REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL NO 113 OF 2017

PATRICK KATUYI INJENDI.....APPELLANT

VERSUS

WEST KENYA SUGAR CO LTD.....RESPONDENT

(Being an appeal from the judgement and decree of Hon. T.K. Kwambai, RM, delivered on 14th September 2017 in Butali PM's Court in Civil Case No. 88 of 2014, Patrick Katuyi Injendi v West Kenya Sugar Co. Ltd)

JUDGEMENT

[Pursuant to Order 21 Rules 2(2) and 3 (2) CPR]

Introduction

1. The appellant has appealed against the dismissal of his claim for general damages arising from an accident on the factory of the respondent, in which he sustained soft tissue injuries. The appeal is only against liability. The trial court would have awarded Kshs 100,000/= as general damages for those soft tissue injuries had the claim succeeded.

2. The appeal is opposed by the respondent.

The grounds of appeal

3. In this curt the appellant has raised two grounds in his memorandum of appeal. In ground 1 the appellant has faulted the trial court both in law and fact for dismissing the appellant's suit against the weight of evidence. In ground 2 the appellant has faulted the trial court both in law and fact for finding in favour of the respondent; when the evidence showed that the respondent was entirely to blame for the accident.

4. I will consider the two grounds together. The appellant testified as PW 1. His evidence was that 1st February 2012 at 11.00 am, he was working as a casual worker on the premises of the respondent. PW 1 testified that he boarded a trailer and was in the process of fixing the wire to a winch, when the sugar fell on him. It was his duty to fasten the cane on the trailer. As a result, he was injured in the chest and back. He blamed the respondent because it did not provide a safe working environment at the work place.

5. Following the said accident, PW 1 sustained injuries in respect of which first aid was applied to him and was told to go home. He continued to testify that his condition did not improve. As a result, he went to Muting'ong'o dispensary for treatment. He was treated and discharged. He went for further treatment there on 3rd February 2012 and on 10th February 2012. He produced the treatment notes he was given from that dispensary as exhibit P 2. Thereafter he saw Dr. Andai, who prepared a medical report, which he produced as exhibit P 3 (a) and the payment receipt for shs. 3,000/=was produced as exhibit P 3(b). He sought to be compensation for those injuries.

6. While under cross examination Pw 1 testified that he worked for the respondent for about two months and was issued with a gate pass, which he produced as exhibit P1. Pw 1 continued to testify that the gate pass does not have a date and it was not signed. He also testified that he had not been paid for those two months, but he was to be paid after three months. Pw 1 further testified that he was told how to work in fastening the wire to the winch. PW 1 also testified that he was not injured while in the field as indicated in the medical report of Dr. Andai, but he admitted that the said doctor interrogated him. He also testified that he never made any friend for the period he was with the respondent.

7. Pw 1 then called **Francis Amunga (Pw 2),** who was a nurse at Muting'ong'o dispensary. Pw 2 remembers treating Pw 1 for pain on the chest on 1st February 2012. The medical history was that the cane fell on him while on duty. Pw 1 went back there for review on 3rd February 2012 and on 10th February 2012.

8. In addition to Pw 2, the appellant called Kelly Peter Lusimamba (Pw 3). Pw 3 was the nurse in charge of Muting'ong'o dispensary. Pw 3

produced the treatment booklet of the appellant as exhibit 2. Pw 3 gave similar evidence as Pw 2. The outpatient number of the appellant is 222\12. She testified that the outpatient number 222\12 according to their register is for Diana Kavakala, who was a female patient. A copy of the said register was put in evidence as exhibit D 1 by consent of both counsel at the close of the defence case.

9. The appellant then closed his case.

10. The respondent called Hyslipe Akonya (Dw 1), who was the transport supervisor. Dw 1 testified that their casual employees are given gate passes. Employees who are on permanent terms are given cards. A casual employee used to sign attendance registers. Upon being shown the gate pass exhibit P 1, Dw 1 testified that it did not belong to the respondent. Dw 1 also testified that it also is not a casual worker's card. It was his evidence that casual employees are paid vide mpesa and the names of the casuals are captured in the casual payment listing, which he produced as defence exhibit D1. If the appellant was on duty on the material date his name would have been on exhibit D 1. The casuals also signed labour sheets, which assist in payment. He continued to testify that in the labour sheet produced as exhibit D2, the name of the appellant does not appear therein. Those who do loading are in the transport department, in regard to which he produced exhibit D. 3. The appellant was not on duty on 1st February 2012. It was also the evidence of DW 1 that those workers who are injured are taken to Mukumu hospital, Moi Referral hospital and Kakamega Provincial hospital. For minor injuries, they used to take their employees to Kabras Action hospital group.

