REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 184 OF 2017

APIYO PAUL ASTIVAH.....APPELLANT

VERSUS

MASTERMIND TOBACCO KENYA LIMITED…....RESPONDENT

(Being an appeal from the judgment of Honourable L.W. Kabaria (Ms.) (Senior Resident Magistrate) delivered on 3rd April, 2017 in CMCC NO. 2385 OF 2013)

JUDGMENT

1. The appellant filed a suit against the respondent on 2nd May, 2013. Therein, he sought general and special damages for injuries sustained in the course of his employment with the respondent as a casual labourer.

2. In his plaint, the appellant pleaded that on or about the 19th of June, 2011 while in the dressing room in the premises of his employer, a metal wall unit fell on him, causing him serious injuries.

3. The appellant further pleaded that his injuries resulted from the respondent's breach of its statutory duty of care owed to the appellant and its failure to ensure a safe working environment as well as provide the necessary protective gear.

4. Two (2) witnesses testified for the appellant's case at the hearing while the trial court closed the respondent's case for inexcusable non-attendance.

5. At the close thereof, the parties filed their respective submissions. Eventually, the trial court dismissed the appellant's claim.

6. The aforesaid decision precipitated the lodging of this appeal.

The appellant put forward the following grounds:

> ***i. THAT the learned trial magistrate erred in fact by holding on the one hand that if the metal drawer or wall unit had been fixed permanently it would not have injured the appellant while on the other hand making a finding that the appellant did not give an explanation on what triggered the falling of the wall unit, hence rendering her judgment contradictory.***
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> ***ii. THAT the learned trial magistrate erred in fact by interchanging the use of the words drawer, cabinet and wall unit to mean one and the same thing in her judgment, thus misapprehending the appellant's evidence.***
>
> ***iii. THAT the learned trial magistrate erred in law and in fact by failing to hold that the appellant had not proved his case on a balance of probabilities yet his evidence was that the wall unit had not been permanently fixed and that the appellant's evidence was uncontroverted.***
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> ***iv. THAT the learned trial magistrate erred in law and in fact by making a finding that the appellant's evidence was not enlightening in terms of what led to the falling of the metal wall unit.***
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> ***v. THAT the learned trial magistrate erred in law and in fact by making a finding that in ordinary circumstances, a metal unit would not simply fall without a trigger yet such explanation was the respondent's responsibility.***
>
> ***vi. THAT the learned trial magistrate erred in law and in fact by failing to appreciate the duty imposed upon the respondent towards the appellant while on duty and therefore arriving at a wrong conclusion.***

vii. THAT the learned trial magistrate erred in law and in fact by ignoring and failing to consider the submissions and authorities of the appellant on liability and quantum, while relying entirely on the respondent's submissions.

viii. THAT the learned trial magistrate erred in law by considering the respondent's submissions on points of fact yet no evidence was tendered on its behalf.

ix. THAT the learned trial magistrate erred in law when she failed to apply the doctrine of res ipsa loquitor in the circumstances of the case.

x. THAT the learned trial magistrate's findings went against the overwhelming uncontroverted evidence on record, thereby rendering the same unsustainable, erroneous and contrary to the law.

7. Parties were directed to file written submissions on appeal. I have also re-evaluated the evidence presented before the trial court and further considered the rival written submission.

8. Having critically examined the grounds of appeal, I think the first five (5) grounds of appeal touch on the circumstances surrounding the injuries sustained by the appellant, hence those grounds shall be determined together.

9. The appellant in his submissions essentially argues that the learned trial magistrate was wrong in concluding that no explanation was given for what caused the wall unit to fall in the first place.

10. It is also the appellant's submission that since he had no control over the falling of the wall unit and since the respondent did not provide any evidence to rebut his version of events, then the trial magistrate ought to have found that the appellant had proved his case and that the injuries sustained resulted from the respondent's negligence or breach of duty of care.

11. The respondent in its opposing submissions contends that the use of different terminologies does not change the fact that was what being referred to happened to be one and the same thing.

12. It is also the respondent's submission that no proper explanation was given for what caused the wall unit to fall, hence the appellant had not proved his case on a balance of probabilities.

13. The appellant (PW2) stated before the trial court that at all material times, he did the night shifts and that on or about 19 th June, 2011 after his shift, he went to the washroom to pick a soap.

