



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 155 OF 2015

MAOBOO KITHAMA MUNYALO.....APPELLANT

VERSUS

SLAPPER SHOE INDUSTRIES LTD.....RESPONDENT

(Appeal from the judgment of Honourable L. T.Lewa, Resident Magistrate delivered on 25th September, 2015 in Mombasa CMCCNO. 421 of 2013, MAOBOO KITHAMA NUNYALO VRS SLAPPER SHOE INDUSTRIES LIMITED)

JUDGMENT

1. The appellant, MAOBOO KITHAMA MUNYALO, was the plaintiff in Mombasa CMCC No. 421 of 2013, where he sued the Respondents, SLAPPER SHOE INDUSTRIES LIMITED seeking for general damages, special damages, costs and interest as a result of an accident which occurred in the course of his duty causing him to suffer injuries .

2. Vide a plaint dated 7th March, 2013, the appellant stated that on 19th July, 2012, he was working as a machine attendant for the Respondents. He stated that he was in the course of operating the lamination machine which is used to combine material used to make shoes when the same stopped and his right hand got trapped between the rollers. He explained that he inserted the material in the machine so that the same could be pressed together with other pieces of material and glued together via a steam chamber beneath the lamination machine.

3. The appellant stated that he sustained serious injuries and suffered loss and damage for which he blamed the respondent as particularized at paragraph 5 of the plaint.

4. The respondent (Defendant) filed its defence dated 15th April, 2013 in which he denied the allegations at paragraphs 4,5 and 6 of the defence. The respondent averred that if there was any accident, which it denied, the same was occasioned by the sole negligence of the respondent, particularized at paragraph 5 of the defence.

5. At the close of pleadings, each party called evidence in support of their pleadings and thereafter filed their respective submissions to buttress their positions.

6. In her judgment, the trial magistrate considered the pleadings and testimonies by either party and came to the conclusion that the pleadings were at variance with the testimonies of the witnesses, and she proceeded to dismiss the plaintiff's suit with costs on 25th September, 2015.

7. This triggered the appeal by the appellant's vide a memorandum of appeal dated 12th October, 2015 in which he has raised six (6) grounds as follows.

(a) The learned magistrate erred in law and fact in dismissing the appellant's case in its entirety.

(b) The learned magistrate erred in law and fact in dismissing the appellant's case while the plaintiff had proved his case on a balance of probability.

(c) The learned magistrate erred in law and fact in requiring the appellant to prove the civil case beyond reasonable doubt.

(d) The learned magistrate erred in law and in fact in failing to exercise the discretion given to her by Order 2 Rule 6 (1) of the Civil Procedure Rules.

(e) The learned magistrate erred in law and fact in failing to appreciate the fact that none of the defence witnesses witnessed how the accident occurred.

(f) The learned magistrate erred in law and fact in relying on the submissions of the defence.

8. The appeal was admitted for hearing on 7th April, 2017 and on 7th August, 2018, parties were directed to canvass the same by way of written submissions.

9. The appellant's counsel filed their submissions on 18th May, 2018 wherein he submitted that the appellant's case had been proved on a balance of probabilities as required in civil case since the occurrence of the accident and injuries sustained by the appellant is not denied by the respondent. He also submitted that the respondent's evidence was by a witness who came to the scene after the accident. He further submitted that the court ought to have exercised discretion as provided for under Order 2 Rule 6 of the Civil Procedure Rules and tried the unpleaded cause of action which came into issue in the course of cross examination. He relied on the case of DHANJI RANJI VRS RAMBHAI & Co. (Uganda) LTD (1970) E.A 515.

10. On the other hand, the respondent's counsel submitted that clearly the plaintiff's pleadings and testimony were at variance. He emphasized this by restating/reciting the specific paragraphs of the plaint where the appellant stated where, how and when the accident happened and the evidence he gave in court. He submitted that from his pleadings and evidence, the appellant did not fault anyone for the occurrence of the accident.

ANALYSIS AND DETERMINATION.

11. Under Section 78 of the Civil Procedure Act, the appellate court's responsibility is to evaluate and consider the evidence that was adduced before the trial court and come to its own conclusion in accordance with the law. However, in doing so, the court has to give allowance to the fact that it neither saw nor heard the witnesses (see also the case of SELLE VRS ASSOCIATED MOTOR BOAT COMPANY (1968) E.A. 123)

12. In considering this appeal, I have taken into account the grounds of appeal, the pleadings and evidence that was tendered before the trial court, the trial magistrate's judgment, submissions by either party, cited statute and case law.

13 I am of the view that the issues for determination are whether (a) the appellant failed to prove his case to the required standard in civil cases;

(b) the trial magistrate ought to have exercised her discretion as provided for under Order 2 Rule 6 (1) of the Civil Procedure Rules.

