



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 29 OF 2009

KEBIRIGO TEA FACTORY.....APPELLANT
-VERSUS-
JAMES MONGARE MIRA.....RESPONDENT

JUDGMENT

The respondent, **James Mongare Mira**, filed a suit against the appellant, **Kebirigo Tea Factory Company Limited**, in the Senior Resident Magistrate's court at Keroka in **SRMCCC No. 111 of 2004**. In the said suit, the appellant sought damages both special and general, costs and interest on account of injuries he allegedly sustained at the appellant's factory. It was his case that he was at all material times an employee of the appellant. On or about 20th August 2002 whilst on duty, he was involved in an accident and was injured on his chest, back as well as the shoulder. He sustained those injuries after he slipped and fell on the dryers and trolley as he was sweeping on the top of them using the appellant's broom. There was no ladder. He reported the accident to the assistant manager one, **Mr. Korir** and was given a sick sheet and went to Tombe Dispensary for treatment. He blamed the accident on the appellant because he was given a short broom and he was also not provided with a ladder. Neither was he provided with gumboots. In a nut shell the respondent blamed the said accident on the negligence of the appellant both at common law as well as breach of statutory duty and or contract. The respondent set out the particulars of negligence with regard to common law negligence, breach of statutory duty and or contract. He also outlined the particulars of injuries sustained and special damages incurred.

On its part, the appellant filed a defence denying responsibility for the injuries suffered by the respondent if at all as well as the accident. In the alternative, the appellant claimed that if the respondent was indeed injured, then it was due to his own negligence and proceeded to give the alleged particulars of negligence it attributed to the respondent.

The suit was thereafter heard by **J. Were, SRM**, and in a judgment delivered on 16th January, 2009, he found the appellant liable and entered judgment on liability in favour of the respondent to the extent 30% and as against the appellant to the extent of 70%. He then assessed general damages at Kshs. 80,000/= less 30% contribution. No special damages were awarded but the respondent was awarded costs and interest.

It is against this judgment that the appellant lodged this appeal. It set 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 himself 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's/respondent's suit in the lower court as no initial treatment notes and medical reports were tendered to (sic) in evidence before him.**
- 4. The learned trial magistrate erred in law and in fact in 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 before me for directions on 29th June, 2010, among the directions given were that the appeal be canvassed by way of written submissions. Those written submissions were subsequently filed and exchanged between the parties. I have carefully read and considered them

alongside cited authorities.

This court, as a first appellate court has a duty to reconsider the evidence adduced before the trial court, evaluate it itself and draw its own conclusion. In doing so it has to bear in mind that it neither saw nor heard the witnesses and therefore cannot be expected to make any findings as to the demeanour of such witnesses. See **Selle –vs- Associated Motor Boat Company Limited (1968) E.A 123.**

It is common ground that the respondent was an employee of the appellant. It is also admitted that he was on duty on the material day. What is in contention however, is whether the respondent was involved in an accident on that day. In so far as the appellant was concerned, the respondent worked for eight hours on that day and being a casual he was paid his full dues for the day. There was no report of an accident involving the respondent on the material day. Thus there was no accident. However, it is the case of the respondent that he worked on the day but slipped, fell and was injured. Thus there was an industrial accident involving him. The trial court acting on the evidence on record had to choose between the two versions, which to go with. The trial court chose to believe the story of the respondent. Was it right to go that route? I do not think so on the evidence on record.

First, much as the respondent claimed to have been involved in an industrial accident on the material day, there was no credible evidence to back up the claim. He claimed that following the accident he reported the same to the assistant manager, **Mr. Korir**. He was then given a sick sheet and went to Tombe Dispensary where he was given a booklet. That booklet though marked for identification was not formally tendered in evidence. That was the only documentary evidence that the respondent had in possession as prove of the industrial accident. Since it was only marked “**MFI-1**” and never produced in evidence it was insignificant and of no evidential value. Considering that he who alleges must prove, the respondent was in the circumstances unable to prove the occurrence of the accident and his involvement thereof. Much as he claimed that he reported the accident, again no credible evidence was led in that regard. There was no accident and or injuries recorded on that day. It is also instructive that though the accident is alleged to have occurred on 20th August, 2002, it was not until 16th April, 2004 that he lodged this claim. This may well tie in with the appellant’s assertion that there was no such accident and that the respondent’s decision to claim injuries must have been an afterthought.

The respondent was not the only employee of the appellant. Evidence on record shows that there were other workers. If indeed he was involved in the accident, co-workers or any one of them would have witnessed the accident. He could have been able to count on such worker (s) for support in terms of their evidence. He never saw the need to summon them or any one of them to support and back up him in his claim. That puts a question mark on the genuineness of the respondent’s claim. It is also instructive that the respondent had in the past, had two similar cases against the appellant that were finalized.

The evidence of the defence was not seriously challenged in my view. DW1, **Charles Mwebi** testified and produced a muster roll and accident register. The muster roll showed that the respondent, worked his entire shift on the day and signed off with no claim of any injuries whatsoever. Indeed had the respondent been involved in the accident the same will have been captured and reflected in the accident register for that day!

The respondent has questioned the authenticity of the documents tendered in evidence on account of having been tampered with. Indeed the learned magistrate seems to have swallowed that bait when he held thus “..... **However as pointed out during the hearing, the entries of that day appeared tampered with**”. I have sived through the evidence of both the respondent and the appellant as well as their cross-examination and re-examination and have not come across any suggestion that the documents had been tampered with. In reaching that conclusion therefore the learned magistrate advanced his own theory unbacked by evidence. In the process he erred.

Liability in this case would only have been proved had the respondent shown that he was actually injured at his place of work on the material day. He would only have done so by producing medical treatment notes which he failed to do. The treatment booklet was only marked “**MFI-1**” and was never tendered in evidence as required. The respondent having failed to produce credible evidence in support of his injuries, his claim ought to have failed. Indeed the respondent did not even bother to tender any medical report to show the nature of injuries sustained, when they were sustained and the treatment given nor did the doctor testify in support thereof. Such evidence would perhaps have countered the appellant’s evidence.

Further, even if there was evidence that indeed the respondent was injured as claimed, I do not see how liability would attach on the appellant. The respondent was engaged in a manual job which did not require special skills or training. It was his evidence that “**...On 20th August, 2002 I was on duty**

sweeping the top of the dryer. I was using the defendant's broom (sic). There was no ladder. As I was sweeping I slipped and fell on other driers and trolleys ...". There was no evidence that the appellant had instructed him to sweep the top of the drier. There was no evidence that a ladder was required and the appellant failed to provide the same though asked by the respondent to. The respondent also claims that he was provided with a short broom. However there is no evidence that longer brooms were required for the exercise nor had he asked for one and he was denied. He also claims that he was not provided with gumboots. However there is no evidence that it was a requirement that he be provided with them and or that other workers doing similar work were provided with such gumboots save for him. Neither is there evidence that he asked for them and he was denied. From all the foregoing, the impression I get is that even if there was such accident, I would still have held that the respondent was the author of his own misfortune. I do not think that there is anything that the appellant would have done that would have prevented the alleged accident.

The appeal is meritorious. Accordingly it is allowed with costs to the appellant. The judgment and decree of the trial court is set aside. In substitution I order the dismissal of the suit with costs to the appellant as well.

Judgment dated, signed and delivered in Kisii this 16th day of September, 2010.

ASIKE-MAKHANDIA

JUDGE