



REPUBLIC OF KENYA

High Court at Nakuru

Civil Appeal 173 of 2009

LIVE WIRE LIMITED.....APPELLANT

VERSUS

HASSAN BORU HUSSEIN.....RESPONDENT

JUDGMENT

INTRODUCTION

The Respondent was an employee of the Applicant. In a Plaintiff dated and filed on 13th September 2007, the Respondent sued the Appellant and claimed general and special damages against the Appellant. The Respondent claimed that he was on duty on the 15th day of June 2007, and he was assigned duties of-

“making nets when he fell from a height and as a result he got injured and suffered loss and damage.”

After calling of evidence the lower court in a judgment delivered on 24/03/2009 found that the Appellant was negligent and awarded the Respondent damages of Shs 90,000/= less 15% contributory negligence, plus special damages of Shs 2,500/= for the injuries the Appellant had suffered and costs.

The Appellant was aggrieved with that judgment and appealed to this court on ten (10) grounds – namely,

- (1) ***That the Honourable Senior Principal Magistrate erred in law and fact by relying on suspicious or fraudulent treatment card.***
- (2) ***That the Honourable Senior Principal Magistrate erred in law and fact by believing the Respondent's evidence and disbelieving Appellants evidence.***
- (3) ***That the Honourable Senior Principal Magistrate erred in finding that the Respondent had proved his case on a balance of probability.***
- (4) ***That Honourable Senior Principal Magistrate erred in shifting the burden of proof to the Appellant.***
- (5) ***The Honourable Senior Principal Magistrate erred in law and fact by awarding damages to the Respondent for similar injuries sustained in Naivasha SPMCC No. 687 of 2007 involving the same parties.***
- (6) ***The Honourable Senior Principal Magistrate erred in law and fact by relying on the***

evidence of PW3 whose evidence was secondary evidence and rejecting the evidence of Appellant's witnesses on various facts in issues which evidence was primary.

(7) The Honourable Senior Principal Magistrate erred in finding that the Respondent had proved negligence against the Appellant.

(8) The Honourable Senior Principal Magistrate erred in law and fact by finding without any basis that the Respondent was not provided with safety gadgets or that the Respondent needed to be supplied with safety belts for the kind of work he was engaged in.

(9) The Honourable Senior Principal Magistrate erred in law in relying on High Court decision in assessing the damages awardable.

(10) The Honourable Senior Principal Magistrate erred in law in unduly enriching the Respondent by awarding high award for soft tissue injuries.

The essence of the Appellant's case is that there was no evidence -

(1) that the Respondent was on duty on the material day when he was supposed to have suffered injury or that he was sick,

(2) there was no report of any accident on the material day,

(3) there was no report that the Respondent was sick,

(4) there was no evidence that the Respondent was treated on the material day,

(5) the cards produced did not show they were issued by the Appellant or from the Appellant's clinic,

(6) the card produced from the Naivasha District Hospital was not that of the Respondent it belonged to another patient treated on another date,

(7) that the entries in the card in the name of the Respondent are fraudulent.

For those reasons the Appellant sought the court's intervention to allow the appeal, set aside the lower court's judgment and award costs to the Appellant.

To facilitate the hearing of the Appeal counsel for both the Appellant and the Respondent filed written submissions and cited relevant authorities for and against the Appeal. The Appellant's Counsel's submissions are dated 6th June 2012, and were filed on 7th June 2012, and those of the Respondent's counsel are dated 4.04.2012, and were filed on 16.04.2012. I have considered both these submissions as well as the evidence before the lower court. It is the duty of this court as the first appellate court to consider and evaluate such evidence and draw its own findings and conclusions.

The critical question raised by the appeal is whether the Respondent suffered injury while at work with the Appellant, and whether he was actually treated at the Naivasha District Hospital Out-patient clinic or department.

On the first question, the evidence of the Respondent is that he was on duty on the material and that he was assigned the task of repairing nets, and that in the course of that assignment he fell and suffered injury to his left leg, on the knee and ankle, left hand and cut wound on his left leg (*dislocation*). As PW1, the Respondent testified that he was treated at the farm, and that he was referred to the farm's clinic and later to Dr. Odhiambo in town. He however testified that he was not given a treatment card from the Appellant's clinic, and later took himself to Naivasha District Hospital where he was issued with out-patient Treatment Card Number OP 37193/06 when he visited the Hospital on 23.05.2006. The card

was produced by PW3, a Clinical Officer, Naivasha District Hospital who testified that he treated the Respondent on 23/05/2000, who complained of having slipped from a shade house, sustained injuries while at work, and complained of having been injured on left hand which was swollen and bruises of the left knee and a cut on the left leg.