13. With regard to whether the appellant proved his case to the required standard of civil cases, Section 107 (1) of the Evidence Act provides 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 these facts exist”.

Section 108 of the Evidence Act is clear that;

“The burden of proof in a suit or proceedings is on that person who would fail if no evidence at all were given on either side”.

And Section 109 of the Evidence Act provides for proof of a particular fact;

“That burden of proof as to any particular fact is on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of fact shall lie of any particular person”.

14. Thus, it was upon the appellant to prove that the respondent was liable in the negligence that resulted to the accident in which he sustained injuries, loss and damage.

15. In matters related to industrial accident, what parties ought to establish are the duties that each one owes the other in the first instance. The victim, such as the appellant, is required to show, through pleadings and evidence that he was employed by the industrialist (the respondents) and was working at the time of the accident; that the accident occurred and he was injured due to some omission or commission on the part of the respondent and that the accident could have been avoided or its impact minimised had certain measures been taken.

16. This information, which is derived from the conditions of safety embedded in the Employment contracts, is what has become standard pleadings of plaintiffs as in the instant case where at paragraph 4 it reads;

“It was a terms of the said employment between the plaintiff and the defendant and/or it was the duty of the defendant to take all reasonable precautions for the safety of the plaintiff while he was engaged upon the said employment not to expose the plaintiff to any risk of damages or injuries of which the defendant knew or ought to have known and to provide and maintain a safe and proper system of work”

17. For the industrialist (Respondent), the brackets of pleadings and evidence establish the safety measures that have been put in place and show that it has complied with the safety measures set by the factories Act. For example, it ought to have enumerated what it has done to minimize accidents occurring and to lessen the impact, if at all they occur, say, by showing they have provided head gear, industrial boots and gloves, fences, guard and stoppers at the work place/premises. They should also show the working system and its safety alongside the training programmes provided for the workers.

18. The appellant's (Plaintiff's) evidence, which is uncontroverted, was that there were three persons at the place of work. He said that the other two were at the rear where one was to control the machine with a switch while the other one was holding the material. He said that the third one, was himself and he was at the front where he was checking whether the material was well aligned. He went on to state that he had bend to check on the material when it flapped upwards and covered his head. And that in a struggle to uncover his face, his hand got sandwiched between the roller and the steam tank. He said that he had only been issued with an overall but no gloves.

19. The respondent's only witness, JACOB KING'ORI MATHU (Dw1) confirmed that he knew the appellant/plaintiff as they had worked together on the lamination machine. He also confirmed that they were three of them on the day the appellant got injured and he was the one standing at the rear of the machine to switch off the same and feed it with material while the appellant aligned the material. He further said that he heard a scream and someone telling him to switch off the machine. He confirmed that after he switched off the machine he went round and saw the appellant with a burnt and scaled hand. He, however shifted blame to the appellant by stating that the machine was in very good condition and the material was perfectly the way it was supposed to be. He went on to state that even if the material was cramped. The plaintiff ought to have told him to switch off the machine so that he can straighten it but he only told him to do so after being injured.

20. From the Appellant's evidence to court, the uncontroverted immediate cause of the accident was the flapping of the material which suddenly covered his face and in a flurry to free himself, his hand got caught up and trapped between the rollers. I find this information was not pleaded but it arose from the appellant's evidence in chief and when he was cross-examined. The respondent did not controvert this testimony.

21. I find that the appellant's said evidence ought to have been admitted and taken into account as happened in the case of DHANJI RAMJI VRS RAMBHAI LTD (UGANDA). The appellant gave an account of his reaction which I find to be a normal reflex action expected of a reasonable man in the circumstances he found himself in after his hand had been Sucked up in rollers. What the respondent/defendant ought to have done was to tell court the measures it had put in place to prevent the material from flapping which was evidenced to have been a common and expected occurrence whenever the material was moving.

22. Having come to this conclusion, I find that the learned trial magistrate misdirected herself on the law. I therefore set aside her orders and decree dismissing the suit in its entirety and substitute the same with judgment in favour of the appellant on liability.

23. However, having regard to the fact that the appellant accepted to work in a risky environment and had not filed any request with his supervisor for his safety, I apportion the said liability. Consequently, the appellant is held liable at 20% and the respondent at 80%.

24. On the issue of damages, I do wish to disturb the same owing to the severe injuries the appellant suffered and rate of inflation. I therefore award the appellant.

General damages Ksh 300,000/=

Special damages Ksh 200,000/=

Total Ksh 302,000/=

25. I award no costs in the lower court but award the appellant costs of the appeal.

It is so ordered.

Dated and delivered and signed this 20th day of May, 2020.

D. O. CHEPKWONY

JUDGE

In view of the declaration of measure restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on, this Ruling has been delivered to the parties online with their consent they have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court.

JUSTICE D O CHEPKWONY