REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 77 OF 2013

BETWEEN

MUMIAS SUGAR CO. LTD……APPELLANT

AND

HENRY KHATOLWA AMUKOYA……..RESPONDENT

(***Being an appeal from the judgment and decree of the Senior Resident Magistrate's Court Butere in Civil Suit No. 7 of 2010 delivered on 15.11.2012)***

JUDGMENT

Introduction

1. This is an injury claim. From the plaint dated 14.01.2010 the respondents case was that on the 26/08/2009 while he was in the ordinary course of his employment with the appellant of harvesting sugar cane in Block 22 NAMBALE/MSOKOTO he fell in a camouflaged hole and sustained injuries for which he held the appellant liable. The appellant alleged that the appellant was in breach of statutory or common law duty of care by

a. Failing to provide effective working conditions.
b. Failing to reveal to the plaintiff the dangers involved in this work
c. Allowing the plaintiff to work without supervision
d. Failing to provide the plaintiff with adequate protective wear
e. Failing to warn the plaintiff of the existence of the hole on the field.
f. Failing to instruct the agents to mark out the camouflaged hole.

2. The respondent alleged that as a result of the accident, he suffered a bilateral tear of the collateral ligaments, a torn anterior cruciate ligament and a longitudinal fracture of the lateral condoyle of the right tibia for these injuries, the respondent claimed both general and special damages.

3. In its written statement of defence dated 14.09.2010, the appellant denied each and every allegation contained in the plaint. The appellant also averred that if any accident occurred which was denied then the same was due to the sole and/or contributory negligence of the respondent who the appellant accused of:

a. Walking without due care and attentions
b. Failing to adhere to safety regulations given by the defendant which were part of his instructions.
c. Working while intoxicated
d. Acting in a careless manner

e. Carrying out duties he had no authority to carry out.
f. Playing around the hole
g. Failing to make use of the safety equipment and his training
h. Working without due care and attention
i. Failing to keep any or any adequate or proper look out.

4. The appellant therefore prayed for dismissal of the respondent's suit

The Respondent's case

5. The respondent testified as PW1. He stated that he worked for the respondent as a cane cutter from 1992 to 26/08/2009 under employment number 403. He produced a payslip for June 2009 Exhibit 6 to confirm he was an employee of the appellant. He stated that on the day in question, he was together with fellow cane cutters carrying some cut sugarcane in block 22 Msokoto area in Nambale when he fell into a camouflaged hole and fractured his right leg. He received first aid and on the following day he was taken to St. Mary's Hospital Mumias for X-ray. He continued receiving outpatient treatment as per Exh P1 being treatment notes. Later he was referred to Moi Teaching and Referral Hospital where he was admitted on 04/12/2009 and discharged on 09/12/2009. The respondent produced a letter written by the appellant to MTRH – EXB P2, discharge summary from MTRH- Exh P3 and an inpatient invoice from MTRH – EXH P4. The respondent also stated that he later saw Dr. Andayi who prepared a medico-legal report produced as mFI –p5a for which the respondent paid Kshs.3,500/= as per Exh P5b.

6. The respondent further testified that the hole into which he fell was neither inspected nor flag marked to warn anybody working in the field of the lurking danger. He also said he was not supplied with gloves or gumboots, that if he had had gumboots, he would not have slipped and fallen into the hole and that the same gumboots would have protected him from getting a fracture. The respondent denied that he played around the hole or that he worked while intoxicated or without attention. He also said he followed the appellant's instructions for the work he was doing. Finally the respondent stated that the appellant paid all his hospital bills. The medical report by Dr. Andayi was produced by consent of counsel for the parties and marked as Exh P5 a.

7. PW2 was Jackson Musungu Oduor. He corroborated the respondents testimony that the respondent fell into a hole during working hours and injured his leg, and that he is the one who helped the respondent to get out of the hole and later carried him to the lorry at the end of the day.

8. Pw2 blamed the appellant for the accident by failing to hoist a red clothing as a warning of the presence of the hole into which the respondent fell. He stated further that in the alternative the appellant should have filled up the hole. PW2 also stated that at the material time the appellant was not issuing gumboots to its workers.

The appellant's case

9. The appellant called only one witness in the person of Samson Mangwana who testified as DW1. He was the appellant's harvesting and transport administration manager whose duties included recruitment of cane cutters and management of his section which included receiving reports on any injuries on any particular working day. He testified that he did not receive any report of the respondent's injury on the 26/08/2009, and that for the said reason, the respondent's claim was false. DW1 stated that a report of injury would have reached him directly through the field supervisor who would have received the same from the field assistant.

