REPUBLIC OF KENYA

High Court at Eldoret

Civil Appeal 26 of 2004

LOCHAB BROTHERS LIMITED……………………………APPELLANT

VERSUS

EZEKIEL MBIYU MULILI……………………………..….RESPONDENT

(Being an Appeal from the Judgment and Decree of Chief Magistrate Solomon Wamwayi delivered on 26.1.2004 in Eldoret SPMC NO. 1366 OF 2002)

JUDGMENT

The Respondent presented a Plaint dated 6th November 2002 on 17th December 2002 in CMCC No. 1366 of 2002 seeking general and special damages arising from an accident that occurred on 4th March 2002 while the Respondent was working for the Appellant. The particulars of negligence were that the Appellant had exposed the Respondent to risk or injury or harm; they had failed to provide the Respondent with protective gear; and they had failed to service the tools and machines used by their employees. The Defendant was served and filed a defence denying liability and in the alternative pleading contributory negligence of the Respondent, in that the Respondent failed to adhere to safety rules set; exposed himself to risk or danger which he knew or ought to have known; failed to make use of protective gear provided; and carrying out duties recklessly, carelessly and negligently without due regard to himself.

The case was heard before Honourable Solomon Wamwayi who in a judgment delivered on 26th January 2004 entered judgment for the Respondent against the Appellant on liability 100% and awarded general damages for pain and suffering in the sum of Kshs. 100,000/=. The Appellant was aggrieved and lodged the presented appeal through a Memorandum of Appeal dated 3rd February 2004 and filed on 4th February 2004 on the following grounds:-

1. THAT the Learned Trial Magistrate erred in law and in fact in ignoring the evidence of the defence witness that no report was received on the alleged date on 4.3.2002 involving the Plaintiff.

2. THAT the Learned Trial Magistrate erred in law and in fact in holding the Defendant 100% liable without any evidence to that effect.

3. THAT the Learned Trial Magistrate erred in law and in fact in ignoring the Defendant's submissions.

4. THAT the Learned Trial Magistrate erred in law and in fact in awarding general damages which were inordinately high.

5. THAT the Learned Trial Magistrate erred in law and in fact in holding the Plaintiff evidence which was not corroborated. (sic)

6. **Without prejudice to the foregoing and any admission on liability the damages awarded were inordinately excessive in the circumstances.**

The Appeal was admitted to hearing on 6th February 2006. The hearing proceeded on 9th May 2006. Counsel for the Appellant submitted that he wished to abandon grounds 3, 4, and 6. He therefore prosecuted grounds 1, 2 and 5. Counsel submitted that the finding of 100% liability was against the weight of evidence. Taking into account, the circumstances of the accident the Appellant was not to blame. He asked the court to review the evidence on record. The accident was not reported to the Appellant. Respondent's evidence was not corroborated at all. Hospital chit is dated 4th March 2002 when the Respondent stated that he went to hospital the next day that is 5th March 2002. He referred to the case of **Withers v Perry Chain Co. Ltd** on the relationship between employer and employee. The employer is not expected to take unreasonable precautions over the safety of his employees. The Appellant had taken reasonable precautions.

In reply counsel for the Respondent contended that the Trial Magistrate was right in his findings. He submitted that court should consider the testimony of the Respondent and the Appellant before the Trial court. The Appellant did not call the supervisor who was in charge of the Respondent. The medical report was admitted by consent without challenge. That no corroboration of Respondent's evidence was required. Urged that the appeal be dismissed with costs.

