REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 96 OF 2013

NGOME MARUMU NGOME.....APPELLANT

-V E R S U S-

MOMBASA MAIZE MILLERS LIMITED.....RESPONDENT

(Being an appeal from the Judgment and decree of Mombasa Principal Magistrate Hon. J. Gandani

delivered on 19th July, 2013 in Resident Magistrate Civil Case No. 2771 of 2009)

JUDGMENT

Introduction

1. This appeal is against a judgment delivered on 19th July 2013 by Honourable Gandani, SPM ("**the Learned Magistrate**") in Mombasa **RMCC No. 12771 of 2009** ("***the lower court case***"). The appeal is based on seven grounds reproduced as follows:

2. On 10th July 2014, this Court directed that the appeal proceeds by way of written submissions. The Appellant filed his Written Submissions dated 22nd August 2014 on 27th August 2014 while the Respondent filed its Written Submissions dated 5th September 2014 on 8th September 2014. Both parties appeared before this court on 18th September 2014 during which the Appellant's Written Submissions were highlighted by his learned counsel but the Respondent's counsel relied entirely on its Written Submissions as filed.

Background

3. The Appellant filed the lower court case on 29th September 2009 claiming that he was injured while working for the Respondent and that the Respondent had breached its duty of care and was therefore negligent for the Appellant's injuries. The Appellant prayed that judgment be entered against the Respondents for special damages of Kshs. 1,500.00, general damages and costs of the suits.

4. A total of four witnesses testified, two for each side. The Appellant called Dr. Ndegwa who had examined him and who produced a Medical Report on the Appellant's injuries. The Appellant himself also testified and told the trial court the circumstances surrounding his injuries. The Respondent called Herbart Aneka, a Senior Health Records and Information Officer at Coast General Hospital who told the court that the treatment notes produced by the Appellant could not be authenticated. The Respondent also called Lucas Soita Mukwame who testified that the Appellant was not injured as alleged.

5. After hearing the witnesses, the learned magistrate delivered her judgment on 19th July 2013 in which she found that the Appellant was not injured as alleged and thereby dismissed the Appellant's case with costs. The Appellant has now filed the present appeal against the said judgment.

The Appellant's Case

6. The Appellant's case is that his evidence that he was injured was not controverted because the person who testified on behalf of the Respondent was not his immediate supervisor. That the person who would have testified of the Appellant's injuries is one PATRICK who is said to have informed the Appellant's immediate supervisor, PHILEMON SAISI about the Appellant's injuries. That the witness who testified for the Respondent, DW2 admitted that he was not involved in the Appellant's case and was only testifying on the basis of the documents availed to him yet he did not produce those documents relating to the Appellant's injury to court. That the failure to call one PATRICK negated the Respondent's case and lowered the probative value of the evidence of DW2.

7. The Appellant argued that the learned trial magistrate fell into error of thinking that failing to attend a medical facility was synonymous with not being injured.

8. The Appellant further submitted that the learned magistrate erred by holding that the Appellant was not treated at Coast General Hospital yet the Appellant had given oral testimony that he had gone to the said hospital for treatment, a fact the Appellant claimed was confirmed by DW2. That the holding by the learned magistrate that the Appellant was at the said hospital at 3.34 pm was speculative and not backed by any evidence on record. That DW2 told the trial court that he was unable to confirm whether the Plaintiff's treatment notes were genuine yet the learned magistrate went ahead to conclude that the Appellant was not treated at Coast Provincial General Hospital. The Appellant submitted that the Respondent adopted the position that the Appellant had forged treatment notes of Coast General Provincial Hospital yet the Respondent did not plead defence of fraud as required by Order 2 Rule 4 (1) of the Civil Procedure Rules.

9. The Appellant faulted the learned magistrate for failing to make a finding on the employer's duty of care. That the Appellant's evidence on how the accident occurred was not challenged and the court should have held that the employer breached its duty of care by failing to provide safety apparels, specifically boots and failing to ensure that the work environment was safe. That the Respondent should be held 100% liable for the accident.

