REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 26 OF 2018

KESI JINDWA KARUKU.....APPELLANT

VERSUS

STEEL MAKERS LTD.....RESPONDENT

[An appeal against the Judgment of the Learned Resident Magistrate Mr L. K. Gatheru

dated 19th December, 2017 in Mariakani SRMCC No. 300 of 2016,

Kesi Jindwa Karuku v Steel Makers Ltd]

JUDGEMENT

1. The Appellant, Kesi Jindwa Karuku, had sued the Respondent, Steel Makers Ltd, before the Senior Resident Magistrate's Court at Mariakani in Civil Suit No. 300 of 2016 seeking damages as a result of injuries allegedly sustained on 4th December, 2015 while he was working for the Respondent as a casual labourer.

2. The Respondent denied the Appellant's claim and put him to strict proof of the same. The central plank of the Respondent's case was that the Appellant's claim was fictitious and unfounded as he was relying on treatment notes similar to those he was using in another case at Mariakani Senior Resident Magistrate's Court in support of a different personal injury claim against the Respondent.

3. At the conclusion of the trial, the magistrate found the Appellant's claim unproved, dismissed it and ordered each party to meet own costs of the suit.

4. Through the memorandum of appeal dated 16th May, 2018, the Appellant seeks to upset the judgment of the trial court on 14 grounds which in summary allege that the trial magistrate failed to appropriately consider the evidence adduced and hence reached the wrong decision.

5. The Appellant testified as PW1 and told the trial Court that on 4th December, 2015 at 8.00am he reported to work at the Respondent's factory where his supervisor by the name Simiyu assigned him the duty of removing hot metals from a conveyor using tongs. In the process one of the metals lost direction pierced him on the right lower leg thereby burning him. One Rama gave him first aid and a day later he proceeded to Mazeras Dispensary where he received treatment. He showed the Court the treatment notes which were marked MFI-1.

6. After instructing an advocate, the advocate referred him to Dr. Adede who prepared a report and charged him Kshs. 2,000. He identified the medical report and the receipt and they were marked MFI-2 and MFI-3 respectively.

7. The Appellant blamed the company for the injury stating that he had not been supplied with safety boots. Further, that he could not have been injured if he had been supplied with such boots.

8. He stated that he had been injured several times and he had sued in respect of three incidents. His evidence was that in Mariakani Civil Case No. 307 of 2016 the injury occurred on 18th December, 2015 and involved the right leg.

9. His testimony was that the work attendance sheet of 4th December, 2015 had his name.

10. During cross-examination, the Appellant disclosed that he was employed on casual basis. He told the court that he narrated the circumstances of the injury and the supervisor recorded it. Further, that one Leonard was a witness and he could avail him if required.

11. The Appellant told the court that in a situation where a worker received a major injury the worker would be taken to Bomu Hospital but in his case he was given first aid by a first aider called Rama and told to go home. The Appellant was shown a statement of one Chiponda and he stated that the said Chiponda was on the night shift.

12. The Appellant confirmed that his name was on the attendance sheet and it showed that he worked for 10 hours with 2 hours being overtime. He clarified that he was not paid for 2 hours out of the 10 hours as he did not continue to work after the incident.

13. The Appellant stated that he paid Kshs.50 at the Dispensary and he was given a receipt. He confirmed that the treatment notes that had been marked did not have a casualty number. The Appellant further testified that the wound was supposed to be dressed and cleaned daily but he did not go back to the medical facility after the first visit.

14. According to the record the Appellant told the court that the treatment notes were fictitious. The Appellant showed 2 scars to the trial Court. He disclosed that he had done that particular assignment for ten years and knew that he needed to be careful as a metal could go in the wrong direction. He stated that sometimes they were given safety boots but they wore out after some time.

15. During re-examination by his counsel, the Appellant was shown the attendance list and in response to questions put to him he stated that his intended witness, Leonard, was number three on the attendance list and the supervisor called Leonard Simiyu Chiponda was in the night shift. Further, that the attendance list did not indicate the author of the same.

