



No. 142

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CIVIL APPEAL NO. 124 OF 2009

KEBIRIGO TEA FACTORY.....APPELLANT

-VERSUS-

JAMES MORWABE KONGO.....RESPONDENT

JUDGEMENT

(Being an appeal from the Judgment and decree delivered by Hon. Komingoi (Senior Resident Magistrate)

in Nyamira SRMCC No. 31 of 2007 dated 10th June 2009.

The respondent, **James Morwabe Kongo**, then as plaintiff filed a civil suit against the appellant then as defendant in the Senior Resident magistrate's court at Nyamira seeking damages both special and general, costs and interest on account of injuries he allegedly sustained in the appellant's tea factory at Kebirigo. He averred that on 30th of November, 2003, whilst on duty at the appellant's factory aforesaid, he was injured on his right hand and chest. The respondent blamed the said injuries on the appellant's negligence both statutory and under common law. According to the respondent the appellant had inter-alia, failed to take all reasonable precautions for his safety while engaged upon its work and exposed him to risk of damage or injury, which it knew or ought to have known. It also failed to provide and maintain adequate and suitable measures to enable him carry out his work safely and to provide a safe system of working. He also complained that he had been employed without being instructed as to the dangers likely to arise in connection with his work or providing him with any or any adequate supervision. He also complained of not being provided with suitable gloves, apron, gumboots, protective clothing and helmet to protect his hand and chest though the appellant knew or ought to have known that it was unsafe and dangerous for him to carry out the said work without such protective gear.

The appellant filed a defence dated 9th May, 2007, in which it denied the averments of the respondent aforesaid. In particular the appellant denied that the respondent was its employee and that it was responsible for the injuries that he sustained if at all. The appellant further averred that if the respondent was indeed injured whilst on duty, then the same was wholly or substantially caused by his own negligence and want of care in his conduct at the material time. The appellant enumerated the particulars

of negligence it attributed to the respondent. As a parting shot the appellant pleaded *volenti non fit injuria*. Thereafter the appellant put the respondent to strict proof thereof on the injuries that he allegedly sustained following the alleged accident.

The suit was heard by **S.K Gacheru RM** and later by **L. Komingoi SRM**. After hearing both parties, the trial magistrate entered judgment on liability in favour of the respondent. She however held that the respondent was also to blame for the accident to the extent of 30%. Thereafter general damages payable to the respondent by the appellant were assessed at Kshs. 90,000/= less 30% contribution. The respondent was also awarded special damages of Kshs. 6,500/= plus costs and interests.

The appellant was aggrieved by the judgment and decree aforesaid and immediately lodged this appeal setting out 5 grounds of attack to wit:-

“1) The learned trial magistrate erred in law and in fact by holding that the plaintiff had proved his case on liability against the appellant on a balance of probabilities.

2) The learned trial magistrate erred in law and misdirected herself in holding that occurrence of the accident was proved and that the appellant was 70% liable for the same.

3) The learned trial magistrate erred in law and in fact by failing to dismiss the plaintiff/respondent’s suit in the lower court (sic) view of the evidence tendered before her.

4) The learned trial magistrate erred in law and infact by awarding general damages that are so manifestly excessive as to be erroneous in light of the nature of injuries allegedly sustained.

5) The learned trial magistrate erred both in law and in fact by not properly considering the evidence on record, the appellant’s defendant’s submissions and authorities and hence did not write a considered judgment...”.

When the appeal came up for directions it was agreed amongst other directions that the appeal be heard by way of written submissions. Those submissions were subsequently filed and exchanged. I have since had the benefit of reading and considering them as well as cited authorities.

This court as a first appellate court, has a duty to reconsider the evidence adduced before the trial magistrate’s court, evaluate it itself and draw its own conclusions. This court is however expected to always bear in mind the fact that it neither saw nor heard the witnesses and therefore cannot be expected to make any findings as to the demeanour of witnesses. As was stated by the Court of Appeal in:

Selle VS Associated Motor Boat Co. Ltd (1968) E.A 123 at page 126;

“In particular this court is not bound necessarily to follow the trial’s court findings if it appears either that it has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

The three issues before the trial court for determination and indeed in this appeal were whether respondent was injured in the course of employment, whether the appellant was thereby liable and finally, if so, the quantum .