I have considered the submissions and the issues that arise for determination and contained in grounds 1, 2 and 5 of the Memorandum of Appeal. The first ground attacks the Trial Magistrate for failing to consider the defence evidence that no accident occurred on 4.3.2002. The duty of this court in first appeal is to re-evaluate the evidence and test the findings of the Trial Magistrate of course giving allowance to the fact that this court does not have the benefit of demeanour of witnesses. I have considered the evidence of the Respondent who was PW1 at the Trial court. His testimony was that he was injured on 4.03.2002 while on duty working for the Appellant. He had made delivery of logs to Webuye Paper Factory. He got out and untied a rope to enable the crane to off load the logs. As he was untying the rear left pillar which was a metal pillar got broken and bent and the logs came off. One log hit the ground and hit his left hand at the wrist and chest.

The Appellant called DW1 one Laurence Nyakundi. He was the transport manager of the Appellant. His testimony was that he did not receive the report of any accident on 4.3.2002. That the Respondent was under a supervisor John Alamisi and that if an accident took place he would have notified the supervisor who in turn would have notified him.

Counsel for the Appellant contends that their version of events was the correct one. No accident took place on 4.3.2002 involving the Respondent because none was reported. The testimony of the Respondent was that after the accident he went to a private clinic where he was treated. On the following day he went to Moi Teaching and Referral Hospital where he was treated. The Respondent did not report the accident to the Appellant or any person in charge. Instead after leaving Moi Teaching and Referral hospital he went to his lawyer. That is the chronology of the evidence. He could not recall the name of the private clinic he went to in Webuye and neither did he have any document. However, medical reports were produced as P Ex. 2 and D ex 1. The treatment note from Moi Teaching and Referral Hospital was P Ex. 1. The date of treatment was shown as 4th March 2002. The medical reports and treatment chit were admitted in evidence without much ado on the date of treatment at Moi Teaching Referral Hospital. According the Trial Magistrate cannot be faulted for finding that the Respondent was injured on 4.3.2002. The Appellant did not dispute that he was on duty on 4.3.2002 and that he was driving motor vehicle in issue assigned responsibility of taking logs to Webuye Pan Paper. The crucial witness who is described as supervisor was not called by the Appellant. It is very clear that the evidence of DW1 was considered. The trail Magistrate stated that 'the Defendant called one Laurence Nyakundi DW1 as DW1 is he transport manager of the Defendant Company. Accordingly to DW1 the Plaintiff failed to comply with company regulations in that he did not report the alleged accident to his immediate supervisor, John Alamisi. The

Defendant did not call John Alamisi to support DW1's assertion that the accident was not reported to the supervisor.

The fact that an accident was not reported does not mean that it did not happen. It would be inferring too much. There is corroborating evidence that the Respondent was treated on 4th March 2002 at Moi Teaching & Referral hospital. No explanation was given as why dates differ if visit was on the next day. Ground one of the appeal fails.

With regard to liability, the Learned Trial Magistrate found that the Plaintiff was injured while on duty at Webuye Paper Mills when one of the metal pillars on the lorry broke and one of the logs came down. He said that the Defendant failed in its duty to maintain the pillars on the lorry and that exposed the Plaintiff to damage. The Defendant's witness did not testify on this aspect and the evidence of the Plaintiff remained uncontroverted. I do not see any basis for interfering with the decision of the Trial Court on this aspect. DW1 concentrated only on the question of failure to report the accident which has been dealt with. The finding on in respect of liability shall therefore remain.

Ground 5 has been covered in the analysis of evidence adduced by Plaintiff. Corroboration of the accident was provided by the medical reports which were admitted by consent.

I have considered the quantum of general damages awarded in the sum of Kshs.100,000/- against the injuries sustained. The Appellant did not submit on or produce any authorities to enable the court reduce the amount awarded. I see no basis for interfering with the assessment of amount of damages. I uphold the amount awarded.

The net result is that the Appeal herein is hereby dismissed with costs to the Respondent.

Dated AND signed at Nairobi on this 21st day of AUGUST 2012

M. K. Ibrahim
Judge

DATED AND Delivered at Eldoret on this 26TH day of SEPTEMBER 2012.

ABIGAIL MSHILA
Judge

In the presence of : Okoth for Appellant

Ombati for Respondent.