10. DW1 also testified that before employment the prospective employees are given instructions on safe cane cutting which include instruction to clear vegetation while they are cutting cane so that the cane is visible and for their own safety Dw1 held the respondent responsible for the accident. He produced the safety cane manual as Exh D1

11. During cross examination, Dw1 stated that as a company the appellant never flagged the dangerous zones in the field. He also conceded that he had not availed the accident occurrence register for the eyes of the court. He also said that the best person to say whether/or not an accident occurred was the field supervisor who was not called as a witness.

Judgment of the Trial Court

12. Upon careful analysis of all the evidence placed on record and the submissions by counsel, the learned trial magistrate Hon. E.S. Olwande PM was satisfied that the respondent had proved his case against the appellant on a balance of probabilities. That an accident indeed occurred on the date alleged and that the accident occurred because of breach of duty **of** care on the part of the respondent. The trial court awarded the sum of kshs.350,000/= in general damages and kshs.3,500/= special damages together with costs and interest.

The appeal

13. Being aggrieved by the whole of the trial court's judgment, the appellant filed appeal based on the following grounds;-

1. The learned trial magistrate erred in law and in fact in disregarding the fact that the plaintiff failed to file a reply to defence yet this omission amounted to an admission of particulars of negligence levied against the plaintiff by the defendant in its written statement of defence.
2. The learned trial Magistrate erred in law and in fact in holding the defendant 100% liable for the injuries suffered by the plaintiff despite overwhelming evidence to the effect that the plaintiff was injured while performing a manual task well within the control of the plaintiff who had received training prior to commencing his job.
3. The learned Trial Magistrate grossly misdirected himself in awarding quantum of damages that was excessive inordinately high and wholly an erroneous estimation of the damages.

14. On the basis of the above three grounds, the appellant prays that the appeal be allowed with costs and that the judgment of the learned trial Magistrate be set aside with costs.

15. As this is the first appellate court, I am under a duty to carefully reconsider and evaluate the evidence afresh with a view to reaching my own conclusions in the matter remembering only that this court has no opportunity to either see or hear the witnesses who gave evidence during the trial. I also have the duty of carefully considering the judgment of the learned trial magistrate with a view to determining whether the conclusions reached by the trial Court were well founded. I am also under a duty to exercise great caution before deciding to depart from the trial Court's findings. See Selle & another – vrs- Associated Motor Boat Company Ltd.& Others (1968) E.A 123 and Peters – vrs Sunday Post (1958) E.A 424.

The Submissions

16. This appeal proceeded by way of written submissions. I have carefully read the appellant's submissions dated 07/04/2015 and filed in court on 08/04/2015. With regard to ground 1 of the appeal, the appellant relied on the Court of Appeal decision in the case of **Katiba Wholesalers Agency Ltd – vrs – United Insurance Co. Ltd. – Civil Appeal No. 140 of 2002** (unreported) for the proposition that: **"……..where a defence contains an allegation of facts, and a reply is filed …….. it is necessary for the plaintiff to deny in the reply an allegation in the defence which he intends to dispute. If he fails to do so, then he is deemed to have admitted the defence allegations."**

17. Reliance was also placed on the case of **South Nyanza Sugar Co. Ltd. – Vrs – James Apepo- Kisii HCCA NO. 83 of 2005 (unreported)** for the further proposition that:

"…… any allegation of fact made by a party in his pleadings shall be deemed to be

admitted by the opposing party unless it is traversed by that party in is pleadings ……..”

18. On grounds 2 and 3 it was submitted on behalf of the appellant that from the trainings given to the respondent and others at time of recruitment the appellant fulfilled its duty of care to the respondent as testified to by DW1. It was further submitted that failure to file a reply to defence implied that the respondent admitted he was negligent and therefore the general damages awarded to him were excessive and inordinately high and that there should have been contribution of at least 10% against the respondent. Reliance was placed on Eldoret High Court decision in the case of China Wuyi & Co. Ltd – Vrs – Samson K. Metho – Eldoret Civil Appeal No. 181 of 2009 (unreported) for the proposition that this court has the power to vary the award made to the respondent herein.

19. The respondent’s submissions are dated 10/02/2015 and filed in court on the same day. With regard to ground 1 of appeal reliance was placed on the provisions of Order 12 Rules 1 and 4 of the Civil Procedure Rules to the effect that **“if there is no reply to defence there is a joinder of issues on that defence.” and that “a joinder of issues operates as a denial of every material allegation of fact made in the pleading on which there is a joinder of issues unless in the case of an express joinder of issue any such allegation is expected from the joinder and is stated to be admitted**”. Reliance was also placed on the case of Denmus Oigoro – vrs – Njica Consolidated Ltd (civil Appeal No. 310 of 2006 (unreported).