During the trial, there was credible evidence that the respondent was on duty on the material day and worked at the processing section from 7.00a.m. He was instructed to push a trolley and as he did so the trolley cut him on the right hand and was also injured on the chest. Apparently, the trolley got stuck and as he forced it, it hit his hand and chest. However from the documents tendered in evidence it appears no such accident occurred nor was the respondent injured. It is possible therefore and as claimed by the appellant that the respondent’s claim could as well have been fraudulent. The respondent did not seriously challenge the appellant’s evidence on the issue. He was contended with merely submitting that the appellant’s witnesses were not competent to tender in evidence the muster roll and the accident register that showed that no accident involving the respondent occurred on that day since they were not the authors of the said records. However such submission provide no answer to the appellant’s contention. In any event the respondent did not object to the said witnesses producing the documents.

The appellant relied on the testimony of DW1, **Akuma George Sagwe** who at the time was a data

clerk at the appellant's factory in support of its defence. He confirmed knowing the respondent. He produced a muster roll as well as the accident register as defence exhibits. In the muster roll, the respondent is shown as having been on duty on the material day. However, it would appear that he was not injured whilst on duty since he signed off at the end of the working day. There is no indication at all that he had been injured on that particular day. Neither does his name feature in the accident register for that day.

The Respondent confirmed in his testimony that he saw the muster roll. Much as the documents aforesaid were generated or prepared by the appellant and the possibility that they could be tampered with exists, I am however satisfied having perused them carefully that they are indeed genuine and not generated purposely for this case. I doubt that the appellant will go to the extent of falsifying documents merely to avoid paying a genuine claim. I am certain that the appellant had a workmen compensation scheme in place which would have taken care of the respondent's claim if it had been genuine and reported. Further if indeed he was involved in such an accident some of the co-workers could have witnessed the same going by the muster roll. Why could he call any one of them to come and testify on his behalf and confirm such an occurrence. Further, why couldn't he pursue the claim under the workmen compensation act.

The evidence of **Dr. P.M. Ajuoga** who testified as PW2 is also telling. He stated that he examined the respondent on the 10th April, 2007, four years after the alleged accident. However, during cross examination he admitted that he merely relied on the history and treatment records from Nyamira District Hospital. One wonders why it took the respondent 4 plus years to see the doctor for purposes of a medical report for soft tissue injuries which did not require extended treatment. Further it appears to me that the respondent's claim may as well have been time barred. It was in the nature of a tortious claim much as the respondent claims breach of contract. The accident is alleged to have occurred on 30th November, 2003. Yet the suit was not filed until 20th April, 2007 a whole 4 years later. Any way I will leave the matter at that as it was not pleaded, canvassed at the hearing in the trial court nor in this appeal.

Lastly, PW3, **Dominic Ombati Onsongo** who is an employee of the hospital in which the respondent was alleged to have been treated, Nyamira District Hospital, testified and produced treatment notes. However, during cross examination he admitted that he did not know to which institution the outpatient number assigned to the respondent belonged. He conceded as well that the respondent would be lying if he claimed to have been treated at Nyamira District Hospital. If anything he had been treated at Bosiango Dispensary. He could not however explain how the respondent found himself at Nyamira District Hospital. This evidence was in my view damning to the respondent's entire case.

The upshot of all the foregoing is that much as the respondent was an employee of the appellant, there is no cogent evidence that he was injured in the accident on that day, contrary to the finding of the learned magistrate. The appellant is thus not liable to the respondent on any account.

Even if I had come to the conclusion that indeed the respondent was injured in the course of his duties, I would still have held that the appellant was not liable. The respondent was engaged in manual work which did not require any special skill and expertise. He did not need special training or expertise to push a trolley. I do not therefore see how the provision of the gloves and overall as testified to by the respondent would have prevented the accident from occurring if at all. The respondent himself testified that as he was pushing the trolley, the trolley got stuck and he forcefully pushed it. It was then that the trolley hit his right hand and chest. What special instruction does one require to push a trolley which according to the respondent looked like a wheelbarrow? In any event, when the trolley got stuck why did he forcefully push it. To my mind the respondent was the author of his misfortune if at all.

Finally, had I dismissed the appeal in part, I would not have interfered with the general damages awarded to the respondent. The injuries suffered by the respondent as per the medical report were soft tissue injuries and the award made was within the acceptable range for those sort of injuries in those days.

In the result however, I allow the appeal, set aside the judgment and decree of the subordinate court. In substitution I order that the respondents' suit be dismissed with costs. The appellant too shall have the costs of this appeal.

Judgment dated, signed and delivered at Kisii this 30th June 2010.

ASIKE-MAKHANDIA

JUDGE