Kibos Sugar & Allied Industries v Ongoro & another (Civil Appeal E119 of 2021) [2023] KEHC 1675 (KLR) (7 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1675 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E119 OF 2021

TA ODERA, J

FEBRUARY 7, 2023

BETWEEN

KIBOS SUGAR & ALLIED INDUSTRIES ..... APPELLANT

AND

VINCENT OMONDI ONGORO ..... 1ST RESPONDENT

RENE SUPERCLEAN SERVICES ..... 2ND RESPONDENT

(Being an appeal from the judgment/decree of the Honourable R.K Ondieki (SPM) in Kisumu CMCC NO. 641 OF 2015 delivered on 23/09/2021)

JUDGMENT

1. Vincent Omondi Ongoro (the 1st Respondent) sued Kibos Sugar & Allied Industries (the Appellant) and Rene Superclean Services (the 2nd Respondent) before the magistrate's court on the December 14, 2015 alleging breach of statutory duty of care/negligence leading to an accident and injuries in the workplace on September 25, 2015.

2. The facts of the case were that on the September 25, 2015 while cleaning the rolling machine it unexpectedly started rolling trapping his left hand resulting numerous injuries.

3. He was then taken for treatment at Jaramogi Oginga Odinga Teaching & Referral Hospital and Milenye Dispensary.

4. The hearing proceeded on various dates and via the Judgment dated September 23, 2021 the learned magistrate found in favour of the 1st Respondent against the Appellant and the 2nd Respondent jointly and severally in the following terms.Liability 90%:10%General damages of Kshs 200,000/=Costs and interests of the suit.

5. Aggrieved by the Magistrate's finding the Appellant proffered this Appeal on the grounds apparent on the face of the Memorandum of Appeal. In support of the appeal the Appellant filed their submissions on the January 10, 2020 while the 1st Respondent filed their submissions on the January 13, 2020.

Appellant's case

6. In their submissions, the Appellant contended that they weren't liable for the injuries due to the fact that the 1st Respondent was an employee of the 2nd Respondent.

7. It was their further contention that they should be absolved from blame because the 2nd Respondent being an independent contractor was in control of how the 1st Respondent carried out his duties, was in charge of provision of safety apparel and paid the 1st Respondent's hospital bill.

8. In support of this point the Appellant relied on the cases *Agricultural finance Corporation v Lengetia limited & Jack Mwangi* [1985]Eklr, *Lalji Bhimji Sanghani and Another v Chemilabs* [1978] Eklr, *Kenya Hotels and Allied Workers Union v Alfajiri Villas (Magufa) ltd* [2014] eKLR and *Fredrick Byakika v Mutiso Menezes International Limited* [2016]. In which the common thread was that an employer was not liable for the negligence of an independent contractor or his servant.

9. They called for the appeal to be allowed with costs.

1st Respondent's case

10. In support of his case the 1st Respondent contended that the injury resulted from the duties he was performing and not the employer-employee relationship alluded to by the Appellant. It was his submission that the rolling machine was being operated by the Appellant's employee hence the onus was on him to ensure the area around it was clear.

11. In further support of his case he contended that the service contract produced by the Appellant did not in any way cover the issue of liability in case of injuries.

12. On the strength of the foregoing he submitted that the lower court was right in finding the Appellant and the 2nd Respondent 90% liable and called for the dismissal of the Appeal with costs.

Analysis and determination

13. The role of the first appellate is to revisit the evidence on record evaluate it and reach its own conclusion. (See the case of *Selle & Anor v Associated Motor Boat Co Ltd* [1968] EA 123). Taking into consideration that it will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it, or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. As was held in the case of *Mwanasokoni v Kenya Bus Service Ltd*. [1982-88] 1 KAR 278.

14. After careful consideration of the proceedings, the judgement appealed against the grounds of appeal and the submissions the sole issue that arises for determination is:

    Whether the Appellant is liable for the injuries suffered by the 1st Respondent.

    Whether the Appellant is liable for the injury suffered by the 1st Respondent

15. The Appellant denied liability on the ground that the 1st Respondent was an employee of an independent contractor. It is their further contention that the 2nd Respondent was wholly liable for the accident given that they were the ones who trained, supplied safety apparel catered for the 1st

Respondent's hospital bills and had an employment contract with him. It is its case that it had no privity of contract with 1st respondent as they had no legal relationship.

