



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 171 OF 2010

GIDEON K. KEMBOI APPELLANT

VERSUS

NYAYO TEA ZONE DEVELOPMENT CORPORATION RESPONDENT

(An Appeal from the Judgment of the Resident Magistrate Honourable G. Mutiso (RM), in Kapsabet PMCC No. 354 of 2005, dated 9th September 2010)

JUDGMENT

1. This appeal arises from the judgment and decree of the Principal Magistrate's court at Kapsabet dated 9th September, 2010.

The appellant was the plaintiff in the lower court while the respondent was the defendant. The appellant had sued the respondent claiming special and general damages for injuries sustained in an accident which occurred on 15th January, 2015 in the course of his employment with the respondent.

2. The appellant blamed the accident on the negligence of the respondent, its servants or agents. The particulars of the alleged negligence are pleaded in paragraph 5 of the plaint as follows:-

- a. Exposing the plaintiff to risk which he knew or ought to have known.
- b. Failing to provide the plaintiff with protective gear/devices to guard against the injuries e.g. gloves, helmet, apron, kits, gumboots etc.
- c. Failing to take proper precaution for safety of the plaintiff
- d. Failing to adhere to safety rules set.

3. The injuries the appellant claims to have sustained were also pleaded in paragraph 5 of the plaint. It is alleged that he sustained a deep cut wound on the left leg about 5 centimeter long; loss of blood and severe pains during and after the injury.

4. In its statement of defence dated 23rd April, 2009, the respondent denied the appellants claims in their entirety and put him to strict proof thereof.

In the alternative, the respondent contended that if the accident occurred as alleged which was denied, the same was wholly or substantially contributed to by the appellant. The particulars of the plaintiff's alleged negligence were also pleaded in paragraph 5 of the statement of defence.

5. After a full trial, the learned trial magistrate *Hon. G. Mutiso (RM)* in a judgment delivered on 9th September, 2010 dismissed the appellant's suit with costs to the respondent. This was after

making a determination that the appellant had failed to prove his case against the respondent to the required legal standard.

6. Aggrieved by the trial court's decision, the appellant proffered the instant appeal through a memorandum of appeal dated 14th September 2010 on grounds that;
 - i. ***The learned trial Magistrate erred in law and in fact in finding that the plaintiff had not proved his case on a balance of probability whereas there was overwhelming evidence to the contrary.***
 - ii. ***The learned trial magistrate erred in law and in fact in failing to consider the submissions of the plaintiff while arriving at his decision.***
 - iii. ***The learned trial magistrate erred in law and in fact in failing to consider the evidence adduced in support of the plaintiff's case while arriving at his decision.***
 - iv. ***The learned trial magistrate erred in law and in fact in failing to find that the plaintiff had proved negligence against the defendant and ought to have been compensated for the serious/grievous injuries suffered.***
 - v. ***The learned trial magistrate erred in law and in fact in failing to find that the defence case did not offer any and/or any satisfactory answer to the plaintiff's case.***
 - vi. ***The learned trial magistrate erred in law and fact in failing to take into consideration matters that he ought to have considered in arriving at his decision and taking into consideration matters he ought not to have considered in arriving at his decision.***

The appeal was prosecuted by way of written submissions: those of the appellant were filed on 1st December, 2014 while those of the respondent were filed on 20th November, 2014.

7. This is a first appeal to the High Court. As such, it is an appeal on both facts and the law. I am aware of the duty of the first appellate court which is to reconsider and re-evaluate the evidence tendered before the trial court to draw my own independent conclusions bearing in mind that I did not see or hear the witnesses:- See: ***Peters V Sunday Post Ltd 1958 E.A 424; Selle V Associated Motor Boat Company ltd (1968) EA 123.***
8. I have considered the grounds of appeal, the pleadings in the lower court, the evidence tendered before the trial court, the impugned judgment and the rival submissions filed by both parties and all authorities cited.

