REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 144 of 2007

TEITA ESTATE LIMITED..... APPELLANT

VERSUS

JOHN MWATHE MUTUA. ..... RESPONDENT

(From the judgment and decree of J Were, Resident Magistrate in Thika CMCC no. 94 of 2004)

J U D G M E N T

The Respondent herein was the Plaintiff in the lower court suit against whose judgment this appeal was filed. By a plaint dated 20th January, 2004 and filed in the lower court on 23rd January, 2004, the plaintiff had claimed for special and General Damages, costs, and interests.

The Plaintiff had pleaded that at all material time he was an employee of the defendant herein the Appellant. That on 4th August, 2003, he was lawfully engaged in his work of carrying sisal loads, when having been trapped by sisal threads he fell and sustained bodily injuries. He alleged negligence on the part of the defendant for failing to take adequate precautions for the safety of the plaintiff, and failing to provide the plaintiff with protective garments. The Plaintiff had described his injuries pain the lower back and injuries to the right shoulder.

In its defence the defendant had admitted the pleadings in paragraphs 1, 2 and 3 of the plaint, the last being the plaintiff's allegation that he was at all material times in the employment of the defendant, although the defendant apparently thought that in the pleadings it had admitted only the mere descriptions of the parties to the suit. Otherwise the defendant had denied all other pleadings in the plaint. The latter included the allegations that Plaintiff was in the employment of the Defendant when he fell, or that the Plaintiff fell and sustained any injuries, and that the defendant failed to prevent any accident and exposed the plaintiff to risk or damage or that it had failed to provide protective clothes to the Plaintiff. It also denied negligence and liability to the Plaintiff. In the alternative, the defendant, without prejudice, pleaded that if the defendant fell and sustained any injuries, he did so because of his own negligence for which he could only blame himself.

The lower court later allowed the Appellant/Defendant to file an amended defence in which it pleaded, in addition that the Plaintiff was not any material time employed by the defendant. This court will however, later herein show that the amended defence, although for a different reason from that used by the trial magistrate, never took off successfully.

During the hearing of the suit the plaintiff testified and called witnesses. He testified that on 4th August, 2003 he was in a casual employment of the Appellant in the year 2003 at Teita Estate, Juja. That he on that day on that day packed sisals loads and carried them in sacks to the store. That as he carried a

load on his back, he tripped and fell down on his stomach with the load his back and thus being injured on the back and on the legs. That he screamed and people came and rescued him. He blamed the employer for not cleaning the store or giving him a trolley to use. That he had tripped because the ground was not clean.

The Plaintiff further testified that he was taken to hospital where he got medical treatment, first at St Luke's Hospital and later at Thika District Hospital. He said later fully healed although he was now unable to do heavy work, nor walk long distances.

The Plaintiff admitted that he had no documents to show that he was an employee of the Defendant. He said that he worked with two others, Kamande and Ebby who he never called to testify for him. He admitted that what was dirty, was the road to the store and not the store or his place of work.

The Plaintiff's first witness was one Leah Mwarangu, a nurse who had first medically attended him. She said that on 4th August, 2003 the plaintiff had gone to her medical clinic with a history of having fallen down and sustained injuries. She examined the plaintiff and found tenderness on the spine and weakness and numbness on the lowers limbs. She gave paracetimal injection and a week and half later she gave more pain killers for nerves and muscles. She produced her clinic's medical register showing plaintiff's name and attendance and a medical attendance card.

The third witness was Dr. George K Keraye who was a medical practitioner at Thika. He said the plaintiff had gone to consult him with a medical card from Thika District Hospital. The cared indicated the plaintiff had sustained a lower back injury and a right shoulder pain. Dr. Keraye examined the Plaintiff for some back and shoulder pains complaints, but found no abnormality. He concluded that the pain would have been due to trauma. He signed a medical report which he produced with a fees receipt. The doctor said that at the time of the plaintiff visit, the plaintiff was well and he found no permanent disability.

The defence also called one witness who effectively testified that the Defendant had no sisal firm at Juja, their head office being in Industrial Area Nairobi, apart from a firm in Taita-Taveta area. The Defendant however stated that they had connections with a Juja Sisal firm operated by one Yakub Hussein who usually supplied sisal to them on contract terms. It however, denied that it had any employees at that firm and could not therefore have employed the plaintiff. They produced the company's employment register which did not show that the plaintiff was at the material time employed by them. They asserted that all their employees including casuals were being given an identification card.

In his judgment the honourable trial magistrate found that: -

a) The amended defence filed was mere a draft which was not allowed by law to become an amended defence for failure to pay court fees in respect thereof.

b)That the plaintiff was indeed the defendant's employee because the defendant admitted so in its defence pleadings.

c) That the Juja premises operated by one Yakub Hussein, belonged to the defendant by their admission in the rejected Amended Defence and on that basis the denial of employing the plaintiff at the material time, was not believable.

d)That both the plaintiff and the defendant were negligent and equally liable for the injuries sustained by the plaintiff.

e) That considering the nature of injuries suffered by the Plaintiff, Ksh.120,000/- as general damages for pain and suffering and loss of amenities, were sufficient to be apportioned at 50% to 50%.

It is the above findings that provoked this appeal by the Defendant/Appellant. His complaints can be summarized as follows: -

a) That the plaintiff failed to prove his claims on the balance of probabilities.

b)That in particular, the trial magistrate erred in law in rejecting the amended plaint without giving the defendant an opportunity to be heard on it.

c) That the plaintiff failed to prove that he was at the material time an employee of the Appellant.

d)That the Plaintiff failed to prove negligence on the part of the defendant and therefore failed to prove liability against Appellant.