11. While under cross examination, Dw 1 denied knowing the appellant. When he was referred to exhibit P1, Dw 1 testified that the letters WEKSCOL are a short form of the respondent's name. He also testified that defence exhibit D 3 showed that the appellant was not their employee on the material day and was not on duty on that date namely 1st February 2012. He finally, testified that exhibit P1 was not a genuine document.

12. The defence then called Peter Kelly Lusimamba (Dw 2), who was in charge of Muting'ong'o dispensary. Dw 2 testified that outpatient number 222\12 appears twice and the second name is for Diana Karakacha. Dw 2 testified that: "*The numbers should be unique to reach (sic) individual. It is strange to have same outpatient numbers*."

13. Defence exhibit D 1 was put in evidence by consent of the parties.

FINDINGS IN RESPECT OF THE GROUNDS OF APPEAL

14. The trial court was faced with the foregoing conflicting evidence of both parties. It proceeded as follows: *"I have considered all the evidence on record. I have also perused the documents produced and the written submissions by both parties and the following issues are for my determination.*

a) whether the plaintiff was an employee of the defendant.

b).……

c).……

d).……

e).……."

15. The court then proceeded to examine the gate pass of the appellant, which he put in evidence as exhibit P 1. After doing so the court saw that it bore serial No. 487 with the name contractor appearing on it. The document does not show who the contractor is. It also does not show who the appellant is. The court then said that*:" It definitely does not show that it belonged to the plaintiff."* In this regard the trial court believed the defence evidence of DW 1, who testified that the appellant's exhibit P1, the purported gate, did not belong to the respondent. Dw 1 further testified that exhibit P 1 was not a casual worker's card. Due to this the court disbelieved the appellant's evidence. It found the appellant to be an incredible witness.

16. The court proceeded to consider what it also found to be incredible evidence in relation to the employment of the appellant. The court then considered the evidence of the appellant that he had worked for two months without being paid and that he was going to be paid after three months. The court found that this piece of evidence was not plausible because *"the term casual means that the said person ought to be paid either on completion of the day's work or within a closer interval. In this case if not daily then perhaps on a forthright (sic) basis with the above analysis. I find that the plaintiff has failed to prove that he was employed by the defendant as a casual. "In* arriving at this finding the court relied on a copy of the casual payment listing for the period 1st February 2012 to 1st February 2012, which was put in evidence pursuant to the provisions of section 69 of the Evidence Act (Cap 80) Laws of Kenya, with notice having been given way back on 22nd July 2012, as part of the documents to be exchanged between the parties. The name of the appellant is not on those casual payment listing, which payments were being effected on a daily basis.

17. In addition to the foregoing, there is further evidence to show that the evidence of the appellant was incredible. This is found in the medical report of Dr. Andai, defence exhibit 3 (a). The medical history part of the report indicates that*: "On 1/2/2012, the above named sustained blunt injury to the chest when he fell down and harvested sugarcane from a trailer fell on him. He was at work in the field where they had gone to collect harvested sugarcane."* In this regard the evidence of the appellant is that Dr. Andai interrogated him, when he went to see him. The appellant conveniently denied in his evidence under cross examination that he was injured while in the field as recorded by Dr. Andai. The necessary inference to be drawn is that what Dr. Andai recorded is what the appellant told him, after he interrogated him. Dr. Andai had no reason to write in his report what the appellant had not told him in the course of interrogating him. This is yet another piece of evidence upon which the court found the appellant to be incredible.

18. I have considered the submissions of both counsel including the authorities they cited in their submissions. Mr. Abok Odhiambo, counsel for the appellant submitted that his client produced what he called a gate pass (exhibit P1) as evidence of his client being a casual worker. I have shown in the preceding paragraphs that the trial court rightly disbelieved the appellant in this regard. The submission of counsel for the appellant that the respondent was to provide a safe working environment for employees, citing ***Otieno Nalwoyo v Mumias Sugar Co Ltd (2014) EKLR*** in support of his submission, does not arise since the evidence on record clearly shows that the appellant was not employed by the respondent.

