



**Msumba v United Aryan EPZ Limited (Civil Appeal 150 of 2010)
[2024] KEHC 8664 (KLR) (Civ) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8664 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 150 OF 2010

JN NJAGI, J

JULY 11, 2024

BETWEEN

SIMON ODUKE MSUMBA APPELLANT

AND

UNITED ARYAN EPZ LIMITED RESPONDENT

JUDGMENT

1. The Appellant herein brought suit against the respondent seeking compensation in general and special damages after he was injured at his place of work while in employment of the respondent. He attributed the injuries to the carelessness and negligence of the respondent by failing to maintain a safe system of work. The respondent denied the claim. The trial court dismissed the suit on the ground that the appellant had not established liability against the respondent.
2. The appellant was aggrieved by the dismissal of the suit and lodged the instant appeal. The grounds of appeal are that:
 1. The learned magistrate erred in not finding the defendant liable.
 2. The learned magistrate gravely and totally misapprehended the evidence tendered by the appellant in support of the case when she held that the appellant was to blame for not arranging the cartons properly when the appellant evidenced that he was tasked to carry the cartons to some other place and when the appellant did not possibly know that the cartons had been improperly arranged in the first place.
 3. The learned magistrate’s finding that the plaintiff was a machine operator and not a general worker was erroneous as the appellant had not pleaded what his description was and was thus not an issue for determination.



4. The Learned magistrate erred in holding that the respondent had proved that the plaintiff was a machine operator by use of a Muster Roll produced in evidence when the Respondent had expressly and unequivocally denied in its defence at paragraph 2 that the appellant was ever its employee. The learned magistrate by accepting the Muster Roll as proof of occupation by the respondent while requiring the appellant to produce a letter of appointment was clearly prejudice.
 5. The learned magistrate gravely erred in holding that the appellant was negligent when the respondent adduced no such evidence and/or rebutted the appellant's evidence on causation and when the respondent had expressly denied that the appellant was its employee and/ or that even if the appellant was the employee, he was injured outside the respondent's premises doing his own things.
 6. The Learned magistrate gravely erred in holding that the appellant was negligent when the respondent had expressly denied that the appellant was its employee and/or that even if the appellant was the employee, he was injured outside the respondent's premises doing his own things.
 7. The learned magistrate gravely erred in law in accepting medical evidence that the appellant was injured as pleaded and then proceeding to dismiss the appellant's claim on quantum without stating what award in general damages the court would have made had the appellant proved liability.
 8. The learned magistrate gravely erred in fact and in law when she completely failed to comment in even passing on the appellant's submissions and authorities tendered in support of the appellant's case.
 9. The learned magistrate gravely erred in seeking from the appellant (by the manner of her judgement) a standard proof beyond reasonable doubt while accepting a lesser standard of proof from the respondent and/or outrightly accepting evidence that was a departure from the pleadings so as to enter judgement in favour of the respondent.
3. The appeal was disposed of by way of written submissions.

Appellant's Submissions

4. The appellant submitted that the appellant testified that he was employed as a general worker and not a machine operator as contended by the respondent. That being a general worker he could be deployed in any section including in the machine section.
5. The appellant submitted that the trial magistrate found as a fact that the appellant was injured while in the course of his employment with the respondent. However, that the magistrate erred in holding that the appellant was employed as a machine operator and not a general worker. It was submitted that the magistrate erred in holding that a machine operator could not do the duties of a general worker. He questioned on what basis the trial court arrived at such a decision.
6. The appellant submitted that the witness for the respondent DW1 testified that it could only be in special cases to make a machine operator do general work. That the witness did not rule out a general worker undertaking the work of a machine operator.
7. It was submitted that the learned magistrate accepted evidence that was a departure from the respondent's pleadings as the respondent had denied in its statement of defence that the appellant was ever their employee and equally denied the occurrence of the accident. Therefore, that the court could



not on one hand accept that the appellant was injured in the course of employment and then turn around and state that since he was not a general worker negligence was not established.

