REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 122 OF 2010

SOLOMON K. TOO...................APPELLANT

VERSUS

KENYA BREWERIES LTD.....RESPONDENT

(Being an Appeal from the Judgment of the Chief Magistrate Honourable C.G Mbogo in Eldoret CMCC No. 948 of 2003, dated 16th June, 2010)

JUDGMENT

The appeal rises from the judgment of Hon. C. Mbogo in Eldoret CMCC 948 of 2003 delivered on 16th June 2010. The suit sought exemplary and special damages against the respondent. The cause of action was an alleged permanent problem of poor vision sustained by the appellant in the course of duty as an employee of the respondent. Appellant contended that it was as a result of the respondent's negligence that the appellant was exposed to harm and danger which resulted in severe injuries the consequence of which was permanent poor vision.

The subordinate court dismissed the plaintiff's suit and this resulted in the present appeal.

APPELLANT'S CASE

The Appeal is based on the following grounds, in a nutshell;

a) The learned magistrate erred in finding that the plaintiff's injuries were acquired at birth and were not caused by the defendant's negligence.

b) The learned magistrate erred by failing to find that the injuries were caused by the work environment where he was exposed to poisonous insecticides and pesticides.

c) The learned magistrate erred in disregarding the finding of the medical board that the appellant's injuries were not a hereditary problem but a problem due to the nature of work at the respondent's premises.

d) The learned magistrate erred in failing to find that the evidence of Prof. Gerrishom Sande was partisan and was full of theoretical assumptions and relying on a finding in a criminal case in accepting DW2s' evidence thereby misdirecting himself.

e) The learned magistrate erred by failing to find that DW1 failed to adduce any documentary evidence to support his allegations and in the circumstances the appellant's evidence on the defendant's negligence was not probatively controverted by the defence.

The appellant submitted that Dr. Aluda PW10 produced a medical report (P. Exh. 1a) and a receipt (1b) as per page 32-33 of the record of appeal. He testified that the appellant had bilateral optic atrophy and the CT showed right carotid aneurysm. He testified that the cause of the problem was chemicals entering the eye of the appellant causing the nervous system to be affected and that the problem was not hereditary., he assessed permanent disability at 90%.

PW2 produced a copy of the appellant's treatment record and an original letter prepared by Dr. Wanjala, an eye specialist. PW2 testified that the appellant was assessed and after dilating of both eyes it was confirmed that the appellant had bilateral optic atrophy as per page 289 of the record of appeal that contains his testimony.

The appellant testified that between 21/11/1992 and 1995 he was employed by the respondent as a process minder and his duty was to fumigate against rodents. He testified that the pesticide was in powder form and he was never provided with protective gear to cover his

hands, eyes and mouth. He underwent medical check-up before commencing work at the company and was certified healthy. He developed eye problems in 1993 and went blind, he was then forcibly retired by the respondent company on medical grounds.

The respondent called DW1 Dr. Gerishon Mudanya, who testified that the appellant suffered from an aneurysm which he developed when he was born. He further testified that he was not an eye specialist and that exposure to chemicals could cause visual problems. DW2, who was an employee of the respondent testified that he was aware the appellant was referred for medical examination before employment and he would not have been employed if he had a medical problem. He testified that he did not have records to show that the appellant was given protective gear.

The appellant submitted that there was overwhelming evidence that the severe injuries sustained resulted from the defendant's breach of duty of care as an employer as follows;

(i) Failure to train and provide supervision to the plaintiff

(ii) Failing to supply the plaintiff with protective gear.

(iii) Failing to warn or put up notices of danger posed by the poisonous chemicals.

(iv) Failing to undertake precautionary measures or to remove the poisonous pesticides.

He relied on the case of Van Dventer vs Workman's Compensation Commissioner (1962) 4 SA on the common law duty of an employer to take reasonable care of his employee.

The respondent failed to lead evidence that the appellant was supplied with protective gear thus it failed to adhere to its statutory and common law duty of providing a safe workplace for the appellant.

It was further submitted that the learned magistrate erred in disregarding the finding of the medical board's proceedings and diagnosis dated 2nd November 1998 regarding the appellant's state of health and cause of injuries captured at page 46 of the record of appeal. The diagnosis found that the poor vision due to bilateral optic atrophy was not a hereditary problem and was as a result of the nature of work at Kenya breweries Limited. The director of medical services approved the findings.

The medical board was established by the director of occupational safety in consultation with the director of medical services vide Section 44 of the Workman's Compensation Act., Cap 236 (repealed). The finding was not challenged by way of Judicial review or appeal as provided by sections 51 and 52 of the Workmen's Compensation Act. The same is final as regards the nature and the cause of the appellant's injuries.

