REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII
Civil Appeal 179 of 2006

KEBIRIGO TEA FACTORY …… APPELLANT

VERSUS

JARED RAINI RAINI …….. RESPONDENT

JUDGMENT

The Respondent was the plaintiff in CMCC.NO.1607 of 2004 before the Chief Magistrate's Court at Kisii. He stated in his plaint that he was employed by the Appellant as a labourer . He alleged that on 10th February 2001, in the cause of his employment, his left hand was injured as a result of which he suffered pain, loss and damage. He attributed the said injury to the appellant's breach of statutory duty and negligence. He set out the particulars of the said breach and of negligence.

He claimed general damages as well as special damages on account of a medical report in sum of Kshs.3,500/=.

The appellant filed a statement of defence and denied the respondent's claim. The appellant stated it was not aware of the alleged accident. In the alternative, the appellant stated that if the said accident ever occurred, the same was caused by the respondent's negligence. The appellant set out the particulars of negligence that it alleged against the respondent.

During the hearing the respondent testified that on the material day he was required to stand on a pile of timber while removing packets of tea leaves in a place where it had been stored. While so engaged he slipped and fell down. He alleged that the timber ranks were hanging and were slippery. When he fell down, his left hand was cut by a piece of iron. Thereafter he went to the appellant's office and he was issued with a sick sheet, which he took to Nyamira District Hospital where he sought treatment. He produced the treatment records that were issued to him at the said hospital. The respondent consulted Doctor Ezekiel Ogando Zoga, who prepared a medical report at a cost of Kshs.3,500/=. The medical report indicated that the respondent sustained a deep cut on the left elbow of the left hand, which healed well leaving a 4 cm scar. The respondent blamed his employer for the said injury, saying that he had not been provided with any protective gear.

The appellant called one witness by the name Charles Mwebi, DW1, one of its clerks. DW1 admitted that the respondent had been employed by the appellant. His work was to off load tea packets from vehicles and put it in troughs. PW1 alleged that the respondent was not on duty on 10th February 2001. The respondent was in employment upto 7th December 2000. PW1 produced the master roll for the month of December 2000 (defence exhibit 2). That was not sufficient evidence to prove that the respondent was not in the appellant's employment as at 10th February 2001. He added that on the aforesaid date no accident occurred. He produced the accident register book as an exhibit.

The advocates for the parties filed written submissions on both liability and quantum of damages. The respondent urged the trial court to find that the appellant was fully liable for the said accident and award general damages in the sum of Kshs.150,000/= plus special damages of 3,500/=. On the other hand, the appellant urged the court to dismiss the respondent's case in its entirety. Alternatively, the trial court was urged to hold that the respondent contributed to the occurrence of the said accident.

In a brief judgment, the trial court noted that the muster roll for 10th February 2001 had not been produced by the appellant and on a balance of probabilities held that the respondent was on duty on the material day. The trial court apportioned liability at 90% to 10% in favour of the plaintiff.

General damages were assessed at Kshs.80,000/=. After 10% contribution the respondent was awarded Kshs.72,000/= and special damages were awarded at Kshs.3,500/=.

The appellant was dissatisfied with the said judgment and preferred an appeal to this court. The appellant stated that the learned trial magistrate had misdirected himself in law and fact by holding that the respondent was on duty on 10th February 2001. It was also alleged that the learned trial magistrate erred in law in his analysis of the evidence and in his findings on liability and award of damages.

Mr. Migiro for the appellant submitted that the respondent did not produce a sick sheet that was allegedly issued to him by the appellant and which had been marked for identification. In the absence of the alleged sick sheet, there was no proof that the alleged accident occurred in the appellant's premises, counsel submitted. Mr. Migiro further criticized the judgment by the learned trial magistrate saying that the same did not meet the requirements of a judgment as set out under order XX rule 4 of the Civil Procedure Rules.

Miss Obaga for the respondent opposed the appeal. She submitted that the appeal was set down for hearing before directions were taken. She further submitted that no certified copy of the decree appealed from had been annexed to the memorandum of appeal. In her view, failure to annex a certified copy of the decree was fatal to the appeal. She cited MURAI AND OTHERS VS WAINAINA (No.2) KLR [1978] 31.