16. The Appellant told the court that they worked for 8 hours without a break from 8.00am to 4.00pm and any work done after that was treated as overtime. He stated that the last time they were given boots was three years prior to the accident.

17. Dr. Ajoni Adede testified as PW2 and stated that he examined the Appellant on 16th May, 2016 after he was injured at work. He found multiple scars of 2 x 2 cm. He also saw notes from Mazeras Dispensary. His observation was that the injuries had healed without permanent disability. PW2 stated that he was paid a fee of Kshs.2,000 and had been paid Kshs.7,000 to attend Court as a witness. He produced the medical report and the receipts as exhibits in the case.

18. Upon cross-examination, PW2 stated that from his experience the treatment notes were authentic. Further, that the scars will not disappear completely but would not affect the Appellant.

19. The Respondent called DW1 Charles Muinde Mutinda as a witness. His testimony was that he worked for the Respondent as a Legal Claims Officer and he was the custodian of the documents of workers injured at work. He stated that on 24th December, 2015 (the date reads 4th December, 2015 in the handwritten record of the trial court) the Appellant was not injured at work. He produced a work attendance sheet showing that the Appellant, whose name appeared as No. 4 on the list, worked for ten hours which included two hours of overtime on the material day.

20. The witness testified that the Appellant had also filed another claim vide Mariakani SRMCCC No. 307 of 2015 in which the plaint, the injuries allegedly sustained and the treatment notes were similar to those in the case that was being tried and they therefore suspected that the claim was fraudulent.

21. DW1 told the court that the applicable procedure in case of an injury was that the employee would report the incident to the supervisor who would take the employee to a first aider who would in turn escort the employee to Bomu Hospital for treatment. His testimony was that Chiponda was their first aider and Chiponda told him that no injury was reported on 4th December, 2015. He produced a statement recorded by Chiponda as an exhibit.

22. Cross-examined by counsel for the Appellant, the witness told the Court that his testimony was about information he had received from other people. The witness further told the Court that the Appellant was indeed at work on 4th December, 2015 and one Leonard was also on duty.

23. He stated that for minor injuries they did not take the injured to Bomu Hospital. He conceded that there was another first aider by the name Onduro and his statement was not in court.

24. The witness told the court that no entries had been made in the injury book in the months of October and December, 2015 although injured workers had made claims during those two months and some of the claims had even paid.

25. Re-examined, DW1 stated that those who received minor injuries were not taken to Bomu Hospital since they had qualified personnel and nurses within the company to treat such injuries.

26. The appeal was by the consent of the advocates for the parties disposed of through written submissions.

27. Through submissions dated 23rd January, 2019 counsel for the Appellant submitted on the findings on liability and quantum by the trial court. On liability, counsel for the Appellant submitted that it was erroneous for the trial Court to hold that failure by the Appellant to produce the treatment notes amounted to failure to establish his claim.

28. Counsel for the Appellant cited various decisions from this Court in support of the submission that failure to produce treatment notes is

not fatal to a plaintiff's case. The cases cited were **Timsales Limited v Elijah Macharia [2012] eKLR; Timsales Limited v Penina Achieng Omondi [2011] eKLR**; **Timsales Limited v Harun Thuo Ndungu [2010] eKLR**; and **Bigot Flowers (K) Limited v David Were [2016] eKLR.**

29. Counsel for the Appellant submitted that the trial magistrate had indeed faulted the defence case on various grounds thus leaving the Appellant's case unchallenged.

30. As to whether the Appellant had proved his case to the required standards, counsel submitted that in civil matters there is no legal provision that requires the plaintiff's testimony on how the accident occurred to be corroborated as submitted by the Respondent. Counsel cited the decision in the case of **Garton Limited v Nancy Njeri Nyoike [2016] eKLR** where the Court believed the testimony of the respondent observing that the other employees may have feared testifying against their employer for fear of reprisals which could include loss of employment. This Court was therefore urged to believe the Appellant's testimony as his co-workers feared reprisals that were likely to occur were they to testify against their employer. The Court was in the same breath urged to find the testimony of DW1 wanting in various aspects.