8. The appellant faulted the trial court for relying on an attendance sheet showing machine operators who attended work, yet the respondent in its statement of defence had denied that the appellant was working for them. The appellant question how the attendance sheet would qualify as evidence of work assigned to specific employees instead of showing the employees who were in attendance on the particular day.
9. The appellant submitted that he had adduced sufficient evidence to establish that he was on the material day carrying cartons when a carton that was not properly arranged fell on him and injured him. That it was the duty of the respondent to rebut that evidence by calling the appellant's supervisor which they did not do. That the witness whom the respondent called in the case, DW2, was not the appellant's supervisor and he could therefore not testify on what happened on the material day.
10. On quantum, it was submitted that the trial magistrate erred in not assessing the amount of damages she would have awarded the respondent had his case succeeded. It was submitted that an award of Ksh.600,000/= was sufficient compensation for the injuries sustained which would cover costs of physiotherapy of Ksh. 20,000/= as recommended in the medical report.

Respondent's submissions

11. The respondent submitted that the issue for determination is whether sufficient basis has been laid to warrant the interference of the trial court's decision.
12. It was submitted that burden of proof in civil cases lies with the person who moves the court while the standard of proof is on a balance of probabilities. Reliance was placed in *Mumbi M' Nabeba vs. David M. Wachira* (2016) eKLR and *Maria Ciabaitaru M' mairanyi & others vs. Blue Shield Insurance Company Ltd* Civil Appeal No. 101 of 2000 [2005] 1 EA 280.
13. The respondent submitted that the appellant did not produce any evidence to show that he was a general worker as contended in his evidence. However, that the respondent produced the muster roll that showed that the appellant was working as a machine operator and not as a general worker. That the trial court was right in making a determination that the respondent was working as a machine operator.
14. The respondent submitted that arranging cartons was not the role of a machine operator. That he took it upon himself to arrange the cartons without instructions of the respondent then he has himself to blame for any injuries received. It was submitted that there was no evidence given to show the negligence on the part of the respondent.
15. It was submitted that the capacity in which the appellant was employed was brought out during the hearing. Therefore, that the appellant cannot argue that it was not an issue for determination. It was submitted that there was no evidence that the appellant had received any injuries on the material day. That the muster roll showed that he worked the full hours for the day. That no injuries were recorded in injuries register and no treatment notes were produced from the factory clinic or from the Community Health Programme where the appellant alleges to have received treatment.
16. The respondent submitted that if at all the appellant was injured as contended, then the evidence he adduced did not attain the bar to shift the evidential burden to the respondent. Counsel referred to case of *Waeham t/a A.F Wareham 2 others vs. Kenya Post Office Bank* (2004) 2 KLR 91 and *Dancun Kiviso vs. Martin Mulala Kyania & another* [2020] eKLR in support of that proposition.



17. Counsel referred the court to various authorities to urge that there is no basis to interfere with the trial court's decision on liability as there was no misdirection or error on the part of the learned magistrate in her approach to the issues of burden of proof and uncontroverted evidence presented by the respondent. It was submitted that in absence of evidence in support of the case the decision of the trial magistrate to dismiss the case was justified.

Analysis and Determination

18. This being a first appeal in the matter, the duty of the court is as was stated in the case of *Selle v Assorted Motor Boat Company* 1968 EA Company 1968 EA 123-126 that:

“Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial. Judge's findings of fact appear earlier that he has clearly failed on some part 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.”

19. The appeal is on the trial court's findings on liability and on quantum of damages. I will deal with them as hereunder.

