REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 30 OF 2011

VINCENT NYANGIGE OKEROMI ..... APPELLANT

VERSUS

ELDORET STEEL MILLS LTD ..... RESPONDENT

(Being an appeal from the Judgment and decree of Hon. G. A. Mmasi (Senior Resident Magistrate) delivered on 3rd February, 2011 in Eldoret Chief Magistrate's Civil Case

No. 740 of 2009)

JUDGMENT

The Appellant was the Plaintiff while the Respondent the Defendant in Eldoret Chief Magistrate's Civil Case No. 57 of 2010. The Appellant sued the Respondent for general and special damages, costs and interests and any other relief the court may deem fit and just to grant.

In his Plaint dated 31st December, 2009, the Appellant had stated that on the material date (18th November, 2009) he was lawfully going about and/or diligently discharging his duties, when, due to the negligence of the Defendant, its employees, servant and/or agent, was hit by metals and as a result sustained the following injuries:-

(a) Tender and swollen scalp

(b) Bruises on the scalp

(c) The right forearm was swollen and tender with bruises and lacerations

(d) Severe soft tissue injuries.

In a judgment delivered on 3rd February 2011, the trial Magistrate found that the Appellant had not proved his case on a balance of probability and dismissed the suit with each party to bear its own costs of the suit.

Being dissatisfied with the judgment, the Appellant lodged this appeal. In a Memorandum of Appeal dated 10th February, 2011, he has raised the following grounds of appeal:-

1. The learned Magistrate erred in law and fact in not failing to find that the Appellant was injured in the cause of duty as an employee of the Respondent.

2. The learned Magistrate erred in law and fact in not considering that the Appellant

sustained injuries while lawfully on duty at the Defendant's work place.

3. The learned Magistrate erred in law and fact in disregarding evidence on record.

4. The learned Magistrate erred in law and in fact, in adopting a standard or proof unknown in law.

5. The learned Magistrate erred in law and in fact in failing to find the Defendant liable.

6. The learned Magistrate erred in law and in fact in failing to appreciate the extent of the standard of proof on a balance of probability.

7. The learned Magistrate erred in law and in fact in failing to find that the Defendant was liable for the accident.

8. The learned Magistrate erred in law and in fact in failing to properly assess the quantity of damages so that he arrived at an erroneous estimate of damages.

9. The learned Magistrate erred in law and in fact in failing to find that the Plaintiff's evidence on record was uncontroverted, and the case had been proved on a balance of probability.

10. The learned Magistrate erred in law and in fact in making a decision on the matter based on predetermined mind/conceptions.

11. The learned Magistrate erred in law and in fact in failing to appraise properly the evidence on record.

12. The leaned Magistrate erred in law and in fact in failing to exercise diligence required of the court.

13. The learned Magistrate erred in law and in fact in being biased as against the Appellant herein.

14. The Learned Magistrate erred in law and in fact in dealing with extraneous and irrelevant matters.

15. The Learned Honourable erred in law and in fact in finding that the Respondent was not liable for the said injuries suffered by the Appellant.

16. The Learned Magistrate erred in law and in fact in failing to consider relevant factors in arriving at his decision.

In a Statement of Defence filed on 25th January, 2010 the Respondent denied liability. It also denied that any accident ever occured and that even if any accident occurred, the same was occasioned by the contributory negligence of the Appellant.

The Appellant filed a Reply to Defence on 1st February, 2010 and reiterated that the Respondent was wholly liable for injuries he sustained. He also denied any contributory negligence attributed to him by the Respondent.

The appeal was canvassed by way of filing written submissions. Upon considering them alongside the grounds of appeal I arrive at the issues for determination as follows:-

(a) Whether the Appellant was on duty on 18th November, 2009 and was injured at the

Respondents premises.

(b) If the answer to (a) is in the affirmative, whether the injuries were caused by the negligence on the part of the Respondent and whether the Respondent should shoulder the liability entirely.

(c) Whether the trial court erred in failing to award general damages as a result of the alleged injuries sustained by the Appellant.

(d) Whether the Appellant proved his case on a balance of probability, and

(c) Who should shoulder the costs of the lower court suit and this appeal.

Three witnesses testified for the Plaintiff's case while two testified for the defence case. It is not disputed that the Appellant worked for the Respondent's company at the furnace section. What is disputed is whether he was on duty on the material date. According to the Appellant who testified as PW1, he was on duty on 18th November, 2009 where he used to push scrap metals into the furnace. He stated that the scrap metal was moved from the roof by the magrate but on this date the driver did not hoot to alert him of the arrival of the metals. So the metal was released and it hit him on the head and hands. He blamed the Respondent for exposing him to danger by not hooting before his arrival. He also said he was placed in a section that had a lot of smoke and could not see properly. He did also blame the Respondent for not providing him with protective gear.

