REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 152 OF 2017

JOSHUA OGAMBA MOMANYI.....APPELLANT

-VERSUS-

MENENGAI OIL REFINERIES LIMITED.....RESPONDENT

(Being an Appeal from the judgment /decree of Hon. LIZ GICHEHA delivered on 3rd November 2017 in Nakuru CMCC No. 1059 of 2015.)

JUDGMENT

BACKGROUND

1. This appeal arises from suit filed by the appellant in the lower court seeking damages for the injuries he sustained on 2nd June 2015 while working for the respondent/defendant. The trial magistrate found that the appellant failed to prove his case on a balance of probabilities and dismissed the suit with costs to the defendant/respondent. The plaintiff availed two witnesses while the defendant availed one witness. The trial magistrate however went ahead to assess damages at kshs 150,000 for the injuries sustained by respondent/plaintiff.

2. The appellant being aggrieved by the trial magistrate's determination filed this appeal on the following grounds: -

i. *The learned trial magistrate erred in law and fact in disregarding the appellant's claim that the appellant had breached the contract in respect of providing a safe system of work on the ground that the same had been sufficiently proved while there were sufficient grounds and evidence to prove the same.*

ii. *The learned trial magistrate erred in law and fact in failing to appreciate and take into account the events as presented by the appellant and evidence as adduced to show that the appellant was an employee of the respondent herein and was injured in the course of performance of his lawful duty.*

iii. *The learned trial magistrate erred in law and fact in making the conclusion that the fact as presented by the appellant were not supported by evidence and there was no cogent reasoning by the learned trial magistrate to support such a conclusion.*

iv. *The learned trial magistrate misdirected herself in disregarding the appellant's claim against the respondent whereas the. appellant adduced evidence to prove his case on a balance of probability*

v. *The learned trial magistrate misdirected herself in condemning the appellant to bear the defendant/Respondent's costs of the suit.*

vi. *That the learned magistrate's findings are totally unsupported in law*

3. Parties agreed to proceed by way of written submissions.

APPELLANT'S SUBMISSIONS

4. The appellant in submissions summarised the grounds of appeal into three; first ground being the trial magistrate misdirected herself by finding that the appellant failed to prove his case on a balance of probabilities, two misdirected herself in finding that the accident may have happened while he was outside the factory and three in not finding that the defendant was liable and not awarding damages.

5. The appellant's counsel submitted that the appellant was burned by chemical substance on 2nd June 2015 as a result he was seriously injured.

6. The appellant submitted that the respondent/defendant owed him a duty of care and that he submitted that he adduced sufficient evidence that he was employed by the defendant/respondent and he was injured while at work doing his authorized duty of cleaning cars; that the respondent ought to have presented the appellant with safe system of work free from harm. The appellant relied on **Halsbury's Laws of England 3rd Edition Vol. 28 Para 88** and the case of **Oluoch Eric Gogo Vs Universal Corporation Limited [2015] eKLR**, where the court held that "…**owing to his contract of service, a servant is not generally in a position to choose freely between acceptance and reflection of risk**.."

7. Further in **Makalia Mailu Mumende Vs Nyali Golf Country Club Nyarangi JA** stated as follows: -

> **"….an employee is expected to reasonably take steps in respect of employment to lessen danger or injury to the employee. It is the employer's responsibility to ensure a safe working place for its employees."**

8. Appellant submitted that it was the respondent's duty to take reasonable precautions for the safety of employees.

9. The appellant also submitted that failure to report the accident officially should not be conclusive evidence that he did not get injured as it is not disputed that he was on duty that day; and appellant could not have been in right state of mind after being burnt and did not have the luxury to follow procedures to ask for sick leave and record the accident on record book.

10. The appellant urged the court to find the respondent 100% liable for the accident.

11. In respect to damages, the appellant submitted that the trial magistrate took cognizance of the fact that the appellant sustained injuries on the face; that the appellant proposed kshs 450,000 as general damages while the Court awarded kshs.150,000 which is inordinately low; that the appellant relied on the case of **Kipkebe Vs Thomas Amoro Ngarisa [2014] eKLR** where the court awarded kshs 100,000.

12. The appellant submitted that the injuries sustained in the above authority are similar to injuries sustained by plaintiff and prayed for kshs 450,000 to be awarded to the appellant and cited the case of **Kemfro Africa Ltd t/a Meru Express Service Vs A.M Lubia and Olive Lubia [1982-88]L KAR 727 at page 730** where the Court held that the appellate court must satisfy itself either that the judge in assessing damages took into consideration an irrelevant factor or left out of account a relevant one and short of this the amount is inordinately low or so high that it must be a wholly erroneous estimate of the damages.

