REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 45 OF 2012

(An appeal arising from the Judgment and Decree of the Chief Magistrate Court in Kakamega Civil Suit No. 322 of 2010 delivered on 11th day of May, 2012)

ZAKAYO WANZALA MAKOMERE …..... APPELLANT

VERSUS

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

JUDGMENT

The appellant has filed this appeal from the decision of P. Achieng', SRM in Kakamega CMCC No. 322 delivered on 11th May 2012.

The learned trial magistrate dismissed the suit of the appellant, who was the plaintiff at the trial, thus giving rise to this appeal. The grounds of appeal are as follows -

1. The learned trial magistrate erred in law and fact in dismissing the appellant's suit against the weight of the evidence on record.
2. The learned trial magistrate erred in law and fact by making a finding that was contradictory to the appellant's evidence.
3. The learned trial magistrate erred in law and fact by failing to consider the appellant's pleadings on record.
4. The learned trial magistrate erred in law and fact in failing to state the damages awardable to the appellant had the appellant proved his case.
5. The learned trial magistrate erred in dismissing the appellant's suit when the appellant had proved his case beyond reasonable doubt.

In support of the appeal, the appellant through counsel Abok Odhiambo & Company filed written submissions. The respondent through counsel Wetangula, Adan and Makokha also filed written submissions.

The advocates who appeared in court for the parties at the hearing Miss Andia for the appellant and Ms Makokha for the respondent relied on written submissions filed. I have perused the written submissions. No authority was cited therein.

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 and inferences – *see* the case of ***Selle -vs- Associated Boat Co. Ltd. [1968] 1968 EA 123***.

I have perused the evidence on record and the judgment. Initially a judgment in default of filing

defence was entered by the trial court. Thereafter, formal proof was also done and a decision made in favour of the appellant. This decision was however later set aside by consent. The case was then heard afresh between the parties wherein only two witnesses testified. The appellant testified on his own behalf as the plaintiff. The defendant called only one witness.

I have considered the evidence on record afresh. This appeal turns on whether the appellant proved his case before the trial court. I have to take in mind that in civil cases, a plaintiff is required to prove his claim against the defendant on the balance of probabilities. This position was clearly stated in the case of ***Kirugi & Ano. -vs- Kabiya & 3 Others [1987] KLR 347*** wherein the Court of Appeal stated that the burden was always on the plaintiff to prove his case on the balance of probabilities, and that such burden was not lessened even if the case was heard by way of formal proof.

The appellant claimed that he was an employee of the respondent and was injured on duty on the material day which was 26th October 2009. He said he was a loader. In evidence however, he stated that he had lost his gate pass and would not be able to produce any employment card. Did the appellant prove that he was an employee of the respondent? It is possible that an employee can lose his employment document as stated by the plaintiff. However, in my view, if the appellant wanted the court to believe that he was indeed an employee of the respondent, he should have given details regarding when he was employed, how he was employed, when he lost his employment card and how he lost it. He did not give details that would convince any reasonable court that he was employed by the respondent. Therefore in my view, the learned magistrate was right in finding that he did not discharge his burden of proving on the balance of probabilities, that he was an employee of the respondent.

The appellant was also required to prove that the accident occurred the way he described. He claimed that he had lost his gate pass. He did not say however how and when he got that gate pass and from whom. He did not also explain how and under what circumstances he lost the gate pass. He did not explain how that gate pass looks like. The court was left to guess whether or not an accident occurred at the scene stated and in the way alleged. In my view, the learned magistrate was also correct in finding that the appellant did not discharge, on the balance of probabilities, his burden of proving that indeed there was an accident in the compound of the respondent, which involved the respondent's equipment and in which the appellant was injured.

On the basis of the above findings, it is my view that the learned magistrate was correct in dismissing the appellant's case against the respondent.

As for the complaints by the appellant that the learned magistrate did not assess the quantum of damages incase the appellant won the case, that was a mistake on the part of the trial court. However, it was not a fatal mistake as the appellate court can make appropriate orders with regard to quantum. In my view, with the facts on record an award of Kshs.3,500/= as special damages and Kshs.140,000/= as general damages would have been an appropriate award.

To conclude, this appeal lacks merit. I dismiss the same with costs to the respondent.

Dated at Kakamega this 31st day of October, 2013

George Dulu

JUDGE