REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Appeal 78 of 2006

DAVID OKOKA ODERO……APPELLANT

VERSUS

KILINDINI TEA WAREHOUSES LTD……..…….RESPONDENT

(An Appeal from the judgment and Decree of the Resident Magistrate at Mombasa delivered on 11th May 2006 by Honourable T. Nzioki)

IN

MOMBASA RMCC NO. 2294 OF 2004

BETWEEN

DAVID OKOKA ODERO…….PLAINTIFF

VERSUS

KILINDINI TEA WAREHOUSES LTD……..…..…….DEFENDANT

JUDGMENT

I have before me an appeal by David Okoka Odero the plaintiff in the original action from the judgment of the Resident Magistrate at Mombasa whereby the Learned Magistrate dismissed the appellant's suit with costs. By his plaint dated 4th May 2004 and filed on 13th May 2004, the appellant had claimed special and general damages plus costs and interest. The foundation of the claim was pleaded in paragraphs 4, 5 and 6 of the plaint. It was that the appellant whilst engaged as a casual employee at the respondent's warehouse on or about 7th March 2004 a fellow employee negligently crushed a sack load on the appellant as a result of which the appellant sustained severe personal injuries and the respondent was vicariously liable for the negligence and for breach of the duty of care as the appellant's employer. Particulars of the respondent's negligence and/or breach of duty of care were pleaded and so was the special damage.

The respondent filed its defence on 31st May 2004. It *inter alia* denied that the appellant was its employee as pleaded. However, in response to the appellant's averment with regard to the terms of his

employment, the respondent pleaded that if a contract of employment did exist, which it denied, its terms provided that the appellant was to take all reasonable precautions for his own safety and not to expose himself to the risk of damage or injury and had further to obey all instructions as to the manner of carrying out work given to him. The respondent in the said defence denied the particulars of negligence and further denied that an accident occurred as pleaded in the plaintiff. In the alternative the respondent pleaded that if at all the accident occurred the same was without any negligence on its part but to the contrary the appellant solely caused the accident by his own negligence particulars whereof were pleaded.

At the trial, the appellant gave evidence and called two witnesses: a doctor and the appellant's co-worker. In his testimony, the appellant stated that on 7th March 2004, he was hired by the respondent as a loader. He commenced work at 5.00 p.m. on 6th March 2004 and worked overnight and the following day upto 4.00 p.m. He was assigned the work of carrying 50 kg bags of fertilizer from a lorry to a warehouse and whilst so engaged a co worker caused a bag to fall on him. He was injured on the neck, ribs and back. He was then treated at Coast General Hospital on 8th March 2004. The appellant blamed the respondent for the accident because the latter allowed 3 teams to work in a narrow path and did not provide an elevator to stack the bags. The appellant produced a receipt for Kshs. 2,000/= for the medical report.

The doctor who prepared a report on the injuries sustained by the appellant produced his report. In his opinion the appellant sustained soft tissue injuries of the lumbar sacral from which he had fully recovered. He charged the appellant Kshs. 2,000.00 for the report. The doctor further testified that he relied on treatment notes issued by Coast General Hospital and on his examination for the preparation of his report which he produced as an exhibit. The treatment notes were produced by consent.

The appellant's co-worker; Philip Odienge Adaya testified that on 6th March 2004 and 7th March 2004, he, together with the appellant, were working as casuals at the respondent's warehouse when a bag fell on the appellant. He blamed the defendant for failing to provide them with safety equipment.

The respondent's evidence before the Resident Magistrate was given through one Heshima Mohammed. He testified that he was working as a team leader at the respondent's warehouse. He recruited the appellant on 7th March 2004 and did not receive any report of injury of the appellant but learnt of the injury to the appellant the next day after recruiting him. He denied that Philip Odienge Adaya was recruited as a casual on 7th March 2004 as his name did not appear in the register of casuals for the period between 13th January 2004 and 19th June 2004.

On the conclusion of evidence counsel for the parties made their submissions before the Resident Magistrate. The Learned Resident Magistrate after considering the evidence adduced before him and the submissions made to him by counsel, concluded that the appellant had not proved his case on a balance of probabilities and dismissed it with costs to the respondent thus provoking this appeal. The appellant has put up seven grounds of appeal namely:

1) That the Learned trial Magistrate erred in law and fact in holding that the plaintiff had failed to prove his case on a balance of probabilities.

2) That the Learned trial Magistrate erred in Law and fact in holding that the date of the accident pleaded in the plaint was contrary to the date referred to in the evidence and in placing too much weight on the issue of the date which was not contentious at the hearing.

3) That the Learned trial Magistrate erred in fact and law in holding that treatment notes had not been produced in evidence to provide a nexus between the medical report and the injuries suffered.

4) That the Learned trial Magistrate erred in Law and in fact in failing to hold that the plaintiff's evidence on injury had been corroborated and in failing to appreciate that the standard of proof in civil claims is on a balance of probability and/or preponderance of evidence.

5) That the Learned trial Magistrate erred in Law and fact in failing to make a finding on the issue of negligence.

6) That the Learned trial Magistrate erred in Law and fact in failing to assess general damages and make a finding on special damages.