31. Still submitting on the issue of liability, counsel stated that the Respondent was 100% liable for the accident and faulted the trial magistrate's finding that he would have attributed 15% negligence to the Appellant had his claim succeeded. It was submitted for the Appellant that he had no control of the movement of the hot metal on the conveyer belt which was operated by a machine operator and he could not hold the hot metal to stop it from burning him since he was not provided with safety apparels.

32. Counsel further submitted that the Respondent was under a statutory obligation to provide a safe working environment for the Appellant. He relied on the decisions in **Mamboleo v Textiles [1998] eKLR** and **Kennedy Mutinda Nzioka v Basco Products (Kenya) Ltd [2013] eKLR** in support of the submission that the Respondent was 100 % to blame for the accident.

33. As for the proposed general damages of Kshs.130,000, counsel submitted that the same was inordinately low. Relying on the decision in **Devki Steel Mills Limited v Thaikou Mwakha Okutoyi [2017] eKLR** where Kshs. 180,000 was awarded for similar injuries, counsel urged this Court to award the Appellant Kshs. 500,000. The Appellant closed his case by urging the Court to allow the appeal and award him costs.

34. For the Respondent it was urged that this Court should not overturn the decision of the trial Court. Counsel for the Respondent submitted that the trial magistrate was correct in reaching the decision that the Appellant had not proved his case to the required standards.

35. Counsel urged the Court to uphold the trial magistrate's reliance on the decision of **Timsales v Wilson Lubwa [2008] eKLR** for the principle that failure to produce the treatment notes was fatal to the Appellant's case.

36. Counsel for the Respondent cited the decisions in **Peter Migro v Valley Bakery Limited [2015] eKLR; Eastern Produce (K) Ltd v James Kipketer Ngetich, Eldoret HCCA No. 85 of 2002**; and **Kibirigo Tea Factory v James Mongare Mira, Kisii HCCA No. 29 of 2009** as upholding the requirement by a plaintiff to produce the treatment notes in support of his/her case. It is therefore urged for the Respondent that the Appellant's failure to produce the initial treatment notes was fatal to his case and the trial magistrate was right to dismiss the case.

37. Turning to the failure by the Appellant to call an eyewitness to corroborate his evidence, counsel for the Respondent submitted that the trial magistrate was correct in finding that the Appellant's allegations were not corroborated. The decisions in **Nandi Tea Estates Ltd v Eunice Jackson Were, Eldoret HCCA No. 66 of 2004,** and **Kebirigo Tea Factory v James Mongare Mira, Kisii HCCA No. 29 of 2009** are cited as conveying the principle that a plaintiff is required to corroborate his evidence.

38. It is the Respondent's case that it had rebutted the Appellant's case through the evidence of DW1 and the exhibits produced and the trial magistrate therefore arrived at the correct decision in dismissing the Appellant's case.

39. The Respondent urged the Court to find that the proposed award of Kshs.130,000 was fair considering the awards made for similar injuries in decided authorities. The case of **Ogembo Tea Factory Company Ltd v Gladys Kwamboka Itira, Kisii HCCA No. 78 of 2006** where the plaintiff was awarded Kshs. 80,000 for chemical burns was cited in support of the proposal.

40. Counsel for the Respondent submitted that the Appellant had not demonstrated that the proposed award was arrived at on account of consideration of irrelevant matters or failure to consider relevant matters or that the same was so inordinately low to warrant interference by this Court in its appellate jurisdiction.

41. In conclusion, counsel for the Respondent urged the Court to disregard the submissions of the Appellant and dismiss the appeal.

42. A first appeal is a retrial. The appellate court is required to reassess, reanalyze and reevaluate the evidence in order to arrive at its own independent decision. In doing so, the first appellate court is required to take into account the fact that, unlike the trial court, it did not have the opportunity of observing the demeanour of the witnesses as they testified. The appellate court should accordingly give due allowance to this fact.