Liability

20. The appellant testified before the trial court that he was employed by the respondent as a casual worker. That on the 10th February 2004 he and other workers were engaged in the work of carrying cartons of finished products and arranging them when one carton fell on his shoulder and finger of the right hand. He was injured. That he was given first aid by a nurse attendant and the injury entered in the injury register. He went for treatment at Community Health Centre. He blamed the respondent for the accident because the cartons were not well arranged when one of them fell on him and injured him.
21. The appellant called one witness in the case, Dr. Kinuthia. PW2. It was the evidence of the doctor that he examined the appellant on 2/5/2006. He relied on treatment notes to complete the medical report that indicated that the appellant had been involved in an industrial accident on 10/2/2004. That he had sustained laceration wounds on the right shoulder and right ring finger. He produced the medical report as exhibit.
22. The respondent on the other hand called one witness in the case, Michael Ongeri, DW1, who stated that he was the respondent's personnel assistant. The witness produced the company's muster roll that indicated that the appellant was working as a machine operator and not a general worker. That it was only in special cases for a machine operator to be made to do general work. It was his evidence that the company gives first aid and has a preferred hospital where it sends its workers. That on the 10/2/2004 the appellant worked throughout the day and did not make any report of injury. The witness produced the muster roll as exhibit.
23. The issues for determination are:
- (1) Whether the appellant was employed by the appellant.
 - (2) Whether the appellant was injured.
 - (3) Whether he appellant proved his case against the respondent.



24. The appellant pleaded in his plaint that he was employed by the respondent in its factory. That on the material day he was in the lawful course of his employment with the respondent when he was injured. That the injury was occasioned by reason of breach of contract of employment and or the terms thereof on the part of the respondent, its servant and/or agents.
25. The respondent in its statement of defence denied that the appellant was its employee. It averred that it was not aware of the accident alluded by the appellant and denied particulars of negligence alleged by the appellant and that the appellant suffered injuries. In the alternative, the respondent pleaded that even if the appellant was an employee as alleged, which was denied, there was never any accident on the date alleged and if the appellant was injured it was outside the respondent's premises.
26. From the pleadings, it is clear that the appellant never pleaded that he was working for the respondent as a general worker. It is during his evidence in court that he stated that he was employed as a general worker. He further stated in cross-examination that as a general worker he could be allocated work anywhere including in the machines. He said that he was not working as a machine operator.
27. The trial magistrate in his judgment stated that the appellant did not produce any document such as a payslip or letter of appointment to show that he was employed as a general worker. The court came to the conclusion that the appellant was employed as a machine operator on the basis that the respondent had produced a muster roll that showed that the appellant was working as a machine operator.
28. Whether the appellant was working with the respondent as a general worker or machine operator was not an issue for contestation as per the pleadings filed before the court. The appellant in his pleadings never stated in what capacity he was working for the respondent. He only pleaded that he was employed by the respondent and that he was injured in the course of duty while working for the respondent. The respondent on the other hand denied in its statement of defence that the appellant was its employee.
29. It is trite law that parties are bound by their pleadings and any evidence that is at variance with the pleadings of a party goes to no issue. In the case of *Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others* [2014] eKLR where it was held:

“It is now very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”
30. The muster roll was not before the court when the respondent cross-examined the appellant. The respondent's witness came to produce the muster roll in court in their defence when it had not been brought to the attention of the appellant before then. More so, the document had not been filed with the defence statement. There cannot be a situation where the respondent was denying in its statement of defence that the appellant was its employee and ends up in court producing documents to prove that he was a machine operator without first explaining why they, in the first place, denied that he was their employee. The document in this case may have been a fabrication. It was wrong for the court to rely on such a document to hold that the appellant was employed as a machine operator.
31. The issue in the case was whether or not the appellant was an employee for the respondent and whether he was injured while working for the respondent in whatever capacity.
32. The question whether the appellant was an employee for the respondent, was answered by the respondent through its witness DW1 who admitted that the appellant was indeed their employee. The same having been admitted by the respondent; the question was whether the appellant was injured while in the course of duty in the employment of the respondent.