I have on my part, carefully perused all the pleadings, the submissions in the lower court and before this court, the evidence adduced before the lower court and the judgment appealed against. I would fist resolve the technical issue of whether or not the amended defence should have been rejected by the trial court.

The record confirms that the defendant was allowed to amend. Its draft Amended Defence was admitted subject, however, to payment of requisite court fees required for the filing of any court document. It was the argument of the Appellant that it had , four months down the line, but before the hearing of the case, paid ksh.75/- as such court fees. It further argued that no issue of the amended defence arose or was raised by the plaintiff or court before or during the trial, and that the trial magistrate should not have raised or considered it, suo moto, and then proceed to rely on it to reject its admission, without giving the defendant, who would definitely be affected adversely by the rejection, a chance to explain.

I have considered the argument. I entirely agrees with the Appellant's argument. I find that the issue of failure to pay court fees for the Amended defence was procedural and ought to have been raised before or during the trial so that it could be resolved. It was not so raised by the court nor plaintiff. Had it been so raised, the defendant would have had a chance to show that he had indeed paid the requisite court fees, though much later in August, 2004. The trial court's raising the issue suo moto, during the judgment writing was too late in the day and adverse to the defence interest who were denied opportunity to explain.

If the above was all, I would have completely upheld the said issue of the Amended defence with the possible legal consequences. However, the law, in my view, did not still favour the defendant's amended defence. The defence had been admitted subject to payment of court fees, without a time prescription being given. In such cases in my view the civil procedure rules i.e. order VIA, Rule 6 provides thus: -

"Where the court has made an order giving any party leave to amend, unless that party amends within the period specified or if no period is specified, within fourteen days, the order shall cease to have effect, without prejudice to the power of the court to extend the period."

This provision is clear and it certainly affected the leave granted by the court to pay the court fees for the admitted Amended Defence. In this case before me, the defendant's failure to pay the court fees within 14 days and instead, paying the same four months after the court leave was granted, denied the defendant the right to amend and the right to rely on the said draft amended defence. The effect of this finding is that the valid defence upon which the defence had to rely on, is the original defence and not the Amended defence. The fact that the honorable trial magistrate used a wrong reason to arrive at the same conclusion as this court has, does not in any way assist the Appellant/Defendant.

The next issue to be resolved is whether the Respondent proved that he was at all material times the employee of the Appellant. There is no doubt that the Plaintiff had pleaded in paragraph 3 of the plaint, that he was at all material time so employed. There is no doubt as well that in its defence (original) the Defendant, whether inadvertently or not, admitted paragraph (3) which contained such pleading. It is not unreasonable therefore, to conclude as did the magistrate, that such admission has to be held against the Defendant to the effect that the Respondent was in the Appellant's employment at the material time.

It is unfortunate that honourable trial magistrate had in addition, to resort to the pleadings of the amended

Defence to resolve this issue. It clearly was illogical for him to rely on the pleadings which he had clearly rejected or expunged from his record. Doing so, therefore, was an error on his part.

The heavily discussed Yakub Hussein could have been joined as defendant by either party. He was not so joined. Let the matter end there.

Turning now to the issue of liability, did the Plaintiff prove that the Appellant had a common law or statutory duty to the Respondent in the said employment and if so, what was such a duty and in what way did the Appellant fail, to honour the same to the detriment of the Respondent?

The Respondent's pleadings and evidence was to the effect that he was carrying some sisal load to the store when he was trapped by some sisal threads on the ground along a pathway to the store. That he fell on his stomach with the load on his back. That the load of sisal he was carrying injured him on the back and right shoulder. That it was because the pathway was not clean or was untidy that he was so trapped. The Respondent did not indicate the distance between where he compiled the sisal loads and the store, to enable the court to decide whether it was the duty of the employer to clear the path. He neither adduced evidence to prove whether or not he himself from the start did not accept the working conditions that he found existing at the working place. He did not personally rule out the allegation that it was entirely his own negligence that caused him to triple and fall on that particular day when the accident occurred. In other words the court was not given opportunity to properly consider the party to blame keeping in mind that the plaintiff had some burden to prove his claim on the balance of probabilities.

I have considered the issue and I am not satisfied that the Respondent/Plaintiff by his evidence defined and proved the alleged negligence against the Appellant on the balance of probability. He thus failed to prove clear liability against the Appellant.

I however also looked at the medical evidence adduced before the lower court. PW 2, Leah Mwarangu, a clinical officer who first attended to the Respondent said that the latter went there complaining of severe back-pains and pains in both shoulders. She found tenderness in the lower spine at the rubber region which may have led to numbness and weakness on the lower limbs. X-ray showed no fracture or dislocation. She gave him some anti biotic and pain killers. The above treatment was later followed by another later. The latter found no abnormality although the Respondent still complained of pain at the lower back and shoulders. He compiled a report to that end stating that no permanent disability was anticipated. In the view of this court accordingly, the injury sustained by the Respondent if any, was minimal.

It is for those reasons that I find that there was not sufficient evidence to prove negligence and therefore liability as against the Defendant/Appellant. The trial court erred in holding otherwise without such evidence. If however I am wrong in my conclusion and that the Respondent was entitled to Judgment, I would award general damages of Kshs.70,000/- with a liability apportioned at 70% against the Respondent/plaintiff to 30% against the Defendant.

As it is, I allow this appeal and dismiss the lower court suit with costs here and below. Orders Accordingly.

DATED and **DELIVERED** at Nairobi this 14th day of December, 2012

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D.A. ONYANCHA

JUDGE