The appellant also averred that the learned magistrate erred by according undue weight to the evidence tendered by DW2 who was a consultant for the respondent. He gave evidence which was clearly biased and his medical report was not supported by evidence.

The respondent did not prove the cause of the appellant's injury to the standards required by law. The appellant cited the case of ***Redland Roses Limited vs Hiribo Mohammed Fukisha (2015) eKLR***. The contraction of the disease would have legitimately been inferred by the evidence adduced by the appellant. He cited Section 39 of the Work Injury Benefits Act, Cap 236 (repealed) on the presumption that an occupational disease specified in the schedule is assumed contracted at the place of work unless the contrary is proven.

Joseph Imbenzi, with a working experience of 20 years produced treatment records and a letter prepared by Dr. Wanjala, an eye specialist (P-Exh10) that confirmed the client's medical history linked to deplorable working conditions. DW2's contention that the ailment was contracted at birth was not supported by any documentary evidence. The evidential burden shifted to Dr. Sande when he alleged this and he should have proved that there was such a hereditary disease in the family.

The appellant submitted that the trial magistrate erred in failing to find and hold that DW1 failed to adduce documentary evidence to support his allegations.

The appellant submitted that the trial court erred in failing to assess the damages awardable to him. The appellant had the right to know the damages awardable to him even if the claim was dismissed. He relied on the case of ***Lei Masaku v Kalparma Builders Ltd. Civil Appeal No. 40 of 2007 (2014) eKLR***. He also cited the case of ***Gladys Wanjiru Njaramba vs Globe Pharmacy & Another (2014) eKLR.***

The appellant sustained the following injuries;

a) Bilateral optic atrophy and mid-dilated pupils which eventually led to blindness.

b) A right internal carotid aneurysm at the junction of middle and anterior cerebral arteries.

The appellant's employment was terminated when he was earning a salary of kshs. 10,629.40. and his contract of employment stated his retirement age as sixty years.

In the amended plaint the particulars of special damages were set out as follows;

a) Medical report Kshs. 1,500/-

b) Medical expenses Kshs. 102,000/-

c) Loss of earnings Kshs. 10,649.00

The plaintiff also made a claim for General damages and costs.

The plaintiff had proposed that he be compensated as follows;

a) Pain and suffering and loss of amenities Kshs. 1,300,000/-

b) Loss of future earnings Kshs. 1,500,000/-

c) Medical expenses Kshs. 100,000/-

d) Hiring domestic servant Kshs. 100,000/-

Total Kshs. 3,000,000/-

RESPONDENT'S CASE

The Respondent submitted that it was DW2s testimony that the appellant had a problem of scratching and wiping his eyes since 1992. Further, that the duty of the appellant as a process minder was to move grain using machines and to package grain into bags for various destinations. It was not his duty to control pesticides, the application of rodenticides was hired out. The appellants' duties were far from handling pesticides and he did not call any witnesses in support of his allegations that he worked and dealt with pesticides. The evidence by the respondent is clear as DW2 was the appellant's supervisor and understood his work therefore the issue of exposure to pesticides was well settled.

The respondent's witness, Dr. Gerishom Mudanya Sande, DW1, was a neurological surgeon who had worked for 35 years. He explained the meaning of the term aneurysm and that he not only examined but treated the appellant in an attempt to arrest the condition. He explained that the appellant suffered from optic atrophy because the aneurysm caused increased pressure in the head. The witness stated that the aneurysm was developed at birth as it is not possible for an external object to cause an aneurysm unless it is a trauma. DW1's evidence was not disturbed on cross examination.

The appellant could not shift the burden of proof to the respondent as it was he who alleged that he was injured while on duty and the respondent can only defend itself against the allegations. It was upon the appellant to prove that the condition was not acquired at birth and that it did not exist in his family. He did not call any witness to prove that the disease was not in the family. The statements made by the appellant were not supported by evidence. DW1 was a competent witness and PW1 and 2 did not go into details surrounding the appellants condition and possible causes. DW1 took the court through his evidence and explained every possible avenue. PW2 only appeared to produce the letter prepared by Dr. Wanjala. PW2 admitted in cross examination that he did not physically examine the appellant.

The respondent relied on the case of ***Radhabhai Shivji Bhanderi (suing as the administrator of the estate of Shivji Ramjibhanderi (deceased) vs Jyotibhala S. Desai & 3 others, Nairobi HCCC No. 35 of 2006*** on conflicting opinions of experts.

The respondent submitted that an award of kshs. 200,000/- would be sufficient compensation based in the case of Gichuki vs Njoki & Anor, HCCC NO. 1174 of 2001. The sum of kshs. 3,000,000/- is excessive.

