REPUBLIC OF KENYA

High Court at Kakamega

Civil Appeal 147 of 2011

ERNEST SHISIA NGALABA ..... APPELLANT

V

WEST KENYA SUGAR CO. LTD. ..... RESPONDENT

JUDGMENT

This appeal arises from the case in the subordinate court at Kakamega wherein the learned trial magistrate dismissed the appellant's suit with costs on 7th September 2011. The appellant herein was the plaintiff in the subordinate court. Being dissatisfied with the decision of the subordinate court, the appellant has appealed to this court through his counsel M/S Namatsi & Company on six grounds as follows –

1. That the learned trial Magistrate erred in finding that the appellant did not prove his case on the balance of probabilities.

2. That the learned trial Magistrate erred in law and fact by finding that the appellant did not prove ownership of the tractor involved in the accident.

3. That the learned trial magistrate erred in law in confusing the facts and cause of action in this case.

4. That the learned trial magistrate erred in law by applying wrong principles of law in this case.

5. That the learned trial magistrate erred in as far as he was biased against the appellant.

6. That the learned trial magistrate erred in law in finding for the defendant.

The appellant's counsel filed also filed written submissions. In the submissions, counsel amplified the above grounds. In addition, counsel submitted that the learned trial magistrate erred in not assessing the general damages awardable. Counsel proposed an award of general damages for the injuries suffered in the sum of Kshs.200,000/=. Counsel relied on two court cases, that is **Denys M. Khabusi -vs- Mawingo Bus Services – Nbi HCCC. 270 of 1990** wherein counsel contended an award of general damages of Kshs.120,000/= was made on 29/10/1991, and the case of **Fanny Esilako -vs- Dorothy Muchene – Nbi HCCC 642 of 1991** wherein an award of Kshs.150,000/= was made by the court on 29/10/1993. These were the same cases relied upon at the trial in the subordinate court.

The respondent's counsel, M/S E. K. Owinyi & Company filed brief submissions, in which reliance was placed on submissions made in the subordinate court. The cases cited therein are **Lucy N. M. Musyoki – vs- Joseph B. Kimani – Nbi HCCC. 2034 OF 1993** where an award of Kshs.40,000/= was made on 19/12/1994 and **Salim S. Zain -vs- Rose M. Mutus – Civil Appeal 147 of 1994** – where an award of 50,000/= was made on 30/4/1997.

Counsel who appeared at the hearing of the appeal for the parties, Mr. Otinga for the appellant and Mr. Nyikuli for the respondent, relied on the written submissions filed.

This is a first appeal. As a first appellate court, I am duty bound to reconsider the evidence on record afresh and come to my own conclusions – *see* ***Selle -vs- Associated Boat Co. Ltd. [1968] EA 123***. In addition to the above, I also have to be mindful of the fact that in civil cases, the burden is always on the plaintiff to prove his or her case on the balance of probabilities – *see* **Kirugi & Another -vs- Kabiya & 3 others [1987] KLR 347.** That burden is not lessened even if the case is heard by way of formal proof.

At the trial in the subordinate court, only the appellant tendered evidence through witnesses. He was PW1. He testified that he was then an employee of the respondent, though he produced no documentary evidence to support the same. He testified that the tractor KAU 272G and trailer ZB 3772 were owned by the respondent. He also produced no documentary evidence. That he was riding on the said tractor/trailer to the factory on the Kakamega/Webuye Road when the accident occurred. He stated that he was injured and that he held the respondent responsible for the accident and claimed damages. He called two other witnesses. PW3, **Andrew Musiko**, testified that on 24/3/2006 while at Kambi ya Mwanza, he saw a tractor coming while carrying sugarcane with people loaded on it. The tractor rolled at Kambi ya Mwanza and the passengers got injured. He testified that the appellant was one of the passengers. PW2 was **Dr. Charles Andai**. Hetestified that he medically examined the appellant. He found soft tissue injuries on the appellant which were in the process of healing. In his opinion, the said injuries would heal without leaving any permanent disability. He filled a medical report which he produced as an exhibit on behalf of the plaintiff. That was the plaintiff's case.

The respondent who was the defendant, on the other hand, did not call any witness to testify. After the close of the case, the parties counsel filed written submissions.

In dismissing the case of the appellant, the learned trial magistrate stated thus in the judgment –

"I have considered the evidence adduced by the plaintiff and his witness Dr. Charles Andai, PW2 and Andrew Misiko and find that there is no evidence to prove that the plaintiff was at the time material to this suit an employee of the defendant. There is also nothing to prove that the tractor KAU 272G New Holland and Trailer ZB 3772 belonged to the defendant. There is nothing to prove that the said tractor was involved in an accident as alleged or that the accident was due to the negligence of the defendant, its driver/or servant. For the forgoing I find that the plaintiff has not proved his case against the defendant on the balance of probability or at all as alleged."