When cross-examined by counsel for the Appellant this witness testified inter alia that he neither saw nor treated the patient, the Respondent, nor had he seen the card, and had come to testify on instructions of the Hospital's administration because he had been at the Hospital for long (17 years).

The Appellant's evidence to the first question whether the Respondent was injured at work, is completely at variance with the Respondent's evidence. The Appellant's evidence (DW1) comprised four parts. **Firstly** whether the Appellant was on duty on 15.05.2006, **secondly** whether the Respondent was injured on that date while on duty, **thirdly**, the procedures of the Appellant company where an employee is injured, and **fourthly**, where and when was the Respondent injured.

From the evidence of DW1, the Respondent was at work on 15.06.2006. DW1 had custody of the Register of the allocation of work.

DW2 produced the Muster Roll for the period from 2005 to May 2006. The record did not show that the Respondent was sick on 16.05.2006. If he was, the Register would have been marked "S" sick. The Muster Roll showed the Respondent was never ill. He was however retrenched in May 2007. DW2 denied that the Respondent was injured on 15.05.2006.

The Respondent had filed another suit alleging injury on the left shoulder on 5/01/2006. That case was pending at the time of hearing of the suit the subject of the Appeal herein.

DW2 also outlined the procedure where an employee is injured. He is first referred to a nurse who as appropriate, would refer the injured employee to a doctor. There was no evidence either from the Respondent or the Appellant that the Respondent was either injured or referred to any Doctor by the company's nurse on that date. The company pays for the doctor's services where an injured employee is referred to the company's Doctor. There was no record of any injured worker being referred to Naivasha District Hospital.

Lastly DW3 who was the Appellants' witness testified that indeed out-patient card No. 37198 belonged to or was issued by the Naivasha District Hospital and heard the Respondent's name. The number however appeared not for 21/05/2006, but for 13/06/2006, over three weeks later, and according to the Hospital Register belongs to another patient called Joseph Kosgei, 22 years, a male from Karagita. The card and the register do not tally. The Respondent is a male adult of 50 years.

The card had had an attendance date of 23.05.2006. The attendance for that date starts from Number 30727 to 30925, and the Respondent's name does not appear. DW3 concluded and the entries on the card are fraudulent.

From that evidence, even giving the Respondent the benefit of doubt his evidence does not add up. He is on duty on 15.06.2006. DW1 testified that the Respondent was assigned to work on drip lines, putting them in order. The Respondent says otherwise. He is assigned a job of repairing nets – a job he does not usually do. He falls from a green-house, 17 feet high, and miraculously, the only serious injury he suffers is a dislocation of his ankle – no bones broken. He does not report to either his supervisor, nor does he seek initial first aid from the Company's Nurse. He nurses injuries until 23.05.2006 when he allegedly goes to Naivasha District Hospital. He again got an out-patient Number 37198, which does not correspond to any of the out-patient numbers 30727 to 37198, a difference of over 6,271 patients allegedly treated before he is reached.

Even, if, as I said, the Respondent were given a benefit of doubt, and the number 37198 were treated as an error, it cannot be an error of such magnitude. At the rate of treating 198 patients per day, it would require at least 32 days to treat the 6,271 out-patients to reach the Respondent's out-patient

Number 37198 on 23.05.2006 when he was allegedly treated. There is therefore one conclusion, the card was taken way or lent or stolen from patient Joseph Kosgei Karagita treated on 16.06.2006.

The Respondents injuries may well have been suffered elsewhere, not at the Applicant's premises. There would have been evidence of a report of an accident, a reference in the Register of Accidents, a reference to the company's Doctor, and if that Doctor could not manage to treat the injuries, then reference to the District Hospital, Naivasha.

From the evidence, this was a case of an attempt to defraud the Appellant out of an accident which or injuries which were not sustained at the Appellant's premises. There was no basis for finding the Appellant liable to any extent. In the circumstances the appeal herein is allowed the learned magistrates judgment delivered on 24.03.2009 is set aside, and the Respondents suit dated and filed on 13th September 2007 is hereby dismissed with costs.

It is so ordered.

Dated, signed and delivered at Nakuru this 12th day of April, 2013

M. J. ANYARA EMUKULE

JUDGE