DW1, Elijah Wanjofu, who was in charge of the furnace department in the Defendant company denied that the Appellant was on duty on 18th November, 2009. He said he keeps on his desk the attendance register which each employee signs upon reporting to work. He said each employee signs in the time he reports at work and leaves. He also testified that the attendance register indicates by 'S' if an employee is sick and 'ACC' if the employee is involved in an accident but in respect of PW 1, none of these letters were applicable.

I have scrutinized the Respondent's work attendance register produced by DW1 as D. Exhibit 1. The same clearly shows that the Appellant was not on duty on 18.11.2009. This register is continuous and its authenticity was not questioned by the defence. I conclude that the Appellant has not convinced the court that he was on duty on 18th November, 2009.

It is also trite law that "***he who alleges must prove***" which cardinal principle is also captured in Sections 107 to 109 of the Evidence Act which provide as follows:-

"107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

This being a civil suit, the burden of proof is much lighter than in a criminal case; being on a balance of probabilities. The Appellant having alleged that he was injured at the Respondent's workplace needed prove that on a balance of probabilities, he was on duty at the Respondent's premises. I pose the question on why he failed to call a fellow employee to corroborate this allegation. While this may not necessarily be a prerequisite requirement, in addition, the glaring discrepancies exposed by the manner of his

treatment and the evidence of professionals from the medical facility he alleges to have been treated at casts a doubt as to whether he sustained any injuries.

To buttress the above point, according to PW1, he was treated at the Uasin Gishu District hospital and he identified as MF1-1 a treatment note from the same hospital. PW3 Patrick Kiprono, was a Clinical Officer from the same hospital. He testified that the Applicant was treated at the said facility on 18th November, 2009. He said he had the treatment book in court, but the book was neither marked for identification nor produced as an exhibit. He further stated that the Appellant was treated for soft tissue injuries but never specified what those injuries were. He produced MF1-1 as P. Exhibit.1.

I have looked at P .Exhibit.1 being PW1's treatment card/notes. The same "unusually" does not specify where the Appellant was ailing from when he visited the hospital. Page 2 of it only shows various prescriptions for which PW1 bought medicines. Page 1 bears PW1's name, the village he came from and the outpatient number. So, for what illness was the prescription made? These are glaring gaps which neither PW1 nor PW3 answered. They cast doubts as to whether PW1 was ever treated at the Uasin Gishu District Hospital.

The puzzle is, DW2, Joel Suter, also a Clinical Officer from the same hospital was categorical that the Appellant was never treated at the facility on 18th November, 2009. His testimony was in the following words:-

"I have the outpatient register running from August, 2009. The summons were to the effect on whether or not patient was in hospital. I have a letter from hospital. The outpatient register shows that on 18th and 19th November, 2009 Vincent Nyangige was not treated at our institution. The O.B number (*I opine he meant O.P reflected on P.Ext 1****) 43563 is dated 20th November, 2009 in respect of Vincent Nyangige P.Ext 1. The booklet bears our stamp dated 19th November, 2009. It is also dated 18th November, 2009 (date patient was seen)...."***

In re-examination DW2 said that documentation of the register is done on the date the patient is seen by a Doctor, and if PW1 was seen on 18.11.2009 the documentation (register) should reflect he was treated on the same date. So I ask myself once again, why would two Clinical Officer's from the same hospital give varied evidence? Why doesn't P. Exhibit.1 indicate the injuries PW1 suffered? Why are there discrepancies in the dates PW1 was treated? These questions were not adequately addressed by the Appellant or any of his witnesses. As the learned trial Magistrate rightly noted the onus of offering an explanation to the discrepancy squarely lay on the Appellant and he failed this test. For this reason my mind is doubtful whether the Appellant suffered any injuries on 18.11.2009 at the Respondent's workplace.

I reiterate that it is not only sufficient to show that the Appellant suffered injuries, but it is incumbent on him to prove that those injuries were occasioned at the Respondent's workplace. And having failed this test, he cannot also be heard to say that the Respondent was negligent for the injuries he alleges he suffered. Accordingly, no iota of liability can be apportioned to the Respondent. Once liability has not been proved it simply implies that the Appellant did not prove his case on a balance of probability as required by the law.

As regards costs, it almost follows that the successful party gets the costs. However, the court has the final discretion to determine how costs are payable. I think the trial court was very kind not to penalize the Appellant to meet the costs of the suit despite that he had lost. I will not reverse that order. He will however meet the costs of this appeal.

In the result, and having carefully evaluated the evidence before the trial court and the respective submissions made by the respective learned counsel, I dismiss this appeal with costs to the Respondent.

DATED and **DELIVERED** at **ELDORET** this 27th day of February, 2014.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

Miss Tum for the Appellant

Mr. Makuto for the Respondent