19. Counsel further submitted that the appellant described how the accident occurred, which evidence was not controverted, since the labour sheet defence exhibit D 2 does not have the name of the appellant. It also does not show who prepared it and is not signed by Dw 1. In this regard, the respondent had put the appellant on notice as early as 22nd July 2014 that it was going to produce copies of the patient register from Muting'ong'o dispensary, a copy of the loader weighment details, a copy of the transporter details report and a copy of the casual payment listing for the period 1st February 2012 to 1st February 2012, among other documents. It is important to point out that these documents were never objected to during trial in respect of their production in evidence.

20. Furthermore, the appellant did not serve notice upon the respondent of non-admission of those documents. In this regard, in contrast the respondent filed and served upon the appellant a notice dated 27th October 2014 of non-admission of copies of documents, which required the appellant to prove all documents under the Civil Procedure Rules. It seems that the trial court admitted these documents of the respondent as secondary evidence pursuant to the provisions of section 69 of the Evidence Act (Cap 80) Laws of Kenya. Counsel for the appellant did not object to their production at trial. He also did not file notice requiring that the original of those documents should be produced as did the respondent in respect of documents of the appellant. The issue of admissibility is being raised for the first time in this appeal. I find that those documents were therefore properly admitted in evidence as secondary evidence in terms of **section 69 of the Evidence Act (Cap 80) Laws of Kenya**. The submission of counsel that they are not admissible is without merit and is hereby dismissed.

21. The name of the appellant does not appear in the copy of the casual payment listing of that day namely 1st February 2012. This is clear evidence that the appellant was not an employee of the respondent. In that regard the case of ***Otieno Nalwoyo v Mumias Sugar Co Ltd, supra,*** is distinguishable from the instant appeal, since in that case copies were put in evidence without complying with the provisions of **section 69 of the Evidence Act (Cap 80) Laws of Kenya.**

22. Furthermore**,** the fact that the respondent did no produce evidence of payments through the mpesa system is not fatal to its case. This casual payment listing shows that casual employees were paid daily, which evidence supports the finding of the trial court.

23. Finally, the respondent produced evidence in the form of patient register from Muting'ong'o, dispensary, which clearly shows that outpatient number 212/12 belonged to Diana Karakacha and not the appellant as testified to by Peter Kelly Lusimamba (Dw 2). It should be borne in mind that Dw 2 was not the maker of the appellant's outpatient card from Muting'ong'o, dispensary. That explains why he found it strange that the said outpatient number belonged to two persons, namely the appellant and Diana Karakacha. I find that the said card of the appellant is not genuine.

24. I have also independently re-assessed the entire evidence of both parties as I am required to do as a first appeal court. I have borne in mind that I did not see and hear the witnesses testifying, an advantage possessed by the trial court. In this regard, the law according to ***Selle vs. Associated Boat Co. Ltd [1968] EA 123 cited in Otieno Nalwoyo v Mumias Sugar Co Ltd, supra,*** is that this court is only entitled to interfere with findings of the trial court if they are not by supported evidence. I find that the findings of the trial court are supported by evidence on record, which findings are based on the demeanour of the witnesses. See also ***Peters v. Sunday Post Ltd (1958) EA 424***.

25. I therefore find no merit in the grounds of appeal in respect of liability and I hereby dismiss them.

26. The trial court found that had the claim succeeded it would have awarded the appellant Kshs. 100,000/= as general damages for the injuries sustained. I therefore confirm it.

27. In the premises, I find that the appellant's appeal fails for he did not prove his case on a balance of probability with the result that his appeal is hereby dismissed with costs to the respondent.

Judgement signed, dated at Narok this 20th day of December 2019

J. M. Bwonwong'a

Judge

And

Judgement signed, dated and delivered in open court at Kakamega this 7th day of February, 2020 in the presence of Ms.Ashitsa for Mr. Abok for appellant and Mr. Mwebi for Mr. Mulama for respondent

W. Musyoka

Judge

7/2/2020