20. On the issue of liability it was submitted that the trial court should have apportioned liability since the hole was camouflaged by sugarcane trash and other cane cutters had cut cane in the said place. The respondent relied on the English case of **Davies – vrs – Swan Motor Co. (1949) 2KB 291 in which Bucknill LJ stated the following;- “ when one is considering the question of contributory negligence it is not necessary to show that negligence constituted a breach of duty to the defendant. It is sufficient to show lack of reasonable care by the plaintiff for his own safety.” See also Joseph Otiende – Vrs _ Hayer Bushan Sigh & Sons Nairobi HCCC NO. 972 OF 1992** in which the court held the defendant 100% liable where a ditch into which the plaintiff fell had not been red-flagged.

21. On ground 3 touching on quantum of damages it was submitted that there was no evidence to show that the trial court failed to apply the relevant principles in arriving at the award nor that the award was so high as to amount to an erroneous estimate of the damages awardable. See **Kenfro Africa Ltd vrs – Meru ExpressService – Gathogo Kanini – Vrs – A.M. Lubia & another (1982 -88) IKAR 777.** The respondent thus urged the court to dismiss the appeal in its entirely.

Analysis and findings

22. After carefully reconsidering and evaluating the evidence afresh and applying the law as above highlighted, I make the following findings:-

Failure to file a reply to defence

23. On this issue I am satisfied that the learned trial magistrate made the correct findings on the issue which she dealt with as a preliminary point before considering the rest of the issues. She stated the following in part of her judgment. “**Before I can go into discussing the issues it is important to address an issue that was raised by counsel for the defendant in his submissions**. **It is his argument that when defendant filed a defence attributing negligence to the plaintiff, the plaintiff ought to have filed a reply to defence and that failure to do so amounts to an admission of the facts stated therein. In any view that is not correct, the plaintiff was the first to raise the issue of negligence on the part of the defendant when he blamed the defendant for the accident in paragraph 5 of the plaint and gave the particulars so as to include the breach of the common law duty of care. This amounts to negligence. Therefore having been the first to accuse the defendant of negligence when the defendant also accused him of negligence there was joinder of issues and as such there was no need to**

file a further pleading"

I entirely agree with the trial court's findings and will say no more on the first ground which I hereby dismiss.

24. On ground 2 of appeal I do find that the respondent had no part or contribution to the accident. Dw1 expressly admitted that they had not red flagged the hole into which the respondent fell. There was an allegation in the defence that the respondent played around in the field and particularly around the hole. The respondent's testimony was supported by PW2 who stated that the respondent fell into the unmarked hole as they worked. There was also no evidence to prove that the respondent in any way failed to take care of his own safety. In any event any training given by the appellant to the plaintiff did not include how to avoid falling in unmarked holes in a field of sugarcane. Ground 2 of appeal fails.

25. In ground 3, the appellant has complained that the damages awarded to the respondent were excessive. I do not think so. First of all let us look at the injuries sustained by the respondent. According to Dr Andayi's report Exh P5 (a) dated 24/11/2009 the respondent suffered the following injuries;-

Right knee joint

1. Bilateral tear of collateral ligaments
2. Torn anterior cruciate ligament
3. Longitudinal facture of the lateral condoyle of the right tibia.

The injuries were accompanied by positive lateral stress sign and appositive anterior draw sign. By the time of examination the torn ligaments were not healed and the doctor noted that they were not going to close without surgical intervention. That was the reason why the respondent was referred to MTRH by the appellant's clinic. The MTRH recommended knee braces.

26. It was on the basis of the above evidence that the trial court made an award of kshs.350,000/= in general damages. For this court to interfere with the award the appellant must show that the learned trial magistrate in making the said award took into account an irrelevant factor or left out of account a relevant one or that, short of this the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See KENFRO AFRICA LTD case (above). In this case, there is no evidence that the learned trial magistrate either took into account an irrelevant factor or left out of account a relevant one or that the amount awarded is inordinately high.

27. Having reached the above conclusion, I find and hold that ground 3 of the appeal has not merit and the same is dismissed.

Conclusion

In the premises this whole appeal lacks merit and the same is dismissed in its entirety with costs to the respondent

Orders accordingly.

Judgment delivered, dated and signed in open court at Kakamega this 24th day of September 2015

RUTH N. SITATI

JUDGE

In the presence of;-

M/s Andia for M/s Menezes & Co. for the Appellant

Mr. Macheti for Namatsi (present) for the Respondent

Mr. Lagat - Court Assistant