



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CIVIL APPEAL NO. 7 OF 2018**

**PAUL OTIENO JAGERO..... APPELLANT**

**VERSUS**

**BUILDERS DEPORT LIMITED..... RESPONDENT**

**[Being an appeal arising from the Judgment and decree of the Hon. C. Yalwala (PM) delivered in KISUMU CMCC NO. 53 of 2017 on 19<sup>th</sup> December, 2017]**

**JUDGMENT**

This appeal arises from the decision which was rendered by the trial court on 19<sup>th</sup> December 2017, when it dismissed the Appellant's case.

1. In the Memorandum of Appeal, the Appellant, **PAUL OTIENO JAGERO** raised six grounds, which can be summarized as follows;

- a. **There was sufficient evidence that proved *that he was injured while on duty at the Respondent's workplace.***
- b. **The trial court erred by assessing the damages payable to the appellant, as the injuries were much more serious that appreciated by the court.**
- c. **The trial court erred by taking into *account extrinsic evidence.***
- d. **The trial court failed to take into account *the submissions made.***

2. Based on the said grounds of appeal, the Appellant asked this Court to set aside the dismissal of his suit, and to replace it with a finding that the Respondent, **BUILDERS DEPORT LIMITED**, was liable to compensate the Appellant for the injuries he sustained.

3. When canvassing the appeal, the Appellant pointed out that the evidence adduced had proved that he was injured whilst on duty at his place of employment.

4. The learned trial magistrate held as follows, regarding the issue as to whether or not the Appellant was an employee of the Respondent;

**“The fact that the plaintiff was employed by the defendant and was on duty on the material date is not in dispute.”**

5. In the circumstances, the issues for determination were whether or not the Appellant was injured on the material date, in the course of duty, and if so, the extent (if any) to which the Defendant was liable.

6. The trial court concluded that the Appellant had failed to prove that he was injured on the material date while on duty, in the course of his employment with the Defendant.

7. The trial court also held that the Treatment Notes produced by the Appellant did not corroborate the evidence adduced by the Appellant, concerning the alleged injury or the particulars of when the injury occurred.

8. When canvassing the appeal, the Appellant submitted that he had provided graphic details of the events of the material day. He pointed out that he had given the name of the Supervisor who was on duty at the material time, as well as the names of other people who were on

duty on that date.

9. As regards the evidence about his treatment, the Appellant asked this court to rely on the Treatment Notes and the medical report which he produced.

10. Being the first appellate court, I am obliged to re-evaluate all the evidence on record.

11. The Appellant's case, as set out in the Plaint, was that the Respondent breached the contract of employment, by failing to provide and maintain adequate and suitable measures for safety of the Plaintiff at the place of work.

12. In the alternative, the Respondent was alleged to have been negligent.

13. As a result of the alleged breach of contract and the alleged negligence, the Appellant was hit on his head by a sharp iron plate, causing him to suffer serious injuries.

14. The Appellant brought the suit, claiming both Special and General Damages, attributable to the failures on the part of the Respondent.

15. During the trial, the Appellant was the only witness to his case, whilst the Respondent called two witnesses.

**16. PW1, PAUL OTIENO JAGERO**, testified that on the material date, 18<sup>th</sup> August 2016, he reported to work at 8.00a.m. He said that he and his colleagues were loading iron bars from the company's store, to the lorry.

17. The Appellant named 2 of his colleagues, being Fredrick Onyango and Victor Oyoo. He also named his supervisor as **OKUTA**.

18. It was his testimony that the incident which resulted in his injuries took place at about 10.00a.m.

19. According to him, the person who took him to the AP Lines Dispensary was his supervisor, Okuta.

20. When he was giving his testimony, on 24<sup>th</sup> July 2017, the Appellant said that he had not yet healed fully, as he was still experiencing pains in the head.

21. The Appellant produced Treatment Notes from the AP Lines Dispensary, as well as a Medical Report signed by Dr. L. W. Okombo.

22. On his part, **DW1 PATRICK OKUTA OGUTU** testified that he worked as a Foreman, with the Respondent, **BUILDERS DEPORT LIMITED**.

23. He confirmed that the Appellant used to work with the Respondent, and also that on 18<sup>th</sup> August 2016, the Appellant was at his place of work. It is on the basis of that evidence that the trial court stated that it was not in issue whether or not the Appellant was an employee of the Respondent.

24. According to **DW1**, he would have been the first person to know if any worker was injured. And in respect to the Appellant, **DW1** testified that he was not injured on 18<sup>th</sup> August 2016.

25. The basis for that evidence was the Injury Record Register, which was maintained by the Respondent; and in which injuries to workers were recorded.

**26. DW1** testified that the Company Regulations require any injured worker to first report to him. He would then refer the worker to Wycliffe, who is the person who maintains the Register.

27. However, the Appellant doubted the authenticity of the Injury Record Register, reasoning that there was nothing to confirm that it emanated from the Respondent.

28. I have carefully re-examined the record of the proceedings, but failed to trace any cross-examination of **DW1**, concerning the authenticity of the said Register.

29. The cross-examination of **DW1** centred on the Regulations pursuant to which an injured employee was obliged to first report to **DW1**; and secondly, on the Master Roll which showed that on 18<sup>th</sup> August 2016 **DW1** was on duty.

