REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CIVIL APPEAL NO.97 OF 2014

GODFREY SITATI MANYASI.....APPELLANT

VERSUS.

NZOIA WATER & SEWAGE COMPANY LIMITED.....RESPONDENT

JUDGMENT

By way of plaint dated 25th September 2015 the Appellant who was the Plaintiff filed suit against and the Respondent who was the Defendant. Seeking for general damages, special damages and costs on account of the Respondent's breach of its statutory duty to provide him with a safe working environment, where upon the appellant sustained injuries.

The particulars of negligence, breach of duty and contract were set out under paragraph 7 of the plaint as follows;

a. Failing to provide or avail the plaintiff with gloves;

b. Failing to provide a proper system of working

c. Failing to warn the plaintiff on impending danger to take measures to prevent plaintiff from sustaining injuries

d. Instructing the plaintiff to work in unsafe conditions

e. Exposing plaintiff to a risk of harm or injury

f. Failing to make plaintiff's workplace safe.

The particulars of injuries sustained were tubulated under paragraph 7 of the plaint as;

i. Deep cut on the left forearm and which was tender

ii. Severe pains incurred during and after the injury

The Defendant entered appearance and subsequently filed his statement of defence dated 12th December 2013 denying the Plaintiff's claim.

Briefly the evidence before the trial court was that Geoffrey Sitati the plaintiff on 9.4.13 while at the factory erecting structure. He stated that he had a defective power grinder machine and on using it he got injured and sustained a deep cut on the left forearm. He stated that he was treated at Lugulu hospital. He discharge summary PMFI-3 and PMFI-4 radiology report.

On cross examination he stated that he was employed as a sheeter and contract was from 13.3.13 to 28.4.13 and that he was an expert in the job.

The defence called Dw1, Victor Onyango project supervisor at Nzoia Sugar Factory who testified that plaintiff was a sheeter. That on 9.4.13 plaintiff was assigned to repair warehouse roof iron sheets and he was an expert. He was provided with a grinder which machine are approved KBS and also inspected by the company. He stated that he was not present when the plaintiff got injured.

On cross examination he stated that he did not have a report on the documents of the machine.

After full hearing and consideration ***the*** **trial magistrate dismissed the appellant claim stating that '' I find that the plaintiff has not proved his case against the defendant** …''

The appellant being dissatisfied with the Judgment filed this appeal on the following grounds:

i. The learned magistrate erred in law and fact in failing to find that the appellant had proved liability against the respondent

ii. That the learned magistrate erred in law and fact in dismissing the appellant's case

iii. That the learned magistrate erred in law and fact in failing to consider the appellant submissions.

By consent of the parties, this appeal was canvassed by way of written submissions.

The appellant Counsel Mr. Mwinamo submitted on liability that the power grinder issued to the appellant was defective,as it was old and of low quality and had not been replaced and as a result it broke while the appellant was working. He submitted that the appellant was not given proper working apparel and the respondent was required to ensure the cutting disc was mechanically sound and appellants safety by replacing the disc.

He submitted that it was the duty of the respondent to provide the appellant with a safe place of work relying on ***NAKURU HCCA NO.38 OF 1995 SOKORO MILLS LIMITED VS BENARD MUTHIMBI NJENG.***

He submitted that burden of proving the disc was safe lay with the respondent and which burden was not discharged.

He submitted on quantum that basing on injuries sustained an award of Kshs.300,000/= would be sufficient.

Mr. Makokha for respondent submitted that the appellant was unable to prove his claim against the defendant and it was upon the appellant to establish that he had a bonafide claim. He further submitted that the appellant did not establish liability against respondent and urged this court to uphold the same. He submitted that appellant pleaded that respondent breached statutory duty of care and stated particulars of negligence in his claim, among them failing to provide proper gear and proper working system.

He submitted that during examination in chief he testified that he had working materials thereof this exonerates the respondent from him claim. He submitted that the machines the appellant was using was approved by KBS and the same are inspected by the company therefore they were in good condition.

This being a first appeal, this court is to reevaluate and reexamine the evidence before the lower court and arrive at its own independent conclusion. This is the principle of law that was well settled in the case of **Selle Vs Associated Motor Boat Company Ltd [1968] EA 123** where Sir Clement De le Stang stated that:

" This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect .

However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Sarif Vs Ali Mohammed Solan [1955] 22 EACA 270).

The issues for determination in this appeal are firstly, whether or not the learned Trial Magistrate erred on matters of fact or law in finding that the Appellant had not proved any negligence on the part of the Respondent and was solely to blame for the accident, and in dismissing the Appellant's claim. Secondly if there was an error made in the said findings, what quantum of damages should be awarded to the Appellant.

