right of appeal would be disadvantaged by such a judgment if he chose to appeal. An Appellate court should be able to follow the reasoning of a trial magistrate in order to determine if the decision arrived at was proper in law or not."

The Appellant then urged that the trial court's judgment be set aside and the evidence be re-evaluated.

7. This being a first appeal, this court is under an obligation to re-evaluate the facts afresh and come to its own independent findings and conclusions as was observed in **Selle v. Associated Motor Boat Company & Others (1968) E.A. 123**.

8. The first and second grounds of appeal deals with compliance with **Order 21 rule 4** of the *Civil Procedure Rules*,2010 which provides as follows:-

"Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision."

The trial court's judgment was as follows:-

"The plaintiff in this suit sues the defendant for injuries he sustained while in his line of duty at the defendant's factory on/about 8th day of February, 2007. Plaintiff was injured on the right foot. I have duly considered the plaintiff's evidence, the medical report produced by consent, the treatment notes and all other exhibits incidental to this suit, the defence's evidence and Nairobi HCC 3322/91 and proceed to award damages as follows:

1. Liability:

90:10

2. General Damages:

130,000/-

3. Special damages:

1,500/-

Total award after apportionment Kshs.118,350/- plus costs and interest @ court rates till payment in full."

9. It was held in the English case of ***Flanner v. Halifaz Agencies Ltd [2001] ALL ER 273*** thus:-

"1. The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties especially the losing party should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know (as was said in Ex parte Dave) whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind, if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.

2. The first of these aspects implies that want of reasons may be a good self-standing ground of appeal. Where because no reasons are given it is impossible to tell whether the judge has gone wrong on the law or the facts, the losing party would be altogether deprived of his chance of an appeal unless the court entertains an appeal based on the lack of reasons itself..."

10. The trial court's judgment set out above clearly has no essentials expected of it under Order 21 Rule 4 of the Civil Procedure Rules. In that regard I adopt the wordings of Makhandia J in the case of **South Nyanza Sugar Co. Ltd v. Omwando Omwando (2011) eKLR** where he held as follows:-

"I do not think that, the judgment as crafted by the learned Magistrate really qualifies for a valid judgment. Ordinarily and in law a judgment should deal with issues raised and should not be scanty. A judgment must comply with the mandatory provisions of order 21 rule 4 of the Civil Procedure Rules which provide that a judgment in a defended suit shall contain a concise statement of the case, points for determination, the

decision thereon and reasons for such decision. In the circumstances of this case, it cannot be said from the extract of the judgment I have set out above the trial magistrate complied with this mandatory provisions of the law. The trial magistrate by not setting out points for determination and reasons for his decision contrary to the aforesaid provisions of the law abdicated his judicial responsibility. As a judicial officer he was under a duty to state in writing the reasons which made him arrive at a particular decision on liability and the apportionment thereof. It could not have been done in vacuo. Any judgment that does not contain the aforesaid essential ingredients is not a judgment and an appellate court will frown at such a judgment and indeed impugn it as I hereby do. This ground alone would have been sufficient to dispose of the appeal. "

From the foregoing, it is quite clear that the judgement of the trial court cannot be called a judgement. The same cannot stand**.**

11. On the third ground, the Appellant submitted that having denied that the Respondent's injury was due to its negligence, it was incumbent upon the Respondent to prove that he was injured but that since no such proof was furnished by the Respondent, there was not merit in the trial court's finding that the Appellant was liable. On this point the Appellant relied on the case of **Afro Apin Ltd v. George Mangaa Maganya (2010) eKLR.**

12. On the fourth ground the Appellants submitted that the award of KShs. 130,000/- for a blunt injury was excessive and proposed an award of KShs. 40,000/-. To support its case to the award of general damages the Appellant relied on **Nakuru HCCA No. 99 of 2003 Sokoro Saw Mils Ltd v. Grace Nduta Ndu'ngu**, **Bungoma HCCA No. 72 of 2007 Mumias Sugar Company Ltd v. Patrick Amamu Saka**, **Kigaragari v. A. Mary Aya (1982-88) 1 KAR 768** and **Tayab v. Kananu (1982-88) 1KAR 90**.

13. Having found that the judgment of the trial court cannot stand, there is jurisdiction that this court can deal with this matter the same way the trial court would have dealt with it (See Section 78 (1) (a)). I will, therefore, proceed to considers grounds 3 and 4 of the Memorandum of Appeal.

