REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO 182 OF 2016

MALONZA IVUTHA…...APPELLANT

VERSUS

POLYSACK COMPANY LTD..................................RESPONDENT

(Being an appeal against the Judgment of S.N. Telewa (RM) delivered on 19/09/2013 in Thika CMCC 961 OF 2011)

J U D G M E N T

1. By a Plaint filed on 22/12/2011, the Appellant herein sued the Respondent claiming compensation for injuries he sustained on 30th September, 2011 while allegedly in the course of his lawful duties. He claimed that the Respondent failed to provide him with a safe system of work: and that while offloading heavy rollers from the machine, the same dislodged themselves with force and struck him occasioning serious injuries.

2. The Respondent filed its defence denying any liability for the accident. In particular, the Respondent averred that if any accident occurred it was caused by the Appellant through his own negligence.

3. The matter proceeded to a full hearing. At the conclusion of the trial, the Trial Magistrate dismissed the suit with costs to the Respondent.

4. The Appellant is dissatisfied with the lower Court's judgment and has preferred the present Appeal. In his Memorandum of Appeal, he has listed five grounds of appeal as follows:

> **"a.*The Learned Trial Magistrate erred in law and fact by failing to consider the evidence adduced by the Plaintiff.***
>
> **b. *The Learned Trial Magistrate erred in law and in fact in dismissing the suit as against the Respondent despite the evidence adduced by the Appellant.***
>
> **a) *The Learned Trial Magistrate erred in Law and in fact by failing to appreciate that the Plaintiff had proved his case on a balance of probabilities as against the Respondent.***
>
> **b) *The Learned Trial Magistrate erred in law and in fact in dismissing the suit despite the Respondent admitting in court and by their filed witness statements that the Appellant had been injured at work and hence arrived at a wrong conclusion.***
>
> **c) *The Learned Trial Magistrate erred in law and in fact in making a decision based on wrong principles of law."***

5. The Appellant's case, as it emerged at the trial was that the Appellant was an assistant machine operator. He testified that on 30th September, 2011 he was on night shift, and in the course of his work, he tried to remove a roller from the machine but the roller fell on his right leg. He stated that he reported to his incharge by the name **Nicholas Mayaka** who advised him to go home and that on the following day, he went to hospital and again on 3rd September, 2011 when he saw the senior doctor who signed his treatment card. He produced a card from Thika Level 5 Hospital and a Medical Report by Dr. Karanja and a receipt. He testified that suffers pain in his leg pains when it is cold and blames the company for not deploying enough employees on the material night. He sought compensation for pain and suffering and the costs of the suit. In cross examination he contended that the rolls pushed themselves by force as he was lifting them alone. In re-examination, he asserted that he was not on duty on 2nd October, 2011 and that he went to hospital on 1st October, 2011.

6. **Nicholas Mayaka** testified as **DW1**. He stated that his attendance sheet showed that the Plaintiff was at work from 3pm -11pm on the material date and also on 1st October. He testified that a single printed roll is more than 100 kilograms and cannot be lifted by one person. He contended that on receiving the Appellant's report that he had suffered injury, he sent him for first aid and he thereafter continued working up to 11pm. In cross examination, he stated that he recorded that the Plaintiff was not so hurt because he opted to continue working. In re-

examination he clarified that the Plaintiff was paid on 30th September, 1st and 2nd October, 2011.

7. The appeal was canvassed by way of written submissions.

8. The Appellant submitted that the only reason that the Appellant's matter was dismissed was that the medical report produced was dated 20th September, 2011 while the alleged accident took place on 30th September, 2011. Counsel submitted that the trial court agreed with the Appellant on all the other aspects of the matter and that the disparity should have been treated as a typographical error and should not have been used as the only basis for dismissing the case. It was submitted that the Appellant sustained a fracture from and that an award of Kshs. 300,000/= is reasonable. Counsel cited the case of ***Nairobi HCCA No. 343 of 2012 Parodi Giorgio vs John Kuria Macharia***. In conclusion, counsel submitted that the trial court applied the wrong principles and failed to appreciate that the Appellant had proved his case on a balance of probabilities thus the appeal should be allowed.

9. The Respondent submitted that no explanation was given by the Appellant when he was questioned about the disparity on the date of the medical report which was prepared ten days before the occurrence of the accident. It was submitted that the trial magistrate decision to dismiss the Appellant's case was based on the evidence and documents presented before her.

10. The court has considered the pleadings, the evidence adduced at the trial and submissions on this appeal. A first appeal is in the nature of a re-hearing. The first appellate court is therefore obligated to re-evaluate the evidence and to draw its own conclusions, but in doing so to bear in mind that it did not have the opportunity to see or hear the witnesses at the trial – see **Peters Sunday Post Ltd [1958] EA 424; Selle and Another v Associated Motor Boat Company Ltd and Others [1968] EA 123.**

11. In the case of **Wareham t/a A.F. Wareham and 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91,** the Court of Appeal set out the duty of the Plaintiff in the adversarial system by stating that:

> **"[W]e are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings and the issues of fact or law framed by the parties or the curst on the basis of those pleadings pursuant to order XIV of the Civil Procedure Rules. And the burden of proof is on the plaintiff and the degree there of is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden should fail".**

12. The Appellant had pleaded in his plaint that the accident occasioning his injuries occurred on 30th September 2011 and that he sustained fractures to the 1st metatarsal of the right foot. These matters were denied in the Respondents defence.

13. In addition to his oral evidence that he sustained injury on 30/9/11 the Appellant tendered a treatment card dated 1st October, 2011 from Thika Level 5 hospital **[Exh 1]** and a medical report dated 20th September 2011 **[Exh 3a]** which refers to an accident occurring on 30th September 2011 and a receipt for KShs.3000/= **[Exh 3b)** which also bears the date 20th September 2011. He also tendered as **Exh 2** an X-ray request whose date is not clear. The doctors who examined him on 1st October, 2011 and on 20th September 2011 were not called to testify. Their evidence could have shed light on the discrepancy in the documents.

14. The Appellant has purported that the erroneous date on the medical report **Exh 3(a)** is a typographical error. That does not explain why the receipt **Exh 3b** is also dated 20th September 2011. By themselves , apart from the medical report, the treatment card **Exh 1** and Xray request **Exh 2** do not prove the injuries pleaded by the Appellant or that they occurred on 30th September 2011. Moreover, , **Exh 3a** and **3b** raise the question whether the accident or injury happened earlier than the pleaded date.

15. The trial magistrate on noting these anomalies observed in his judgment that the disparities were not explained at the trial and that the doctor's report seemed **"to confirm an injury that had not yet occurred."** The trial magistrate was perfectly entitled to dismiss the medical report dated 20th September 2011 in those circumstances.

16. Section 107 of the Evidence Act provides that:

> **"(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**
>
> **(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person".**

17. The Appellant did not tender credible evidence to support his claims regarding the injuries allegedly sustained on 30th September 2011. It could not help his case at all that **DW1** admitted that on the said date the Appellant *reported* to him that he had been injured. That is not a confirmation of the injuries. Besides, there is uncontroverted evidence that the Appellant worked his shift to the end and on the next day. A person with a serious fracture could not manage such a feat in my view.

18. The Appellant's suit was properly dismissed and I can find no reason to fault the trial magistrate. I find no merit in the grounds urged on this appeal and will dismiss it with costs.

DELIVERED AND SIGNED AT KIAMBU THIS 15TH DAY OF MAY 2019

C.MEOLI

JUDGE

In The Presence of…

Appellant absent

Respondent absent

Court Assistant - Nancy