REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO 116 OF 2013

EDWIN MUTUA KIOKO…….…….....…...…APPELLANT

VERSUS

APEX STEEL MILL CO. LTD……..…….…...RESPONDENT

(An Appeal arising out of the Ruling of T.A. Odera PM delivered on 21st May 2013 in Mavoko Principal Magistrate's Court Civil Case No. 165 of 2012)

JUDGMENT

The Appellant was the original Plaintiff and the Respondent the original Defendant in Mavoko Principal Magistrate's Court Civil Case No. 165 of 2013. The Appellant instituted the said suit for special and general damages on account of the Respondent's negligence. The learned trial magistrate, Principal Magistrate T.A.Odera, in a judgment delivered on 21st May 2013 dismissed the suit for reasons that the Appellant had not proven his case on a balance probability.

The Appellant then filed a Memorandum of Appeal dated 14th June 2013 appealing against the judgment of the trial magistrate. The grounds of appeal are as follows:

1. The learned trial magistrate erred in law and in fact in dismissing the Appellant's claim without cost in absence of any evidence rebutting his evidence on record.
2. The learned magistrate erred in law and in fact in disregarding the Appellant's evidence on the Respondent's negligence, despite the Respondent admitting and bringing evidence that the Appellant was injured in its company.
3. The learned magistrate erred in law and in fact in finding that the Respondent was not negligent in absence of any evidence on record and relying on defence evidence which had no support.
4. The learned magistrate erred in law and in fact in disregarding the Appellant's pleadings and submissions on liability and quantum and misdirecting herself on the case law used by the plaintiff.

The Appellant is praying for orders that that the appeal be allowed and that the judgment delivered in favour of the Respondent, and the resultant decree be set aside, vacated and/or replaced with a judgment which this Court may deem just. Lastly, that the costs of the appeal and of the suit in Mavoko PMCC No. 165 of 2012 be paid by the Respondent.

The Facts

The brief facts of this appeal are that the Appellant had instituted a suit in the trial Court by filling a plaint therein dated 25th July 2012. The Appellant claimed that at all material times, he was an employee of the

Respondent as a casual labourer. Further, that in March 2011 he was working at the Respondent's company and that while carrying out his duties a sharp object cut his right leg occasioning him serious injury. He claimed that the accident was caused by the negligence of the Respondent's company, as it failed to provide protective gear to him as well as provide a safe working environment.

The particulars of injuries were a cut wound on the right leg, and the Appellant claimed special damages of Kshs 1,000/= as medical expenses incurred during treatment of the said injuries, general damages for pain and suffering and costs of the suit.

The Respondent filed a defence in the trial Court dated 21st September 2012 in which it denied the allegations of negligence and averred that it provided adequate safety devices, supervision, a safe system of work, and that all employees are sufficiently warned, equipped and trained to handle all possible risks when working in their employment. The Respondent stated that the accident was wholly caused or substantially contributed to by the Appellant's own negligence and want of care in his conduct, and gave particulars thereof. It also relied on the doctrine of *volenti non fit injura.*

A brief summary of the evidence adduced before the trial court is as follows. The Appellant testified that in the month of March 2011, he was working at the Respondent's company as a welder. Further, that in the course of his work on 3rd March 2011, he was walking and he stepped on an iron sheet which tripped him and he fell. He stated that he sustained leg injuries. He was then taken to Athi River medical centre where he was treated. He stated that he continued with the treatment for two months. He produced a medical report on the same. He claimed that he had not been given any protective gear while at work.

The Respondent called Peter Wafula (DW1) as their witness. He stated that he worked as a supervisor at the Respondent's company, and the Appellant was one of the workers he was in charge of. He testified that in March 2011 the Appellant had indeed suffered an accident at the steel mill, by stepping on a metal. He stated that the Respondent did not contribute to the accident as the Appellant was supplied with safety shoes and helmet.

In addition that at the time of the accident the Appellant was participating in the making of a trench and tucking. He noted that the trench was 50cm wide and there was sufficient walking space for the plaintiff. He claimed that the Appellant was careless to walk on the trench yet there was a safe ground. He stated that the Appellant had been given sufficient orientation and caution as to the danger involved as a welder.