10. The Appellant urged that the learned magistrate's finding be set aside, the Respondent be held 100% liable for the Appellant's injuries and damages be assessed at Kshs. 150,000.00

The Respondent's Case

11. The Respondent opposed this appeal and supported the learned Magistrate's decision to dismiss the Appellant's case.

12. The Respondent submitted that the Appellant failed to prove that he was injured as he alleged. According to the Respondent, the Appellant's allegation that he was injured was well countered by the evidence of DW2 who produced a register of people who were working on the material day and which indicated that although the Appellant was on duty, he was not injured.

13. The Respondent's argument is that the treatment notes produced by the Appellant were not signed and could not be authenticated by DW1, a Senior Health Records and Information Officer at Coast General Provincial Hospital, an indication that the Appellant was not treated at the Hospital and was not therefore injured at all.

14. The Respondent argued that the Appellant ought to have called his co-workers who were present on the day he was allegedly injured to prove his allegations.

15. According to the Respondent, the Appellant did not prove that it was negligent. That since the Appellant did not prove that he was actually injured, the Respondent could not be held negligent for non-existent injury. That there was no accident hence no injury.

16. The Respondent submitted that the Appellant's evidence in court was materially different from what he pleaded in his Plaint. That the Appellant pleaded in his Plaint that he was injured when his co-worker carelessly and recklessly thrust a heavy sack of wheat on him. That, however, in his evidence in court, the Appellant stated that he was injured when he slipped and fell.

17. The Respondent submitted that if the trial court were to hold that there was injury as alleged, the same was of blunt trauma of the neck without permanent disability and that Kshs. 50,000.00 would have been sufficient compensation.

The Issues

18. In my opinion, the following are the main issues for the court's determination:

i. Whether the learned magistrate erred in law and fact in holding that the Appellant was not injured; and

ii. Whether the Respondent was negligent and hence liable for the Appellant's injuries

Analysis/Determination

Whether the Appellant was Injured?

19. In her judgment, the learned magistrate held as follows:

> **"I have looked at the treatment notes P exhibit 3 which DW1 could not vouch [for] from their documents and find that the Plaintiff was attended [to] at the hospital at 3.34 pm. This is not suggestive of who had to rush to hospital the following day after pain got worse. Most probably he could have gone to the hospital early in the morning. In deed if at all the Plaintiff was injured on 18/6/09 and the Defendant offered free treatment to its workers, one can ask why he did not report the injury on 19/6/09 and sought treatment from the Defendant's medical services providers namely Mewa Hospital. I find that the Plaintiff's case is doubtful. The Defence's case sounds credible and convincing for these reasons I dismiss the Plaintiff's case with costs to the Defendant."**

20. The essence of the learned magistrate's judgment was that the Appellant did not go to Coast General Provincial Hospital for treatment as he alleged and was therefore not injured because:

i. the treatment notes he produced could not be authenticated by DW1, a Senior Health Records and Information Officer at Coast General Hospital;

ii. the Appellant was attended to at the hospital at 3.34 pm yet he should have gone to the hospital much earlier as he complained of pain; and

iii. the Plaintiff did not offer any explanation why he did not seek free treatment offered by the Respondent at Mewa Hospital.

21. The Appellant testified that he sought treatment at Coast General Provincial Hospital ("the Hospital") and was given treatment notes which he produced in evidence. DW1 confirmed that the Appellant visited the hospital on 19th June 2009 and was registered on the Accident and Emergency Department and issued with casualty Number 3451/09, a number that is reflected in the treatment notes produced in court by the Appellant. DW1 was however not able to confirm whether the Appellant was treated at the Hospital and whether the treatment notes produced by the Appellant were authentic or not because they were not

signed by the doctor who attended to the Appellant. He stated as follows in his testimony:

> **"We are unable to confirm the authenticity of the documents because treatment (note) is incomplete and signature of the author is missing."**

22. In my view, it was not the burden of the Appellant to prove the authenticity of the treatments notes. He who alleges must prove. It was the Respondent who claimed that the treatment notes produced by the Appellant were not genuine so it was incumbent upon it to prove that fact. The witness called by the Respondent (DW1) to prove that the treatment notes were not genuine did not achieve that goal. He was not able to confirm whether the documents were genuine or not. In my opinion, DW1 ought to have stated categorically that the treatment notes were not genuine for the Respondent's claim to have basis.