Having done so, I find that the main issue for determination by this court in this appeal is whether the learned trial magistrate erred in law or in fact in finding that the appellant had not established his case against the respondent on a balance of probabilities and in consequently dismissing the appellant's suit with costs.

In resolving this issue, I will be guided by the general rule that an appellate court should be slow to interfere with findings of fact made by a trial court unless such findings are not supported by any evidence or are based on a wrong legal principle. In ***Makube V Nyamuro (1983) KLR 403,*** the court of appeal discussed this principle and held as follows:-

“A court on appeal will not normally interfere with a finding of fact by a trial court unless it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion....”.

9. That said, I now wish to turn to the evidence adduced before the lower court. In his evidence, the appellant testified that on 15th January 2005, he was working for the respondent as a tea pruner at its Denja Estate. He had worked for the respondent in the same capacity for six years. He testified that on the material date, he was cut by the pruning knife on the left foot. As a result, he sustained an injury for which he received treatment at Asai Medical Clinic on the same date
10. He blamed the respondent for his injury because he had not been provided with gloves and gumboots. He did not however tell the court how provision of gloves and gumboots would have prevented him from sustaining the said injury.

In his evidence on cross examination, the appellant maintained that he was working for the respondent in January 2005 and that he was paid

Kshs. 4,000 for his labour that month though he had no evidence to support that claim.

However, in his evidence in re-examination, for no apparent reason, the appellant changed his mind and contended that he was not paid for the month of January 2005.

11. In support of his case, he called two witnesses namely PW2 and PW3. PW3 is the clinical officer who treated him at Asai medical clinic on the same date of the alleged injury. He testified that he treated the appellant for a bruise on the right hand. In his view, the injury had been caused by a stick. He produced his treatment notes as P exhibit 1.

PW2 Dr. Samuel Aluda examined the appellant on 25th August, 2005 about seven months after the injury. He noted a scar on the appellant's left leg and relying on PW3's treatment notes, he opined that the appellant had sustained a deep cut wound of 5cm on the left leg. The wound had healed at the time of examination.

12. The respondent in his defence called one witness John Hamisi who was one of its block supervisors. He advanced the respondent's case that though the appellant used to work for the respondent as a tea plucker, he was not working in January, 2005 and that this is why his name was missing from the master roll and pay sheet produced as D exhibit 1 and 2.

The respondent's case therefore was that if the appellant was injured on 15th January 2005, then the injury was not sustained in the course of his employment.

13. After analyzing and weighing the evidence placed before the court, the learned trial magistrate in his judgment stated as follows;

“was the plaintiff injured while working for the defendant on 15th January, 2005? I doubt. The plaintiff claims to have been working for the defendant that day but his name does not appear in the muster roll nor does it appear in the pay sheet. He has not produced documents to show that he worked for the defendant on 15th January, 2005. He did not call any co-workers who saw him working for the defendant or who saw him being injured. The plaintiff has failed to prove that he was working for the defendant on 15th January, 2005 on a balance of probabilities.

I need not answer issue No. 3 given my holding on issue number 2 above. But supposing I am wrong in my finding that the plaintiff did not work for the defendant on 15th January, 2005? The plaintiff claims that he was cut by the pruning knife he was using to prune tea. He was solely in control of the knife and there is no evidence that it was defective. As with all sharp objects, every reasonable man is required to exercise caution not to harm himself while using sharp tools. It is opposed to logic that the plaintiff after harming himself should blame the employer. There is also an inconsistency of the evidence presented by the plaintiff's witnesses.

While Dr. Aluda (PW2) claims to have observed a deep cut wound on the plaintiff's left leg, PW3 the clinical officer who supposedly treated the plaintiff when the injuries were fresh states that the plaintiff had a bruise on the left hand. This contradictory evidence substantially weakens the plaintiff's case...”.