The Issues and Determination

The issues for determination in this appeal is whether or not the learned Trial Magistrate erred on matters of fact or law in finding the Respondent not negligent, and in dismissing the Appellant's claim. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions. See in this regard the decisions in this respect **Jabane vs. Olenja [1986] KLR 661 , Selle vs Associated Motor Boat Company Limited [1968] EA 123** and **Peters vs. Sunday Post [1958] E.A. 424.**

The Appellant and Respondent filed written submission as regards the appeal. The Appellant in submissions dated 18th May 2015 filed by his Advocates, J.A. Makau & Company Advocates, argued that that his case had been proven to the required standards by production of medical records, namely a medical summary report dated 6-2-2012 produced as his exhibit 1 and a medical report from Machakos Level 5 Hospital produced as exhibit 3. He argued that the occurrence of the accident had also not been disputed as a fact by the Respondent.

The Appellant emphasized that the accident had occurred in the premises of, and under instructions as an employee of the Respondent. He submitted that one of the documents supplied by the Respondent was a notice by employer of occupational accident, which showed that the Appellant was injured on his right leg posterior of ankle joint. Additionally, it was his argument that there was a duty on the part of the Respondent to ensure safety of its employees.

In the instant case the Appellant noted that the Respondent was negligent in that regard, as there was failure to ensure that the iron bars were properly welded and that the evidence by DW1 clearly shows that the iron bar that injured the appellant was not well welded. He also claimed that the Respondent had been negligent in not providing notices showing danger on the trucked trenches. The Appellant relied on the Nigerian Supreme Court ruling in **Adetoun Oladeji (Nig) Ltd vs. Nigerian Breweries PLC, S.C 91/2002** that a party is bound by its pleadings and cannot deviate from the same

Lastly, the Appellant argued that the trial magistrate never considered his pleadings and submissions on quantum and liability. Further, that the trial magistrate misdirected herself in not looking at the injuries sustained by the plaintiff in the authorities provided, to see if they mirrored the injuries suffered by the Appellant, but instead looked into the circumstances leading to the said injuries. He therefore prayed for an award of Kshs. 180,000/= and liability at 100% against the Respondent.

The Respondent's Advocates, Wangai Nyuthe & Company Advocates, filed submissions dated 4th May 2015. The Respondent submitted that it called one witness, DW1, who testified as to the issue of liability, and rebutted the Appellant's evidence. Secondly, that although the occurrence of the accident is not disputed, there was not enough evidence to hold the Respondent accountable, who denied any wrong doing on its part. In that regard they relied on the case of **Eldoret Steel Mills Ltd V Gilbert Nyanchoka Mogoi (2014) eKLR**.

It was the Respondent's contention that the burden of proof in any suit lies with the claimant, and that in this case the Appellant stated that the reason he blamed the Respondent was because he was not given protective clothing, and testified that the protective clothing he was speaking about was goggles to protect his eyes. The Respondent urged the court to take not of the fact that there is no relevance at all between the injury sustained and the protective clothing named by the Appellant, as goggles could not in any way prevent the injury to the leg. It is in that regard that it was submitted that the Appellant failed to prove his claim.

The applicable law as regards this appeal has been stated in various legal treatises and judicial decisions. In **Halsbury's Laws Of England, 4th Edition** it is stated at paragraph 662 at page 476 as follows with respect to the what is required to be proved in an action such as the Appellant's:-

"The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal connection must be established."

In addition in **Winfield and Jolowicz on Tort, 13th Edition** at page 203, the employers liability is provided for as follows: -.

"At common law the employers duty is a duty of care, and it follows that the burden of proving negligence rests with the plaintiff workman throughout the case. It has even been said that if he alleges failure to provide a reasonable safe system of working the plaintiff must plead, and therefore prove what the proper system was and in what relevant respect it was not observed."

Likewise, in **Purity Wambui Murithii v Highlands Mineral Water Co. Ltd, [2015] eKLR** it was held by the Court of Appeal sitting in Nyeri as follows:

> ***"Section 6(1)* of the *Occupational Safety and Health Act* provides:-**
>
> ***"Every occupier (employer) shall ensure the safety, health and welfare at work of all persons working in his workplace."***
>
> **It, therefore, follows that as a general rule the employer is liable for any injury or loss that occurs to his employees while at the workplace as a result of the employer's failure to ensure**

their safety. Does this mean that the employer would always be liable in all circumstances regardless of what caused the accident in question? We do not think so. We say so because where an accident happens due to the employees own negligence it would be unfair to hold the employer liable. Further *Section 13(1)(a)* of the *Occupational Safety and Health Act* provides:-

"13(1) Every employee shall, while at the workplace –

(a) ensure his own safety and health and that of other persons who may be affected by his acts or omissions at the workplace.