The applicable law as regards to this appeal has been stated in various legal treatises and judicial decisions. A regards an action in negligence it is stated in **Halsbury's Laws Of England, 4th Edition** at paragraph 662 at page 476 as follows with respect to the what is required to be proved in an action such as the Appellant's:-

"The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal connection must be established."

The essentials of an action for breach of statutory duty are also stated in **Clerk & Lindsell on Torts, Eighteenth Edition** at paragraph 11-04 page 600 as follows:

"1. The claimant must show that the damage he suffered falls within the ambit of the statute, namely that it was of the type that the legislation was intended to prevent and that the claimant belonged to the category of persons that the statute was intended to protect. It is not sufficiently simply that the loss would not have occurred if the defendant had complied with terms of the statute. This rule performs a function similar to that of remoteness of damage.

2. It must be proved that the statutory duty was breached. The standard of liability varies considerably with the wording of the statute, ranging from liability in negligence to strict liability.

3. As with other torts, the claimant must prove that the breach of statutory duty caused his loss, which he will fail to do if the damage caused his loss, which he will fail to do if the damage would have occurred in any event.

4. Finally, there is the question whether there are any defences available to the action."

The relevant statute in Kenya when it comes to employers statutory obligation to ensure safety at the workplace is the Occupational Safety and Health Act (Chapter 514 of the Laws of Kenya), whose application under section 3 thereof is stated as follows:

"(1) This Act shall apply to all workplaces where any person is at work, whether temporarily or permanently.

(2) The purpose of this Act is to—

(a) secure the safety, health and welfare of persons at work; and

(b) protect persons other than persons at work against risks to safety and health arising out of, or in connection with, the activities of persons at work."

It was held by the Court of Appeal in **Purity Wambui Murithii v Highlands Mineral Water Co. Ltd, [2015] eKLR** as follows:

"Section 6(1) of the *Occupational Safety and Health Act* provides:-

"Every occupier (employer) shall ensure the safety, health and welfare at work of all persons working in his workplace."

It, therefore, follows that as a general rule the employer is liable for any injury or loss that occurs to his employees while at the workplace as a result of the employer's failure to ensure their safety. Does this mean that the employer would always be liable in all circumstances regardless of what caused the accident in question? We do not think so. We say so because where an accident happens due to the employees own negligence it would be unfair to hold the employer liable. Further *Section 13(1)(a)* of the *Occupational Safety and Health Act* provides:-

"13(1) Every employee shall, while at the workplace –

(a) ensure his own safety and health and that of other persons who may be affected by his acts or omissions at the workplace.

Therefore, the employee is also required to take reasonable precaution to ensure his/her safety at the workplace while performing his/her duties."

The principles of law that can be distilled from the above legal authorities is that for the Appellant to succeed in his claim, he has to prove, among others, that he was injured while engaged on duties that he was assigned or expected to perform in the course of his employment. Further, the Appellant also has to prove any one or more of the particulars of negligence and breach of statutory duty pleaded as against the Respondent, and to show that he was also not negligent in the performance of his duties.

In the present appeal, the evidence by the Appellant that he was employed by the Respondent at their factory, and that on the day of the accident he was carrying out duties assigned to him in the course of his employment was not disputed or controverted by the Respondent. This Court notes in this respect that the Appellant did produce a pay slip and contract in evidence a as his exhibit 1 and 2 in the trial Court. Furthermore, it is not disputed that the Appellant was injured in an accident that occurred while carrying out the said duties, as a sheeter to a designated area of the Respondent's farm.

What is disputed is whether the Respondent was negligent and in breach of his statutory duty in failing to provide a safe working place and system to the Appellant, and therefore liable for the accident.

The evidence in this regard by the Appellant was that he provided with a power grinder and the cutting disk was not original and it broke and cut him.

He also stated that he was given all protection gears. On cross examination he stated as follows and I quote;

'' I am an expert in the job. I knew how to use them and could detect any problem. I was given all the protection gears. I do not have proof in court it was not original…"

The Respondent on the other hand gave evidence that the grinder is protected and body cannot touch the disc and appellant was an expert. He also stated that the machine is approved by KBS and also inspected by the company.

In this appeal and with this evidence it my finding that the appellant testified that the grinder was old and of low quality. However, the plaintiff did not give any proof that machine was defective.

He also testified that he was provided with protective gears and he was an expert in the work. I therefore I find no reason on how he could attribute to the respondent lack statutory duty of care. Indeed the respondent failed to prove particulars of negligence on the part of the respondent or Lack of care on the part of the Respondent

The upshot of the foregoing is that find that the appeal lacks merit and is hereby dismissed with costs

Dated and Delivered at BUNGOMA this 4th day of March, 2020.

S.N. RIECHI

JUDGE