REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 53 OF 2011

ELDORET GRAIN.....APPELLANT

VERSUS

ERICK MULINYA LIDEDE.....RESPONDENT

(Being an Appeal from the Judgment of the Resident Magistrate Honourable J. Owiti in Eldoret CMCC No. 1522 of 2004, dated 28th February, 2011)

JUDGMENT

INTRODUCTION

The appeal arises from the judgement of the Resident Magistrates' court delivered on 28th February 2011. The cause of action arose when the respondent injured his hand in the course of duty at Mumias Town, under the employment of the appellant. He filed the suit and the trial court awarded him Kshs. 100,000/- as damages for pain and suffering. He was also awarded special damages in the sum of kshs. 1,500/-.

The appellant filed the appeal based on various grounds. He stated that the court erred in entering judgement for the Plaintiff when the plaintiff had not proven his case on a balance of probabilities. Further, that the magistrate erred in finding the defendant wholly liable and shifted the burden of proof. The appellant also relied on the ground that the magistrate erred in law in expressing a personal opinion about an accident register that wasn't produced in court. He also appealed on the ground that the award was excessive and the pleadings were not weighed.

APPELLANT'S CASE

The appellant submitted that both the parties admitted that the respondent was employed as a loader and that no loader is forced to work as turn boy. Further, that no loader who refuses to work as a turn boy would face punitive measures.

The appellant submitted that the respondent voluntarily accepted to work as a turn boy and that he is a reasonable man who knows that using a weak spanner can lead to injuries.

The appellant submitted that the respondent should be held 100% liable for his injuries. He relied on the case of ***Stephen Odhiambo Ondu v Hayer Bishan Singh and Sons Ltd. HCCA No. 201 of 2002***, the crux of which was that the position of law is that the cause of injury must be established before a party can be held liable. It was the duty of the plaintiff to establish the nexus between the injury, the co-worker and the defendant, so as to say that the defendant was liable vicariously for the acts or the omissions of the employees.

The appellant further submitted that the award was excessive and the plaintiff should have been awarded Kshs. 20,000/-. He relied on ***Civil Appeal no. 26 of 2015; Isinya Roses v Zakayo Nyongesa.***

RESPONDENT'S CASE

The respondent submitted that he reported to work on the material day for his duties as a stacker. Loaders were not sufficient to accompany the drivers and salespersons and he was therefore assigned to work as a loader in a vehicle delivering flour to Mumias. While on duty the vehicle got a puncture and it was the loaders' duty to help the driver change the tyre. When changing the tyre, the spanner broke and punctured his hand. He sustained a deep cut from the same. The respondent contends that the spanner was of poor quality and this is what caused the breakage.

The respondents' position is that there was a breach of common law duty of care owed to him by the appellant when he failed to provide him with gloves and quality tools.

The appellants denied that the accident occurred and claimed the respondent was at work the whole day. However, the court arrived at the conclusion that the respondent was injured by assessing the medical evidence. The court also concluded that the respondent was injured as the applicant failed to produce the accident register which would have controverted the evidence. The court looked at the demeanour of the witnesses in addition to the evidence before it to determine the occurrence of the accident.

The respondent contended that the trial court's decision should not be set aside merely because the appellate court on the same facts would have arrived at a different decision. It is incumbent on the appellant to demonstrate that the trial magistrate exercised discretion wrongly by taking into account wrong principles of law or simply disregarding clear evidence on record.

The respondent relied on the case of ***Erastus Onyango v Manoa Malenya [2015] eKLR*** where the court observed;

> ***"The appellate court will hardly interfere with the conclusions made by a trial court after weighing the credibility of the witnesses in cases where there is a conflict of primary facts between witnesses and where the credibility of the witness is crucial."***

He further referred to the case of ***Administrator HH the Aga Khan Platinum Jubilee Hospital v Munyambu (1985) Eklr*** the crux of which was that where a straight conflict of primary facts between witnesses exists, and where credibility is crucial, the appellate court can hardly interfere.

The respondent submitted that the trial court reached the decision on liability upon careful consideration of evidence. Further, the trial court did not shift the burden of proof on the appellant. The trial magistrate said that the witnesses did not provide any evidence to controvert the position as stated by the respondent.

The trial court observed that the accident occurred away from the appellants' premises and as a result the same could not have been recorded in the accident register on the date of the accident. This was based on the evidence given by the respondent.

The respondent maintained that there is nothing to suggest the quantum was excessive and that the court relied on comparable awards as referred to by parties before arriving at his decision. He relied on the case of ***Ndung'u Dennis v Ann Wangari Ndirangu & Anor. [2018] Eklr,*** the upshot of which was that appellate court would not disturb awards for damages unless it is shown that the judge proceeded on the wrong principles or that he misapprehended the evidence in some material respect and arrived at a figure which is inordinately high or low. The appellant has not provided evidence that the wrong principles were applied in assessing the quantum of damages.

ISSUES FOR DETERMINATION

a) Whether the appellant was 100% liable

b) Whether the quantum was excessive

WHETHER THE APPELLANT WAS 100% LIABLE

The appellant failed to produce the attendance register to prove that the respondent was indeed on the premises on the day of the accident and not in Mumias. The appellant failed to controvert the evidence that the accident occurred on the material date and that the respondent was injured carrying out duties under the employment of the appellant. The appellant never controverted the evidence that there were no hand gloves provided to the employees. The duty of a loader was not disputed and therefore this consequently rendered the defence that the respondent was on a frolic of his own moot. The appellant further failed to call the driver who was present as a witness. This appears a deliberate move to conceal relevant eye witness evidence.

The appellant provided ***Civil Appeal No. 26 of 2015; Isinya Roses v Zakayo Nyongesa*** as the authority he relied upon. The court in that appeal held;

> ***"It is therefore trite that the burden of proof is on the claimant who must satisfy on a balance of probabilities; that the claim is based on statutory breach of duty and acts of negligence. How that duty is to be discharged and what are the key elements is crystal clear in the following case law and texts;***
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> ***Halsbury's Laws of England 4th Edition Pg. 662***.
>
> ***"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 appellant did not dispute that the plaintiff was an employee and failed to prove that he did not get injured while in the course of his employment. I agree with the trial court that the appellant exposed the respondent to a risky work environment and find that the appellant has not proven any contributory negligence on the part of the respondent. Further, the omission to provide gloves is proof of negligence on the part of the appellant. The trial court did not err in finding him 100% liable.

WHETHER THE QUANTUM WAS EXCESSIVE

The principles upon which this court will interfere with the award of damages are well settled in the case of ***Buttler v Buttler CA 49 of 1983***. The court held as follows:

> ***"An appellate court cannot interfere with an award on damages by a lower court unless it has shown:***
>
> ***(1) That the court acted on wrong principles.***
>
> ***(2) That the court has awarded so excessive or so little damages that no reasonable court would allow it to stand.***
>
> ***(3) That the court has taken into consideration matters it ought not have considered, or not taken into consideration matters it ought to have considered, and as a result arrived at a wrong decision."***

The appellant has failed to prove that the court acted on wrong principles or that the damages were so excessive. Further, there has been no proof that the court considered matters it ought not to have considered.

On the grounds I do find the appeal in want of merit and is dismissed with costs to the Respondent.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 5th day of April, 2019

In the absence of:

The appellant

The respondent

And in the presence of Mr. Mwelem – Court assistant