14. The appellant stated that as he did so, a drawer from a cabinet fell on his right leg, causing him to sustain injuries, following which he was taken to hospital and treated.

15. In her judgment, the learned trial magistrate stated that whereas the appellant's evidence was not controverted, it was not clear how the accident came about since the appellant's testimony did not offer a proper explanation.

16. The learned magistrate further stated that there was nothing to show what duty the respondent failed to discharge which led to the accident.

17. A cursory perusal of the plaint filed by the appellant, the appellant pleaded that it was a metal wall unit that fell on his leg.

18. PW2 in his oral evidence referred to the object as a drawer but again reverted to the metal wall unit in his filed submissions.

19. With respect, I am in agreement with the learned trial magistrate that it was not made clear what exactly fell on the appellant's leg.

20. The record shows that the appellant told the trial court that he was picking a soap when the metal drawer/wall unit fell on his leg. He however failed to state the circumstances surrounding the accident therefore failing to discharge the burden of proof.

21. The appellant's predicament is compounded by the fact that no other witness save for the medical doctor who prepared the medical report was called to corroborate the appellant's story.

22. It is clear in my mind that the learned trial magistrate cannot be faulted in the manner he determined the case.

23. In his witness statement, the appellant stated that it was while he was changing clothes that he metal wall unit abruptly fell on him. However, in his oral testimony, he swore that a drawer fell on him while he was picking a soap from the washroom.

24. Given the evidence presented by the appellant is difficult to come to the conclusion that the injuries sustained were as a result of breach of a statutory duty of care by the respondent. The evidence tendered before the trial court did not show the nexus between the falling wall and the respondent.

25. It is clear in my mind that the appellant simply failed to establish his case against the respondent on a balance of probabilities.

26. On grounds (vi), (vii), (viii) and (x), the appellant argued that since his evidence was uncontroverted, the trial court ought to have

adopted the appellant's evidence entirely.

27. The respondent refuted the appellant's submission by submitting that notwithstanding its failure to adduce evidence, it was not for the court to automatically find in favour of the appellant.

28. It is trite law that indeed, the mere fact that the evidence of a party has not been rebutted does not mean that such a party has automatically proven his or her case. The evidence tendered must prove the ingredients of the case. The appellant's evidence appeared contradictory and unreliable.

29. The burden of proof remained with the appellant and in the end, the learned trial magistrate correctly found that the appellant had failed to discharge the burden of proof.

30. On the subject of quantum, it is the appellant's submission that in making her award, the learned trial magistrate failed to take into account the lapse of time as well as economic factors in awarding Kshs.280,000/= as opposed to the award of Kshs.500,000/= proposed by the appellant.

31. On its part, the respondent argued that the award proposed by the said magistrate factored in the inflationary trends.

32. The recorded evidence show that the appellant had sustained a degloving injury to his right lower limb as indicated in the medical report produced by PW 1. The learned trial magistrate also considered the awards proposed by the respective parties along with the authorities cited by the appellant since the respondent did not cite any comparable awards. In the end, the trial magistrate made an award of Kshs.280,000/=.

33. In this appeal the trial court's award is said to have been arrived at without considering both the appellant's proposed award and inflationary trends.

34. I have considered the proposal made before the trial court. I have also considered the cases cited. It is apparent that the trial magistrate took into account the material placed before him before making the award. I am satisfied that the award of the trial court is reasonable and within the comparable awards. The appeal is against quantum must fail.

35. The appellant has argued that the learned trial magistrate ought to have considered the applicability of the doctrine of *res ipsa loquitor* notwithstanding the fact that the same was not pleaded, since it constitutes a rule of evidence.

36. The respondent on its part submitted that seeing as the appellant having failed to demonstrate negligence on its part, the trial magistrate had no basis on which to apply the doctrine of *res ipsa loquitor*.

37. It is apparent that the appellant did not raise nor rely on the aforesaid doctrine in his pleadings. The same cannot be introduced on appeal. Therefore, it is not worth to belabor considering it.

38. In the end, I find the appeal to be without merit. It is dismissed with costs to the respondent.

Dated, Signed and Delivered at Nairobi this 2nd day of May, 2019.

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J. K. SERGON

JUDGE

……for the Appellant

.....for the Respondent