RESPONDENT'S SUBMISSIONS

13. The respondent started by submitting on the role of first appellate court as set out in the case of **Selle Vs Associated Motor Boat Company Limited [1968] EA** and urged this Court to re-evaluate evidence adduced before the trial court.

14. The respondent submitted that the appeal is fatally flawed as the decree was not annexed in the record of appeal contrary to **Order 42 of The Civil Procedure Rules.**

15. The respondent in submitting on what is required in proving an action in negligence quoted **Halsbury's laws of England,4th Edition at paragraph 662 at page 476** as follows: -

> **"The burden of prove for damages for negligence rests primarily on the plaintiff who to maintain the action must show that he was injured by 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."**

16. The respondent submitted that under **Section 6(1) of Occupational Safety and Health Act** provide as follows:-

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

17. The respondent however submitted that as provided by **Section 13(1)** every employee shall ensure his own safety and health and that of other persons who may be affected by his acts or omissions at the workplace.

18. That the employee is therefore required to take reasonable precaution to ensure his safety at workplace while performing his or her duties.

19. Respondent further submitted that there has to be link between harm and negligence of the respondent; that the appellant bore the burden of proving that the injuries he sustained were as a result of an industrial accident at the respondent's premises.

20. The respondent submitted that the appellants case was detrimentally affected by nonproduction of initial treatment card to prove that he sustained injuries at Menengai oil Refineries Limited; that as held by **Justice Maraga in Timsales Ltd Vs Wilson Libuywa Nakuru HCCA No.135 of 2006**, the initial treatment card is crucial for sustenance of any case pertaining to an industrial claims and failure to avail treatment card in this case is fatal to appellants case. The respondent urged this Court to dismiss the appellant's case.

ANALYSIS AND DETERMINATION

21. I recognise the role of this Court as set out in the case of **Selle & Another Vs Associated Motor Boat Co. Ltd & Others (1968) EA 123** where the Court stated as follows: -

"…An appeal to this court from the trial court is by way of retrial and the principles upon which the court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions thought it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect…"

22. In view of the above, I have perused the trial court proceeding, exhibits produced and considered submissions filed. It is not disputed that the appellant was an employee of the respondent Menengai Oil Refineries and that he was on duty on 2nd June 2015 as stated by the defence witness DW1. He confirmed that the appellant was working in the car wash on the material day but denied that any chemical was used on that day. He stated that the appellant was using soap and water to clean cars. He stated that the appellant never reported the accident and produced accident an extract from register to show that the appellant never reported the accident. The witness stated that the extract produced in court covered the period the appellant was allegedly injured and there is no entry in respect of the plaintiff; but he confirmed that the plaintiff was on duty on that day. He said he had duty roster for June 2015 to confirm that the appellant was on duty for the month except half day on 30th June 2017.

23. The reason for DW1s stand that the appellant was not injured at the place of work is the fact that he did not report to immediate supervisor and the accident was not reported in the accident record; he explained that if the process is not followed it will be believed that the worker was injured out of work.

24. I note that the plaintiff on cross examination, the appellant stated that he worked for 2 hours on 2nd June 2015 but on further cross examination he stated that he worked for 8 hours on the said date and he was paid for it. He stated time of injury as 10.00 a.m. If indeed the appellant got injured at 10.00am while on duty records would not have shown that he worked the whole day. He confirmed that he worked the whole day when he says he worked for 8 hours. He also confirmed that they signed when they checked in and out. He said he did sign and that if injured a report memo is done and one has to be escorted by supervisor but he was not escorted by supervisor. He further stated that when the injuries are not serious a worker cannot be escorted by a supervisor. In this case the description of the injuries, burns on face and hand in my view are serious and he should have been accompanied by supervisor. He confirmed that the injury book does not bear his name.

25. I note that the appellant sought summons for a doctor at Mother Kelvin to come to Court. PW2 a records officer from Mother Kelvin Medical Centre testified that the appellant was referred to the hospital by Menengai Oil Refineries but did not avail referral note.

26. It is not disputed that the plaintiff had the burn to prove that he sustained injury while on duty and that the injury occurred as a result of negligence on part of the defendant. In the instant case the appellant failed to prove on a balance of probabilities that he sustained injuries while on duty and that the injury occurred as a result of negligence on part of the defendant. I do not see nexus between the injuries alleged and the defendant.in my view, the appeal lacks merit.

27. **FINAL ORDERS**

1. Appeal is hereby dismissed.

2. Costs to the respondent.

Judgment dated, signed and delivered via zoom at Nakuru this 5th day of November, 2020

……

RACHEL NGETICH

JUDGE

In the presence of:

Jenifer - Court Assistant

Ms Daye holding brief for Munene, Chege for the Appellant

No appearance for the Respondent