23. It is possible that the Appellant was treated at the Hospital but the doctor who attended to him did not sign the treatment notes. It was not the Appellant's duty to ensure that the notes were signed. There is no dispute that the Appellant visited the Hospital's Accident and Emergency Department on 19th June 2009. The only dispute is whether he was treated there or not. I believe that DW1, being an officer in charge of records at the Hospital, was able to obtain records of the doctor or doctors who were on duty at the said Department on the day the Appellant visited it. Since the only reason why DW1 doubted the treatment notes was on the basis that they were not signed, he should have consulted the doctor or doctors who were on duty on the material day to find out if they were responsible for the notes or not. If it was established that none of the doctors who was on duty on the material day signed the treatment notes, then that would have been sufficient proof that the notes were not genuine and therefore the Appellant was not treated at the Hospital. By stating that he was not able to confirm the authenticity of the documents, DW1 left some probable room that the notes were genuine. That probability, in the circumstances herein, tilts the evidentiary scale in favour of the Appellant.

24. Further, the learned trial magistrate concluded that the Appellant was not treated at the Hospital because he had delayed in visiting the facility despite being in pain as he had gone to the Hospital at 3.34 pm. There is nothing on record to show that the Appellant visited the Hospital at 3.34 pm. The learned magistrate's finding in that regard was merely speculative. For the foregoing it is clear to me that the Respondent did not discharge the burden of proving that the Appellant was not treated at Coast General Provincial Hospital. The learned trial magistrate's finding that the Plaintiff was not injured because he did not seek treatment at the Hospital shall therefore be set aside and substituted with a finding that the Plaintiff was treated at the Hospital and was therefore injured as alleged.

Whether the Respondent was Negligent

25. Having found that the Appellant was injured, the next question is whether the injury could be attributed to the Respondent's negligence. At paragraph 5 of the Plaint dated 26th September 2009, the Appellant pleaded as follows:

> **"That on or about the 18th day of June 2009, the Plaintiff was employed by the Defendant as a casual labourer and charged with the task of loading and offloading sacks of wheat, when while in the process of so doing a co-worker carelessly and recklessly without regard to the Plaintiff's safety thrust a heavy sack of wheat at the Plaintiff and or on the Plaintiff as a consequence of which he sustained severe injuries for which he holds the defendant liable as the employer both under statute and the common law."**

26. In his testimony in chief, the Appellant stated as follows:

> **"...I was carrying the last sack and as I was climbing the stack, I slipped and fell down. My neck was twisted and I was injured."**

27. On cross-examination, the Appellant testified that:

> **"I had reported for work at 6 pm. We were offloading wheat from lorries. We offloaded 5**

lorries, I carried many bags. I was tired and sweating."

28. The Appellant's account in court of the circumstances under which he was injured is at variance with what he pleaded in his Plaint. While in the Plaint he pleaded that he got injured when his co-worker carelessly and recklessly thrust a heavy sack of wheat at him, in his testimony in court he said that he had slipped and fell while carrying a sack of wheat.

29. It is trite law that a party is bound by his pleadings. Where the evidence tendered is at variance with what is pleaded, the variation must be construed against the pleading party unless an appropriate amendment is made. The circumstances under which the Appellant was injured are not clear and therefore the court cannot reach a conclusion that the Respondent was negligent. Was the Plaintiff injured when he slipped or he was injured when his co-worker thrust a sack of wheat at him? Clearly, that inconsistency must be interpreted against the Appellant.

30. The prayer to hold the Respondent liable for the Appellant's injuries and to award damages shall be declined. Since each party has partly succeeded- the Appellant has succeeded on the finding that he was injured while the appellant has succeeded on the finding that it was not negligent - each party shall bear its own costs.

31. The Court issues the following orders-

a. This appeal is hereby dismissed.

b. Each party shall bear their own costs.

DATED and DELIVERED at MOMBASA this 27TH day of NOVEMBER, 2014.

MARY KASANGO

JUDGE