16. On the other hand, the 1st Respondent asserts that the Appellant owed him a duty of care given that the machine operator was its employee. He also contended that the kind of liability alluded to by the Appellant only extended to issues of employment and not to cases of injury at the workplace.

17. Section 3 of the occupiers Liability Act provides ; ''

    (1) An occupier of premises owes the same duty, the common duty of care, to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.

    (2) For the purposes of this Act, "the common duty of care" is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.''

18. It is not disputed that the injury occurred at the Appellant's premises and that the machines involved belong to the Appellant. It is equally not in dispute that the controller of the machine was an employee of the Appellant. The appellant being the occupier of the premises did not relinguish all the control of the premises upon contracting 2nd respondent to clean it . The appellant had a duty to ensure that the premises were safe for all who enter it and 2nd respondent had to ensure that the working space was safe by properly supervising 1st respondent to ensure that he was safe in the course of his duties .

19. In trying to decipher whether a party is vicariously liable, it behoves the court to find out who was in control of the way in which the act involving negligence was performed.

20. In applying the control test of vicarious liability to this scenario it is only logical to arrive at the conclusion that the Appellant was vicariously liable for the accident that led to the 1st Respondent's injuries. In reaching this conclusion Iam guided by the case of *Mersey Docks and Harbour Board v Coggins & Griffiths (Liverpool) Ltd & Anor* [1946] 2 A11 E R 345. In which it was held that:

> " (i) the question of liability was not to be determined by any agreement between the general employers and hirers but depended on the circumstances of the case, the proper test to apply being whether or not the hirers had authority to control the manner of the execution of the relevant acts of the driver;"

21. In this appeal it is decipherable that both the 1st and 2nd Respondents were not in control of the manner in which the machines at the Appellant's premises were run. The 2nd respondent however owed the 1st respondent a duty of care being its employee and it was incumbent upon it to supervise the work which of 1st respondent has performed. On this premise alone the Appellant and 2nd respondent cannot escape liability. To buttress this point, I place reliance on the *Mersey Docks case* (supra) where it was further held that:

> " The Board as the general employers of the crane driver, had failed to discharge the burden of proving that the hirers had such control of the workman at the time of the accident as to become liable as employers for his negligence, since, although the hirers could tell the crane driver where to go and what to carry, they had no authority to give directions as to the manner in which the crane was to be operated. The Board were, therefore, liable for his negligence."

22. The 1st Respondent testified that while they were cleaning the machine it was started unexpectedly by the Appellant's employee. This evidence remained largely unchallenged on cross-examination and even by the Appellant's witness.

23. It is trite law as per the provisions of Section 80 of the *Evidence Act* that Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist. In this case the burden of proof was on the Appellant to prove their case on a balance of probabilities.

24. The question as to what amounts to proof on a balance of probabilities was elucidated upon in the case of *Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another* [2015] eKLR, where the Judges of Appeal held that:

> " Denning J, in Miller v Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
>
> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
>
> This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

25. The appellant failed to demonstrate that their employee was not in control of the rolling machine. The Appellant has thus failed to discharge the burden of proof in their favour. The 2nd respondent also did not say what it's supervisor did ensure the safety of the 1st respondent.

26. On the strength of the foregoing it is my considered view that the learned magistrate was right in finding the Appellant vicariously liable for the negligence of the machine operator and for injuries suffered by the 1st Respondent. He entered judgment on liability at the ratio of 90 % against appellant and 2nd respondent and 1st respondent was to bear 10 %. However did not apportion liability as between the Appellant and 2nd respondent. I will proceed to apportion liability as between appellant and 2nd respondent at 50:40. I agree with the learned trial Magistrate that the 1st respondent bears 10 % liability as he also had a duty of care towards himself to ensure that the machine was safe before embarking on cleaning it.

27. In the upshot I find that the 1st respondent proved his case against appellant on a balance of probability. I proceed to enter judgment for 1st respondent against the appellant and 2nd respondent Jointly and severally in the sum of Kshs 200,000/=.

28. The appeal therefore partially succeeds. Each party to bear its own costs.

29. 30 days right of appeal.

T.A ODERA - JUDGE

7. 2. 2023

DELIVERED IN VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF;

1. Onsongo for Appellant.

2. Mukhongo for Respondent.

T.A. ODERA - JUDGE

7/2/2023

Onsongo: We seek 30 days stay and typed copy of the Judgment.

Mukhongo: No objection.

Order

Typed copy of Judgment be supplied and 30 days stay of execution granted.

T.A. ODERA - JUDGE

7/2/2023