7) That the Learned trial Magistrate erred in Law and fact in basing his decision on extraneous issues and in holding against the weight of evidence.

In his brief submission before me, counsel for the appellant argued that there was no contradiction in the evidence deduced by the appellant as found by the Learned Trial Magistrate and whatever conflict that existed on the record was of a minor nature and was not sufficient to find against the appellant. Counsel further submitted that the Learned Magistrate was wrong to hold that no witness was called to produce evidence on the initial medical report or treatment notes given at Coast General Hospital when the latter were produced by consent. It was also argued on behalf of the appellant that the appellant's evidence was buttressed by that of his co-worker: Philip Odienge Adaya. In the premises, according to counsel for the appellant, the Learned trial Magistrate erred in Law and fact in holding that the plaintiff had failed to prove his case on a balance of probabilities.

Finally, counsel for the appellant submitted that the Leaned Magistrate erred in Law and in fact in failing to make a finding on the issue of negligence and further failed to assess damages payable even though he had not found for the appellant.

The appellant therefore prays that the Learned Magistrate's judgment be set aside and that judgment be entered for him as prayed in the plaint. On damages counsel for the appellant opined that Kshs. 150,000/= would be adequate compensation for the appellant.

The respondent opposed the appeal and supported the decision of the Learned Resident Magistrate. On quantum counsel for the respondent submitted that the injuries allegedly received were minor soft tissue ones and infact the appellant was able to work upto 4.00 p.m. the following day after the injury. Counsel suggested a figure of Kshs. 20,000.00 as damages for the said damage in the event that the appeal is allowed otherwise in his view the appeal has no merit and should be dismissed with costs.

This is a first appeal. The court is therefore duty-bound to re-evaluate the evidence and in doing so, it should be slow to disturb findings of fact of the Learned Resident Magistrate (see **Peters – v – Sunday Park Ltd. [1958] EA 424)**. I must therefore examine with care whether the findings on facts were not based on evidence adduced before the Learned Resident Magistrate or whether there was a misapprehension of the evidence or that the Learned Resident Magistrate acted on wrong principles in arising at those findings of fact.

The Learned Resident Magistrate specifically found as a fact that the appellant was working for the respondent on 7th March 2004. The issue the Learned Resident Magistrate framed for determination was whether the appellant was injured while in the course of his employment on the said date. On that issue the Learned Resident Magistrate found against the appellant. He did so because he found that the appellant's evidence and that of the doctor conflicted with respect to the date of the accident. The Learned Resident Magistrate also found that there was no medical evidence to show that the appellant suffered the alleged injuries on 7th March 2004. The Learned Resident Magistrate also found that the evidence of Philip Odienge, the appellant's co-worker, contradicted the evidence of the appellant in respect of the date of the accident. On those findings the Learned Resident Magistrate concluded that the appellant did not call sufficient proof that he suffered any injury on either the 7th or 8th of March 2004. He observed that the appellant failed to call a witness to produce the initial medical report or treatment notes of Coast General Hospital to support his evidence. This last finding made the Learned Resident Magistrate fail to understand how the doctor was able to ascertain the injury allegedly suffered by the appellant after a month.

Was the Learned Resident Magistrate entitled to make those findings and arrive at the conclusion he came

to on the evidence adduced before him? With respect to the date of the accident, the appellant pleaded as follows at paragraph 5 of his plaint:

"**5. That on or about the 7th day of March 2004 the defendant retained the service of the plaintiff as a casual labourer and charged him with the responsibility of downloading packs and/or 50 kilogram sack loads from a motor vessel into a warehouse when a co-employee negligently crushed a sack load into the plaintiff as a result of which he sustained severe injuries. The plaintiff holds the defendant vicariously liable for negligence and holds it liable also for breach of duty of care as an employer."**

A plain reading of the said paragraph shows that the appellant gave an approximate date of the accident as being on or about the 7th of March 2004. When the appellant testified he said that he was injured on 7th March 2004. The doctor who was PW1 testified that he examined the appellant who had sustained injuries on 7th March 2004. I do not therefore see any conflict in the evidence of the appellant and that of the doctor as regards the date when the accident occurred. PW 3, Philip Odienge Adaya the appellant's co-worker testified that he together with the appellant started work at 5.00 p.m. on 6th March 2004 until the following day on 7th March 2004 and as they off-loaded sacks from a lorry a sack fell on the plaintiff. Although the appellant's co-worker did not give the exact date when the accident occurred, I, with respect do not find his evidence conflicting with that of the appellant with regard to the date of the accident. I find that the Learned Magistrate's findings as to the date of the accident were not based on any evidence adduced before him at all. There was infact no inconsistency in the pleadings and in the evidence as to when the accident occurred as the Learned Resident Magistrate held.