30. The question as to whether or not the Register was authentic is a matter of factual evidence. If the Appellant wished to cast doubt on the authenticity, he ought to have cross-examined **DW1** about it.

31. The Appellant was well aware of the value of cross-examination, as he raised with **DW2**, issues concerning the Out Patient Register that **DW2** produced in court.

32. By cross-examining **DW2**, the Appellant was able to get the witness to concede that the "*Patient Record Book*" which the Appellant had adduced in evidence looks exactly like the booklet used at the AP Lines Dispensary.

33. On the other hand, when the Appellant did not test the veracity of the testimony given by **DW1**, concerning the Injury Record Register, the court deems such evidence as uncontroverted.

34. Legal submissions cannot be a substitute for either evidence which is to be tendered, or for a challenge to evidence which had been tendered.

**35. DW2, GEORGE OWINO**, was an employee at the AP Lines Dispensary. His responsibility was the issuance of Patient Record Books.

36. Although the records produced by him, as an exhibit, did not have any mark to show that it was from the AP Lines Dispensary, **DW2** recognized the rubber stamp, the writings and the signature on the Out Patients Register.

37. He testified that the name of the Appellant was absent from the Register, in respect of the 18<sup>th</sup> August 2016. Therefore, **DW2** said that that meant that the Appellant was not treated at that Dispensary, on that date.

38. He testified, during cross-examination, that the writing on the Register, on the 18<sup>th</sup> of December 2016, was his.

39. As the Appellant's name was not on the Register for that date, **DW2** said that that confirmed that the Appellant was not treated at the said Dispensary on the date in issue.

40. However, **DW2** conceded thus'

**“There are cases, though very rare, where a patient can be treated at our facility but his/her details are not captured in this register.”**

41. In the light of that concession, the Appellant submitted that the absence of his name from the Out Patient Register did not necessarily mean that he had not been treated at the AP Lines Dispensary.

42. I find that the Appellant's contention, concerning the absence of his name from the Register is correct. In other words, it is possible that, notwithstanding the absence of his name from the Register, the Appellant may have received treatment at the AP Lines Dispensary.

43. We now have a situation in which **DW1** was the foreman on duty at the Respondent's premises, on the material day.

44. His name is **PATRICK OKUTA OGUTU**. The name Okuta also happens to be the name of the person who the Appellant said was his supervisor on the material date.

45. But whilst the Appellant testified it was his supervisor, Okuta, who took him to the dispensary, **DW2** testified that he was never made aware of the Appellant's alleged injury.

46. The Out Patient Book indicates that the Appellant was received at the Dispensary at about 8.30a.m. On the other hand, the Appellant testified that he sustained the injury at about 10.00a.m. The discrepancy remained unexplained.

47. The Out Patient Book indicates that the Appellant was attended to at the dispensary;

**“Having injured with Blunt object at the head and hands at around 8.30a.m. Bleeding excess.”**

48. On the other hand, at paragraph 5 of the Plaintiff, the Appellant's case was that;

**“On or about 18<sup>th</sup> August 2016, the plaintiff was in the course of his lawful duties as an employee of the defendant as a loader when while loading iron plates from the store to the lorry, an sharp iron plate hit his head as a result of which he suffered serious injuries and he suffered loss and damage.”**

49. If the injury to the Appellant was caused by a blunt object, as he said when giving evidence, the said evidence was at variance with the pleading. The said discrepancy remained unexplained.

50. And, at any rate, the evidence did not support the case which the Appellant had set out in his Plaintiff. Evidence which does not prove the case pleaded by a party cannot prove the said case.

51. At paragraph 8 of the Plaintiff, the Appellant specified the particulars of the injuries he had sustained, as;

**“(a) Deep cut wound on the Head.”**

52. In the Medical Report dated 6<sup>th</sup> February 2017, Dr. L. W. Okombo also indicated that the Appellant's injury was a cut wound on the head.

53. Thus, the plaintiff and Dr. Okombo did not mention any injury to the Appellant's hand.

54. However, in his testimony, the Appellant said that he suffered a cut injury on the left side of the head, as well as on the left hand.

55. Meanwhile, the Treatment Notes indicate that the Appellant had sustained injuries;

**“..... at the head and hands.”**

56. In the light of the variances between the pleadings and the various pieces of evidence which the Appellant provided to the court, it is difficult to hold that the Appellant had led sufficient evidence to prove his case.

57. The Appellant stated that he is well aware that;

**“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 the 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 casual connection must be established.”**

58. I find that the Appellant did not discharge that onus.

59. Although the Appellant has made submissions based on **Section 6 (1)** of the **Occupational Safety and Health Act**, I find that the said submissions have no application to this case because that statutory provision was never the foundation of the Appellant’s case.

60. Having re-evaluated the evidence on record, I find that the learned trial magistrate did not err, either in fact or in law, when he dismissed the Appellant’s claim.

61. As regards the quantum of damages, the Appellant did not give any reasons that could lead this court to upset the assessment by the trial court.

62. Therefore, even if the finding on liability had been set aside, I would have upheld the quantum that was assessed by the trial court.

63. In the result, the appeal is dismissed, with costs to the Respondent.

**DATED, SIGNED and DELIVERED at KISUMU This 6<sup>th</sup> day of May 2020**

**FRED A. OCHIENG**

**JUDGE**