REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

APPELLATE SIDE

CIVIL APPEAL NO. 39 OF 2011

(Being an appeal from the judgment and decree in Civil Suit No. 52 of the Principal Magistrate's Court at Kilifi before Hon. A.M. Obura – SRM)

FRANCIS KITSAO MUZUNGU…………………………..…. APPELLANT

VERSUS

HAYER BISHAN SINGH & SONS LTD. ….…….........……. RESPONDENT

JUDGMENT

1. This is an appeal from the magistrate's court in Kilifi. The primary suit was brought by the appellant to recover damages for injuries he allegedly sustained in the course of duty. The suit was dismissed by the Lower Court. The appellant, aggrieved by the decision filed this appeal citing six grounds. The key grounds are grounds 2, 3, 4, and 5 which state:

    "2. THAT the learned magistrate erred in law and in fact by delivering a judgment in total disregard of provisions of the law.

    3. THAT the learned magistrate erred in law and in fact by holding that the appellant failed to prove that the respondent failed in its statutory or common duty of care.

    4. THAT the learned magistrate erred in law and in fact in holding that the appellant was fully liable for the accident.

    5. THAT the learned magistrate erred in law and in fact in holding that the accident did not occur while the appellant was in the course of his employment with the respondent."

2. The parties agreed to dispose of the appeal by way of written submissions. I have considered the submissions and authorities cited as well as evidence tendered in the Lower Court. I take the following view of the matter. The first appellate court is obligated to reconsider the evidence on record and re-evaluate it in order to draw its own conclusions bearing in mind the fact that the trial court had opportunity to see and hear the witnesses testify (see **Selle vs Associated Motor Boat Company Ltd.[1968] EA 123)**. The court will not normally interfere with the findings of fact by the trial court unless it is demonstrated that the same were arrived at as a result of misapprehension of the evidence or application of wrong principles.

3. The standard of proof in a civil suit is on a balance of probabilities. The trial court found inter alia that though the appellant was an employee of the respondent, he was "solely to blame for the alleged injury if at all it occurred at work". The appellant gave uncontroverted evidence of his injury at work and produced treatment notes. The court doubted the evidence as no eye witness was called to firm up his assertions. I think it was up to the defendants to controvert that evidence especially because medical treatment notes were tendered. They chose not to and did not even call the named supervisor, one Gurumuk Singh to whom the appellant allegedly reported the accident on the same date. In this regard, I do agree with the appellant's submissions.

4. However, on the question of the liability of the respondent, the position is not so straight forward. He who avers must provide proof. The appellant's evidence in the trial was fairly brief. His description of the incident in which he was injured was equally brief; "my work entailed lifting boulders using an iron bar. It slipped and the boulder fell. I was injured on the right foot." The cross-examination centred on his alleged failure to wear protective gear, namely boots, that he wore slippers, hence the injury.

5. From this description of the accident, it is difficult to say exactly how the appellant was injured and whether wearing boots would have prevented the injury, or secondly, whether the work was inherently dangerous. Or whether the problem was an inappropriate or defective tool provided for lifting the boulders – the metal bar – and how this resulted in the accident in which he sustained injury. The trial magistrate captured this difficulty in the following portion of her judgment:

> **"The plaintiff has a duty to prove a causal link between the defendant's negligence (or breach of statutory duty) and his injury. In the above quoted case, it was held that an injury "per se" is not sufficient to hold someone liable."** (sic)

6. This was in reference to the case of **Sat Pack Industries v James Mbithi Munyao Nrb HCCA No. 152 of 2003**. In that case Visram J, as he then was emphasized that the element of causation – that an accident and consequent injury resulted from the negligence of the party sued – requires proof on the part of a claimant. From the plaintiff's own description of the material accident, it is difficult to tell just how the accident occurred and why, and ultimately whether the respondent's breach of duty was the cause of damage. On the contrary, as the trial court found, the appellant was in control of the metal bar, and, that the appellant failed to prove that "the employer failed on his statutory duty or common (law) duty of care".

7. In this regard, the trial court relied on **Mumias Sugar Co. Ltd. V Samson Muyinda Kakamega HCCA No. 58 of 2000** where Waweru J's oft quoted words are found, which were, inter alia that:

> **"The respondent's work for which he was engaged involved cutting sugarcane in an open filed using a sharp "panga". No machinery of any type was used in this exercise. He would hold a cane in one hand and cut it at its lowest point with the panga in the other hand. It was a simple operation of which the respondent had full command and control. It was entirely his duty to ensure that he did not cut himself with the panga. No evidence was led that in that type of work there was reasonable necessity of any type of protective clothing….no proof of hidden inherent danger in the operation of cutting down care of which the appellant ought to have warned the respondent. To ensure that he did not cut himself with the panga was a matter that was peculiarly within the power and control of the respondent…"**

8. This line of reasoning is also found in other decisions of the High Court including those cited in the judgment of the Lower Court e.g **South Nyanza Sugar Co. v Daniel Okindo Kibari (2010) eKLR**, as well as in the case of **Wilson Nyanyu Musigisi v Sasini Tea & Coffee Ltd. Kericho HCCA No. 15 of 2003** which the respondents have referred to in their present submissions.

9. In the instant case the appellant performed a manual task of lifting boulders by means of a metal bar of which he apparently had full control. He had done this work for two years without

incident. Prima facie, the work was not dangerous or shown to require special protective wear. How did he come to be injured? He has accused his employer of negligence and breach of statutory duty. But the same was not proved by him. In the circumstances of this case, the conclusion by the trial court that the appellant was solely to blame cannot be faulted.

I find no merit in this appeal and dismiss it with costs.

Delivered and signed at Malindi this **20th** day of **March, 2014** in the presence of Mr. Mouko holding brief for Mr. Oloo for the respondent, appellant absent.

Court clerk – Samwel

C. W. Meoli

JUDGE