14. With regard to the third ground, certain questions arise concerning the Appellant's argument that the Respondent did not prove that he was injured. The first question is whether DW1's statement that he did not see the Respondent get injured conclusive evidence that the Respondent did not get injured. My answer to that question is in the negative. DW1's statement is negated by DW2's statement that he learnt of the Respondent's injury from Mr. Karimi who was the personnel manager. It is worth noting that Mr. Karimi failed to attend court to explain exactly how he got to know of the Respondent's injury neither was it suggested that Mr. Karimi was no longer in the Appellant's employment. The presumption in law is that a party who has in his possession evidence which he fails to call, that evidence is presumed to have been adverse to him. In the absence of such an explanation, it is my view that the Appellant bore liability and that the Appellant tried to conceal the fact that the Respondent indeed sustained injury at work. Additionally, The Respondent’s testimony throughout remained consistent and was not effectively challenged. He produced authentic treatment documents which proved that he sustained the injury to his foot. I am therefore, satisfied that the Respondent was injured while at his place of employment with the Appellant.

15. On liability, while DW2 stated that the workers had been issued with new boots in January OF 2007, no documentary evidence was produced to so prove. As I have already stated, the Respondent’s testimony remained consisted and unshaken at the trial. I, therefore, find no substance in statement, by DW 2 and find that the Respondent was not supplied with proper protective boots. It was the Appellant’s statutory duty under the Factories Act (Cap 514 Laws of Kenya) to provide the Respondent with boots considering the risk he was exposed to. Clearly a pallet of between 10-13 kgs is heavy enough to cause a serious injury to one's foot. The court in **African Highlands & Produce Co. Ltd v. Collins Moseti Ontekwa Kericho HCCA No. 38 of 2002(UR)** while dealing with similar facts held as follows:-

“I do hold that the appellant was solely liable for the injuries sustained by the respondent due to the fact that under the Factories Act the failure of an employer to

provide protective gear to an employee, especially when he is working in a dangerous environment means that, in the event such an employee is injured, then an employer shall be guilty of breach of a statutory duty. Liability in such event is strict."

16. The learned authors of Winfield and Jolowicz on Tort by WVH Rogers 14th Edition, London Sweet and Maxwell at page 213 it is state as follows:-

"If a worker is injured just because no one has taken the trouble to provide him an obviously necessary safety devise, it is sufficient and in general satisfactory to say that the employer has not fulfilled its duty."

17. In this regard, the Appellant cannot escape liability having not produced evidence. In my considered opinion, in measuring the duty care, one must balance the risk against the measures necessary to eliminate the risks. The Respondent knowing that he was working under unfavourable conditions ought to have been cautious. He too has to shoulder liability. In the circumstances, I will apportion liability at 70% -30% as between the Appellant and the Respondent.

18. On quantum I am guided by the principles laid down in **Loice Wanjiku Kagunda -vs- Julius Gachau Mwangi C A No. 142 of 2003 (UR)** where the Court held as follows:-

"We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence, an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (See Mariga –vs- Musila (1984) KLR 257.)

19. As earlier stated, lack of reasons for the decision is an error in principle that invalidates the entire decision. This court is therefore of the view that quantum ought to be re-assessed. In his plaint, the Respondent alleged that he suffered a crush injury on his right foot. However, the medical reports show that the Respondent sustained an injury that was expected to heal with no resultant incapacitation. I have considered the authorities cited by the Appellant vis a vis **Eastern Produce (K) Ltd (Savani Estate) v. Gilbert Muhunzi Makotsi (2013) eKLR**, where a Respondent who has suffered a pricked wound on the left foot (dorsal aspect) which was tender and incurred severe pains during and after the injury was awarded KShs. 70,000/= as general damages in the year 2013. The Appellant's proposal on damages is on the lowest side considering the Respondent's injury. I also note that the cases cited by the Appellant are very old cases. Bearing in mind the age of the Eastern Produce case (supra) and the rate of inflation on the Kenya Shilling, I find that an award of KShs.130,000/= would be reasonable. In the end, the appeal succeeds.

20. Accordingly the judgment is set aside in it's entirely. The Respondent shall be held 30% liable. The Respondent produced a receipt for KShs. 1,500/- for medical report. Damages are assessed at Kshs.130,000/-. A sum of KShs.131,500/= is awarded to the Respondent less 30% contribution, that is Kshs.92,050/- plus interest at court rate from the date of judgment in the lower court. The Respondent shall have the costs of the suit. Parties shall meet their own costs of this appeal.

Dated, Signed and Delivered at Nairobi this 22nd day of May, 2015.

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A MABEYA

JUDGE