With regard to the Learned Magistrate's findings with respect to the initial treatment notes issued at the Coast General Hospital, I am unable to find the basis for the same. It is not easy to appreciate his finding that the appellant failed to call a witness to produce the initial treatment notes when his own record shows that those notes were produced by consent. There was no duty cast on the appellant to call the clerical officer or doctor who initially treated him when no objection was raised against production of the same treatments without producing the maker thereof. It appears therefore that the Learned Resident Magistrate came to the conclusion that there was no medical evidence that the appellant suffered the injuries alleged on the basis that the initial treatment notes were not produced. That was a clear misapprehension of the evidence adduced before the Learned Resident Magistrate. His conclusion was therefore not based on any evidence at all. If the Learned Resident Magistrate had remembered that the initial treatment notes were produced by consent, he would not have found it difficult to understand how the doctor was able to ascertain the injury suffered by the appellant after one month of the accident. In any event the said doctor gave clear testimony that his opinion of the injury suffered by the appellant was based upon his own physical examination of the appellant in addition to what he found in the initial treatment notes issued at the Coast General Hospital. He produced his report of the injuries suffered by the appellant. He opined that the appellant sustained soft tissue injuries on the Lumbar Sacral Spine. There was therefore sufficient evidence adduced by the appellant for the Learned Magistrate to find that the appellant suffered the injuries pleaded.

Having re-evaluated the evidence, this being a first appeal, I find and hold that the Learned Resident Magistrate's findings of fact on whether the appellant sustained the injuries pleaded were predicted on no evidence and on a misapprehension of the evidence adduced before him. I therefore allow grounds 2, 3 and 4 of the appeal.

With regard to negligence, the appellant particularized the same at paragraph 5 of his plaint. In his oral testimony in court the appellant stated that they had no ladder where they worked and improvised by using the bags that were being off-loaded. He blamed the respondent for allowing 3 teams to work at the same store while using a narrow path. He further testified that the stacks were very high and the respondent should have used an elevator to stack the bags and for want of the elevator, as he climbed the improvised stairs a bag fell down from the stack. Co-workers constructing the stack, caused one of the bags to fall upon the appellant. The appellant's testimony was supported in part by that of his co-worker Philip Odienge Adaya. He confirmed that as they off-loaded sacks from a lorry a sack fell on the

plaintiff. He blamed the respondent for failing to provide safety equipment. Unfortunately, the Learned Resident Magistrate made no finding of negligence. However, on my own independent evaluation of the evidence, I find that the appellant established negligence on the part of the respondent on a balance of probabilities. In any event, the respondent did not rebut the evidence of negligence attributed to it.

Ground 5 of the appeal is therefore also allowed. Ground 6 must also be allowed as the Learned Resident Magistrate did not assess general damages nor did he make any finding on special damages as he was required to do even after he had rejected the appellant's claim.

The upshot is that ground 1 of the appeal is also allowed.

On damages, the appellant had pleaded special damages of Kshs. 2,000.00 being the sum he paid the doctor for preparing a medical report of the injuries he sustained. The doctor confirmed that payment and receipts for the fees were produced. I find and hold that the special damages of Kshs. 2,000.00 were specifically pleaded and strictly proved.

On general damages, I find that the appellant sustained minor soft tissue injuries of the Lumbar Sacral Spine. He appears to have attended hospital only once. The medical report produced at the trial indicates that the appellant had fully recovered when he was examined by the doctor. The appellant did not suffer any permanent incapacity. At the trial counsel for the respondent suggested an award of Kshs. 40,000.00 as adequate compensation for the appellant. He relied upon an unreported High Court decision in **Nairobi HCCC No. 3944 of 1990: Kenneth Onyango & 4 Others – v – Hassan Genya Juma & Another** in which an award of Kshs. 50,000.00 was made to a plaintiff who suffered soft tissue injuries on the back, right knee and leg. The injuries fully healed leaving scars.

The appellant's counsel on the other hand proposed, at the trial, that an award of Kshs. 80,000.00 would adequately compensate the appellant. He relied upon several High Court decisions for that proposal including **Nairobi HCCC No. 2164 of 1991: Vincent Oduor – vs – K.P.&L. Co. Ltd.** where the plaintiff suffered soft tissue injuries involving bruises and cuts. He was rendered unconscious for about one hour following a bang on his head and had fully recovered without permanent incapacity. I agree with counsel for the respondent that the injuries suffered by the appellant were minor soft tissue ones which did not prevent the appellant from continuing to work immediately after the accident. Having considered the submissions of counsel and the cases cited to me, I am inclined to accept the respondent's counsel's proposal at the trial. I award the appellant Kshs. 40,000.00 as general damages for pain, suffering and loss of amenities.

In the end, I allow the appeal, set aside the judgment of the Learned Resident Magistrate dismissing the appellant's suit with costs and substitute therefore judgment for the appellant for Kshs. 40,000.00 as general damages and Kshs. 2,000.00 as special damages making a total of Kshs. 42,000.00. Interest on general damages at court rates will be applied from the date of judgment of the Lower Court whist interest on special damages will be applied at the same rate from the date of filing suit. The respondent shall pay the costs of this appeal and those of the Lower Court.

Judgment accordingly.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF MAY 2008.

F. AZANGALALA

JUDGE

Read in the presence of Sewe H/B for Jengo for the Appellant and Ms Muya for the Respondent.

F. AZANGALALA

JUDGE

7TH MAY 2008