Regarding the occurrence of the accident, counsel submitted that the respondent was a casual labourer and having stated that he was on duty on 10th February 2001, it was up to the appellant to produce appropriate evidence to disapprove the respondent's contention. She observed that the appellant had deliberately avoided producing the muster roll for 10th February 2001. She added that the learned trial magistrate had an opportunity to observe both the appellant's witness as well as the respondent's witness so as to determine who was telling the truth. She urged this court to dismiss the appeal in its entirety.

The duty of the first appellate court was well set out in the case of SELLE AND ANOTHER VS. ASSOCIATED MOTOR BOAT CO. LTD AND OTHERS, [1968] EA 123. The court must reconsider the evidence that was adduced before the trial court, evaluate it and draw its own conclusions. The appellate court should bear in mind that it neither saw nor heard the witnesses as they testified and should therefore make due allowance in that respect. The court is not bound to follow the trial court's findings or fact if it appears that the court failed to take account of particular circumstances or material factors.

The respondent pleaded that he was in the appellant's casual employment on 10th February 2001. He stated on oath that he was required to stand on slippery timber while off loading packets of tea leaves. He explained that he slipped and fell down. His left hand was cut by a piece of metal. The appellant's witness contended that the respondent had left its employment on 7th December 2000. According to DW1 the respondent was not in the appellant's employment 10th February 2001. The appellant produced a muster roll for December 2000. In the said exhibit the respondent's name was crossed out. There was an indication that he had worked on 4th, 6th and 7th of December 2000. The appellant did not produce the muster roll for the month of February 2001. That would have been a very appropriate document to prove that the respondent was not in the appellant's employment on the material day. There was no indication as to why the same was not produced. Section 107(1) of the Evidence Act states as follows:

"*whoever desires any court to give judgment as to*

legal right or liability dependent on the existence of

facts he asserts must prove that those facts exist."

DW1, having conceded that the respondent had been in the appellant's employment for some time but was not in its employment as at 10th February 2001, ought to have produced the muster roll, which reflected the aforesaid date.

The accident register was not sufficient on its own. DW1 was the one who was keeping the appellant's muster roll. The learned trial magistrate was of the view that the extract of the muster roll that was produced before the court was tailor made for purposes of the case that was before him. What he was saying in other words was that he did not believe the evidence of DW1.

In light of the above analysis of the evidence that was adduced before the trial court, I am inclined to agree with the learned trial magistrate that the respondent proved his case on a balance of probabilities. The apportionment of liability that was arrived at by the trial court was not shown to have been unreasonable or unwarranted in the circumstances of the case. I would therefore not disturb the same.

Regarding the quantum of damages, an appellate court cannot interfere with an award of damages by a trial court unless it has been shown that the trial court, in assessing the damages, took into account an irrelevant factor or left out of account a relevant factor or that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage, see KEMFRO AFRICA LTD t/a MERU EXPRESS SERVICES (1976) AND ANOTHER VS. LUBIA AND ANOTHER (No.2) [1987] KLR 30.

Neither of the above factors were demonstrated by the appellant. Consequently, I decline to interfere with the award of both general and special damages.

Order XL1 rules 1(a) and 8B(4) of the Civil Procedure Rules make the filing of a certified copy of the decree appealed from mandatory. The appellant did not comply with the aforesaid provisions of the law. I would agree with the respondent's advocate that failure to do so is fatal to the appeal.

On the issue of directions, Order XL1 rule 8B(1) requires the registrar (deputy registrar) to list the appeal for the giving of directions by a Judge not less than 21 days after the date of service of the memorandum of appeal. If the appellant had ensured that the aforesaid rule was complied with before the appeal was set down for hearing, it would have been realized at that stage that a certified copy of the decree was missing and the court would have ordered the same to be filed. It is important that appellants comply with all the procedural requirements as set out under Order XL1 before fixing an appeal for hearing.

For the above reasons, I dismiss this appeal with costs to the respondent.

DATED, SIGNED and DELIVERED at KISII this 10th day of June, 2008.

D. MUSINGA

JUDGE.

Delivered in open court in the presence of:

N/A for the appellant

Mr. Mbunde HB for Ms. Obaga for the respondent

D. MUSINGA

JUDGE.