14. On my part, after re-evaluating the evidence tendered before the trial court, I am unable to fault the learned trial magistrate on his finding that the evidence adduced by the appellant fell short of

establishing on a balance of probabilities that he was indeed injured on 15th January 2005 while working for the respondent. The trial magistrate correctly observed that the appellant did not produce any documentary or other oral evidence from either his co-workers or anybody else who could have witnessed the alleged accident to substantiate his claim that he had been injured in the course of his employment with the respondent on the date alleged.

15. There is no doubt in my mind that the above finding was based on the evidence which was before the trial court; that it was also anchored on the legal principle codified by **Section 107** of the **Evidence Act** which basically provides that he who alleges must prove. The law is that in civil cases, the burden of proof remains with the plaintiff throughout the trial and does not at any time shift to the defendant.

For the appellant to have succeeded in his suit, he ought to have proved to the required legal standard two things; First, that he had not only sustained the injury complained of but that the injury had actually occurred in the course of his employment. Secondly, he had to prove that the injury was occasioned by the negligence of the respondent, its servants or agents.

16. In this case, as stated earlier, I am satisfied that the learned trial magistrate correctly addressed himself to the evidence before him and the law and arrived at the correct conclusion that the appellant had not proved on a balance of probabilities that he was injured on 15th January 2005 in the course of his employment with the respondent. The material contradictions in the appellant's case noted earlier in paragraph 10 and 11 further supported the trial court's finding on this limb of the appellant's case. Of particular importance is the evidence of PW3 which in my view created serious doubt whether the appellant sustained the alleged on 15th January 2015.

17. Regarding the second limb that the appellant needed to prove in order to establish his case, I wish to state at the outset that an employer is not automatically liable for every injury sustained by an employee in the course of employment. For an employer to be found liable for an accident involving its employee or resultant injuries, the employee must establish a causal link between the accident and the respondent's negligence or breach of contractual or statutory duty. In **Statpack Industries V James Mbithi Munyao Nairobi H.C Civil Appeal No. 1152 of 2003**, the court held as follows:-

“It is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone's negligence and his injury. The plaintiff must adduce evidence from which on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone's negligence. An injury per se is not sufficient to hold someone liable”.

18. Applying the above principle to the present case, I find that the appellant also failed to establish a link between his alleged injury and the respondent's negligence. He only stated in his evidence that as he was working, the pruning knife cut him on his left foot. He did not go further to explain the circumstances surrounding which the knife left his hands and landed on his foot. It must be remembered that this is a job that the appellant in his own admission had undertaken for six years and in my view it is not a job which required any special training. As such, as pointed out by the learned trial magistrate, the appellant must have been aware that he was dealing with a sharp instrument and had a duty to be vigilant in the course of his duties in order to avoid injuring himself.

19. Apart from blaming the respondent for failure to provide him with gloves and gumboots, the appellant did not adduce any evidence to prove that the respondent or its agents were guilty of any act or omission which was negligent and which caused or contributed to the occurrence of the accident.

The duty of an employer to ensure the safety of an employee is not absolute. The law only requires an employer to exercise reasonable care against foreseeable risks or risks that can be avoided by taking reasonable precautions. While as it may be true that provision of gloves may have been necessary for the appellant to work in safety given the nature of his work, the appellant did not demonstrate that there was any relationship between lack of gloves and his injury. As for the claim

that the respondent was liable for its failure to provide him with gumboots, I fail to see how provision of gumboots would have aided the appellant with his work of pruning tea.

20. For all the above reasons, I concur with the learned trial magistrate's findings that the appellant totally failed in this case to prove his case against the respondent on a balance of probabilities as required by the law. Having failed to prove his case on liability, the learned trial magistrate was right in dismissing the appellant's suit with costs to the respondent.

In the result, this appeal fails in its entirety. It is consequently dismissed. The appellant shall bear the costs of the respondent in the lower court and in this appeal.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 29th day of September 2015.

In the presence of:-

Mr. Misoi holding brief for Mr. Kagunza for the Appellant

No appearance for the Respondent

Mr. Lesinge court Clerk