As I have said earlier in this judgment, a plaintiff is required to prove his case on the balance of probabilities, even if the case is heard by way of formal proof, where judgment on liability has already been entered and the defence side might even not be present to put their side of the case – *see* ***Kirugi & Another -vs- Kabiya & 3 Others [1987] KLR 347***. In our present case the appellant testified in evidence on Oath that he was an employee of the respondent. He testified that he was on the subject trailer which was being towed by a tractor belonging to the respondent. He stated that the accident occurred, and that he was injured and that his injuries were assessed by the medical doctor, Dr. Charles Andai, PW2. PW3, Andrew Misiko, supported his evidence in so far as it relates to the occurrence of the accident. Did this evidence suffice for a finding that the appellant proved his case against the respondent on the balance of probabilities? In my view, it did because the allegations were clearly made against the appellant though no documents were produced. Once those allegations were made that the accident had occurred and that the tractor and trailer and driver belonged or were controlled by the respondent, then it was upon the respondent to tender evidence to rebut the same. Unfortunately, though the respondents were represented by counsel at the trial, they never did so, leaving the trial court in a predicament, which made the magistrate make an error of thinking that the denial in the defence was evidence in favour of the respondent.

That error by the learned magistrate was clearly demonstrated when the learned trial magistrate stated in the judgment as follows -

"The defendant filed its written statement of defence in which it denied that the plaintiff was its employee, that it was the owner of tractor registration KAU 272G and trailer ZB 3772, that the alleged accident ever occurred and that the plaintiff sustained the injuries alleged and put the plaintiff to strict proof thereof.

Further the defendant denied that particulars of negligence, breach of contract and statutory duty attributed to it and averred that if the accident occurred which it denied, the same was wholly or substantially attributed to the contributory negligence of the plaintiff. The defendant prays that the suit be dismissed with costs. The plaintiff did not file a reply to the defence."

In my view, the learned trial magistrate erred in relying on the contents of the defence as the basis for dismissal of the appellant's case. A defence, just like a plaint, is a pleading. It is not evidence. Where each of the parties are contesting the contents of the pleadings of the other side, only witness evidence tendered in court can prove or disprove the allegations contained in pleadings. A pleading is an allegation, and unless such allegation is proved by evidence, it so remains an allegation. In my view, the learned trial magistrate erred in thinking that the averments or denials in the defence, displaced the evidence tendered by witnesses of the appellant. The evidence tendered through the plaintiff's witnesses could only be rebutted by evidence to be tendered through a witness or witnesses from the respondent's side. Since the respondent failed to call any witness to testify, their defence of denials of the contents of the plaint remained and still remain an allegation. They cannot be weighed against the evidence tendered by witnesses in court on behalf of the appellant.

Considering the totality of the evidence tendered at the trial court, I find that the appellant proved that the accident did occur and he got injured in the process. I also find that he proved on the balance of probabilities that the respondent owned and controlled the tractor and trailer. The appellant as a passenger could not control how the tractor was driven or controlled. I find therefore that the respondent is liable to the appellant in negligence to the tune of 100%, since the appellant was a passenger who was not or could not be in control of the tractor and trailer. Whether the appellant was an employee of the respondent or not, in my view, is immaterial, as what he claimed were damages for the injuries suffered.

What are the damages awardable? I agree with counsel for the appellant that the learned trial magistrate should have assessed the general damages awardable. He did not. This imposes a duty on this court to assess the damages awardable.

I have perused the cases cited. They are old cases of the 1990s. The injuries therein appear to have been more serious than in our present case. However, there is inflation and increase in the cost of living to take into account. The doctor (PW2) stated that after 8 months the appellant would have fully recovered. The appellant experienced pain and suffering though as a result of the accident. I am of the view that an award of Kshs.100,000/= as general damages will be adequate compensation for pain suffering and loss of amenities.

Consequently, I allow the appeal and set aside the decision of the learned trial magistrate and order as follows –

1. The respondent is found 100% liable in negligence to the appellant as a result of the accident.

2. I award the appellant general damages in the sum of Kshs.100,000/= and costs in the trial court and this appeal.

3. The general damages will attract interest at court rates from the date of this judgment till payment in

full. The costs will attract interest at court rates from the day they will be agreed or taxed until payment in full.

It is so ordered.

Dated and delivered at Kakamega this 6th day of June, 2013

George Dulu

J U D G E