33. The trial magistrate in his judgment stated that the medical report of Dr. Kinuthia was not challenged and therefore that the appellant had proved that he was injured on the material day while working for the respondent. The question is whether the trial magistrate was correct in holding so.
34. Though the appellant stated in his evidence-in-chief that he was given off duty after the injury, he stated in cross-examination that the company refused to let him go off duty but instead gave him light duties as there was shortage of workers. He admitted that he worked the full day on the 10/2/2004, which was the day of the alleged injury. He admitted that he worked the full days on the subsequent days of 11th and 12th February 2004.
35. Apart from working full days on those days, the appellant did not produce any medical document showing that he was treated of any injury on the day of the alleged injury or on any of the subsequent days. It was clear from the evidence that Dr. Kinuthia is not the one who attended to the appellant after the alleged injury. He did not see the injuries. In fact, he came to prepare the appellant's medical report two years later while making reliance on treatment notes purported to have been from Community Health Programme. No witness was called from the said Programme to produce the treatment notes in court as exhibit. The effect of not producing the treatment notes as exhibit is that it left the evidence of Dr. Kinuthia hanging in the air as it cannot be known whether the documents the good doctor relied on to prepare his report were genuine or not. It was therefore not proved that the appellant was treated of any injuries. In my view, the trial magistrate was not correct in making a finding that the medical report of Dr. Kinuthia proved that the appellant had been injured.
36. For the reasons given above, the appellant's case was for dismissal.

Quantam

37. Even after dismissing the appellant's case for want of proof, the law required the trial magistrate to assess the amount of damages he would have awarded the appellant had his case succeeded. The trial magistrate did not do so and therefore erred in that respect. I will proceed to do the same.
38. The medical report of Dr. Kinuthia showed that the appellant sustained:
 - Laceration wound right shoulder
 - Cut wound right ring finger.
39. The treatment given was tetanus toxoid injection, cleaning and dressing of wounds and analgesics and antibiotics. At the time of examination, he complained of painful right shoulder with inability to lift heavy weight. The doctor opined that the pain on the right shoulder was due to posttraumatic neuromyalgia. This occurs when a health condition affects the nerves that carry sensations to the brain. According to the doctor, the appellant required constant use of analgesics and several sessions of physiotherapy at an estimated cost of Ksh.20,000/=.
40. The appellant had in his submissions before the lower court proposed general damages in the sum of Ksh.600,000/=. He had cited old authorities where awards of between Ksh.120,000 and Ksh.180,000/= were made. The source of the authorities was not stated.
41. The respondent on the other hand had not proposed any figure on quantum of damages.
42. I have considered the awards in the following cases:
 - Francis Ndung'u Wambui & 2 Others v Purity Wangui Gichobo (2019)eKLR where the respondent had suffered a deep laceration on the medial side of the left foot and a degloving



injury on the left thumb and the award was on appeal reduced from Ksh.450,000/= to 250,000/=.

- Jubilee Hauliers Ltd & Another v Mary Waithera Wanja (2019) eKLR where the respondent suffered degloving injuries to the right elbow, multiple lacerations on the right arm, and soft tissue injuries on the chest; cut wound on the tongue and bruises on the forehead. An award of Kshs. 200,000/= was upheld.

- Maimuna Kilungya v Motrex Transporters Ltd (2019) eKLR where the court substituted the lower court's award with an award of Kshs. 125,000/= for blunt neck injury, blunt injury left shoulder and bruises on the left ear.

- Daniel Gatana Ndungu & Another v Harrison Angore Katana (2020) eKLR where the court substituted the lower court judgment of Kshs. 350,000/= with an award of Ksh. 140,000/= for cut on the head, blunt injury to the right knee, multiple bruises on the upper limbs and bruises on the right knee.

43. Considering the residual effects of the injuries on the appellant herein that occasioned him purported neuromyalgia on his right shoulder, I would have awarded him Ksh.200,000/= in general damages had his case been successful. Otherwise the case was for dismissal.

44. The upshot is that I find no merit in the appeal and the same is dismissed with costs to the respondent.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 11TH JULY 2024

J. N. NJAGI

JUDGE

In the presence of:

Mr. Mugambi HB for Mr. Muturi for Appellant

N/A for Respondent

Court Assistant – Mokeira

30 days Right of Appeal