ISSUES FOR DETERMINATION

a) Whether the injuries sustained by the defendant were as a result of carrying out his duty in the course of employment

b) Whether the court erred in regarding the evidence of DW1 in dismissing the suit

c) Whether the court erred in failing to assess the damages the appellant would be entitled to if he had succeeded in his claim.

WHETHER THE INJURIES SUSTAINED BY THE DEFENDANT WERE AS A RESULT OF CARRYING OUT HIS DUTY IN THE COURSE OF EMPLOYMENT

In order to establish this, I must first determine what his duty was. DW2 testified that he was a supervisor of the plaintiff and that the duty of the plaintiff was to move grain using machines. His duty did not involve the use of pesticides therefore it is apparent that even if it was proven to have been the cause of his injuries he was acting outside his duties. Further, his inability to name the pesticides that he used bring into question whether that was his duty at all.

As per plaintiff exhibit 6, the doctor therein has described the plaintiff's duties as lifting and arranging sacks of wheat. Further, the plaintiff provided no proof that his duty as a process minder was to fumigate. He did not produce his contract of service to indicate what his duties were. He failed to satisfy the burden of proof.

WHETHER THE COURT ERRED IN REGARDING THE EVIDENCE OF DW1 IN DISMISSING THE SUIT.

The medical board proceedings concluded that the injuries were sustained due to the nature of work and that it was not congenital. The plaintiff did not submit any documentary evidence or provide any witness to prove that the condition was not congenital. The appellant cited section 51 and 52 of the Workman's Compensation Act with regards to the challenge of the board's decision. However, the said Act only has 44 sections which makes the point baseless or incorrect.

The trial court relied on the evidence of Dr. Gershom Mudanya, a neurologist and an expert. In the case of ***Stephen Kinini Wang'ondu v The Ark Limited [2016] eKLR*** the court held that,

> "***Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for court use being commissioned on any factual matter, technical or otherwise, provided; it is deemed likely to be outside the knowledge and experience of those trying the case, and the court agrees to the evidence being called.***
>
> ***While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account. [11] Four consequences flow from this.***
>
> ***Firstly, expert evidence does not "trump all other evidence". It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.***
>
> ***Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be "artificially separated" from the rest of the evidence. To do so is a structural failing. A court's findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.***
>
> ***Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.***
>
> ***Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones. [12]"***

The trial court rightly found that the opinion of a neurologist was of more weight than that of Dr. Aluda and Dr. Imbenzi. The evidence indicated that the appellant's injuries were not caused by carrying out his duties in the course of his employment and the expert evidence was in support of this.

I do find that the court did not err in finding that the plaintiff failed to prove his case on a balance of probabilities.

WHETHER THE COURT ERRED IN FAILING TO ASSESS THE DAMAGES THE APPELLANT WOULD BE ENTITLED TO IF HE HAD SUCCEEDED IN HIS CLAIM.

In the case of **Lei Masaku v Kalparma Builders Ltd [2014] eKLR** the court held;

> **It has been held time and again by the Court of Appeal that the court of first instance must assess damages even if it finds that liability has not been established. To have casually dismissed the suit and fail to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the Appellate Court needs to know the view taken by the court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand.**

In that respect I opine that the trial court erred in failing to assess the damages and this court shall proceed to assess the damages.

Special Damages;

a) Medical report Kshs. 1,500/-

b) Medical expenses Kshs. 102,000/-

c) Loss of earnings Kshs. 10,649.00

General Damages

In **Kenya Power And Lighting Company Limited v Bernard Mutuku Kilonzo [2015] eKLR** although the victim therein only sustained

severe burns on the scalp and forehead with a total loss of sight in one eye the High Court awarded Kshs. 1,500,000/= on general damages in 2015. I opine that an award of kshs. 1,500,000/ for pain and suffering would suffice.

Loss of future earnings

Given that his contract had a retirement age of 60 years and he left employment at 36 years then a multiplier of 24 years suffices, which leads to the following sum:-

10,629.40 x 12 x 24 = 3,061,267/=

Domestic Servant

The amount submitted by the appellant of kshs. 100,000/= is reasonable.

Medical Expenses

The appellant has proposed a sum of kshs. 100,000/- and it appears to be a fair sum.

This brings the total damages that could have been awarded to: **Kshs. 4,866,267.00.** However, the appeal fails with costs to the respondent.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 4th day of June, 2019

In the presence of:

Mr. Abiero holding brief for Mr. Kipkurui for the appellant

And absence of Miss Karage for the respondent

Ms Sarah – Court assistant