Therefore, the employee is also required to take reasonable precaution to ensure his/her safety at the workplace while performing his/her duties."

The principles of law from the above authorities is that for the Appellant to succeed in his claim, he has to prove, among others, that he was injured while engaged on duties that he was assigned or expected to perform in the course of his employment. Further, the Appellant also has to prove any one or more of the particulars of negligence pleaded as against the Respondent employer, and to show that he was also not negligent in the performance of his duties.

In the present appeal, it is not disputed that the Appellant was injured in an accident that occurred in the Respondent's premises in the course of his employment. What is disputed is whether the Respondent was negligent, and therefore liable for the accident. The evidence in this regard by the Appellant was that he stepped on an iron sheet which had been at the workplace for long and had rusted, and that he tripped, fell and was injured .

This evidence was corroborated by DW1 whose testimony was that the Appellant stepped on an iron bar which had not been well welded, and that a metal that was adjacent then pricked the Appellant's leg. The action of stepping on the iron sheet that was not well welded by the Respondent's witness own admission, is what led to, and was the proximate cause of the injury suffered by the Appellant. It is thus my finding that the Respondent thereby failed to provide a safe working environment for the Appellant by not properly securing the said iron sheet.

The Respondent claimed that the Appellant was also negligent as he had been working in the area and had seen the iron sheet. However the primary responsibility for providing a safe working environment is that of the employer, and it was established in this case that the place the Appellant was working was not safe. Any other contribution by the Appellant can only be secondary. I therefore find that the trial magistrate erred in not finding the Respondent liable for the accident, and I apportion liability to the Respondent at the ratio of 80:20 in favour of the Appellant.

As regards the issue of quantum of damages that can as a result be awarded to the Appellant, I note that the applicable principles of law are that the appellate court will only interfere with quantum of damages where the trial court either took into account an irrelevant factor or left out a relevant factor, or where the award was too high or too low as to amount to an erroneous estimate, or where the assessment is not based on any evidence (see **Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727, Peter M. Kariuki v Attorney General CA Civil Appeal No. 79 of 2012 [2014]eKLR** and **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5)**.

In this appeal it has already been found that the trial magistrate erred by not taking into account the relevant factor of the Respondent's liability. As regards the special damages sought, the Appellant did produce as his exhibit 2 a receipt dated 6th February 2012 issued by Athi River Medical Services for Kshs 1,000/=, being payment for the case summary. He therefore was able to prove his claim for special damages.

On the prayer for general damages, the Appellant in his submissions in the trial court relied on the award given in **Eldoret Steel Mills Limited vs Parmenas Okemwa Obiri, (2011) e KLR** of Kshs 180,000/= for severe burns on the right ankle suffered by the Plaintiff therein. The Respondent on the other hand

submitted that an award of Kshs 50,000/= would be sufficient as damages to the Appellant. While the injuries suffered in **Eldoret Steel Mills Limited vs Parmenas Okemwa Obiri,** (**2011) e KLR** are comparable to the ones suffered by the Appellant, in that case the Plaintiff was left with permanent scars and skin pigmentation unlike in the present case where from the medical reports presented by the Appellant, his wounds healed leaving residual scars. I therefore find that an award of Kshs 120,000/= as general damages would be reasonable in the present case.

The Appellant's appeal herein is accordingly allowed for the above reasons, and I hereby set aside the judgment of the trial court and substitute it with a total award of damages of Kshs 96,800/= to the Appellant which has been computed as follows:

a. General damages for	
Pain and suffering	120,000.00
b. Special damages	1,000.00
	121,000.00
Less 20% contribution	24,200.00
Total	**96,800. 00**

The Respondent shall meet 80% of the costs of this appeal and of the suit in Mavoko Principal Magistrates Court Civil Case No. 165 of 2012.

It is so ordered.

DATED AT MACHAKOS THIS 28TH DAY OF OCTOBER 2015.

P. NYAMWEYA

JUDGE