43. These principles were stated by the Court of Appeal in the case of the **Association for the Physically Disabled of Kenya v Kenya Union of Domestic Hotels Educational Hospital and Allied Workers Union & another [2018] eKLR; Civil Appeal No. 116 of 2016 (Mombasa)** in the following words:-

> **"[10] This is a first appeal, it is therefore the duty of this Court imposed by law to evaluate afresh by way of a retrial the**

evidence recorded before the trial court in order for it to reach its own independent conclusion. (See **Selle v. Associated Motor Boat Co. Ltd (1968) EA 123) Selle and Another v. Associated Motor Boat Company Ltd And Others**, **[1968] 1 EA 123 (CAZ):**

"An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this 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 though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v. Ali Mohamed Sholan, (1955), 22 E.A.C.A. 270).""

44. That is the onus I set out to discharge in this appeal. Upon perusal of the submissions made by the parties in this matter, it is apparent that the issue for the determination of this court is whether the Appellant proved his case to the required standards.

45. In deciding whether a plaintiff has proved his case on a balance of probabilities, the court must weigh both the evidence of the plaintiff and the defendant in order to arrive at its decision. In other words, the winning party must show by a preponderance of the evidence that its case is more credible and convincing than that presented by the losing party.

46. Even though the advocates submitted at length on the implication of the failure by the Appellant to produce the treatment notes, I do not think that it is necessary for this Court to tackle the issue as to whether failure by a plaintiff to produce treatment notes is fatal to his/her case. The question for the decision of this Court is whether considering the evidence adduced by the Appellant, it was necessary for him to produce the treatment notes in order to boost his case.

47. Throughout the trial, the Respondent's defence was that the Appellant's claim was fraudulent as he was relying on the treatment notes he was using in another personal injury claim he had filed against the Respondent. The Appellant insisted that he was injured on the material day. A critical look at the testimony of the Appellant leaves some gaps which could only be filled by the calling of other witnesses and the production of the treatment notes.

48. A perusal of the court record shows that on 1st November, 2016, when the parties appeared for the pre-trial conference, counsel for the Respondent told the Court that they wanted the authors of the treatment notes and the medical report to testify. The trial magistrate directed the Appellant to avail the makers of the documents as witnesses. When the Appellant testified, the treatment notes were marked as MFI-1. The document was not produced as an exhibit and no reason was given as to why the author of the same was not called as a witness.

49. DW1 told the court that they only referred serious injuries to Bomu Hospital but minor injuries were treated by the nurses within the Respondent's premises. In light of DW1's testimony, failure by the Appellant to avail the maker of the treatment notes from Mazeras Dispensary cast doubts on the authenticity of the treatment notes. This in turn raised questions about the genuineness of the Appellant's claim.

50. The evidence of PW2 could not be of any help to the Appellant in the circumstances of this case. PW2 saw the Appellant some months after the incident. His testimony was that he saw some scars. There is the possibility that those scars were as a result of the injuries allegedly sustained by the Appellant on 18th December, 2015.

51. The Respondent's assertion that the Appellant's claim was fraudulent was not without basis. In the plaint dated 18th July, 2016 and filed in Court on 19th July, 2016 in Mariakani SRM Court Civil Suit No. 300 of 2016 it was pleaded at paragraph 5 as follows:-

"That on or about 4th December 2015 the plaintiff was lawfully and carefully in the course of his employment with the company as a casual labourer at the company premises and while instructed by his supervisor to remove hot metals on the conveyer belt using scissor/tongs, a hot metal missed the normal conveyor belt hitting and burning his right leg as a direct result whereof the plaintiff sustained serious injury, loss and damage."

52. In the plaint dated the same date and filed the same day in the same Court in Civil Suit No. 307 of 2016 it was pleaded at paragraph 5 as follows:-

"That an or about 18th December 2015 the plaintiff was lawfully and carefully in the cause of employment with the company as a casual labourer at the company premises and while instructed by his supervisor to remove hot metals from the conveyor belt using tongs, a hot metal missed the conveyor belt hitting and burning his right leg as a direct result whereof the plaintiff sustained serious injury, loss and damage."

53. The similarities in the manner in which the two incidents occured leaves a lot of question marks. The Appellant had in his testimony told the court that he would avail an eyewitness by the name Leonard who saw him sustain the injury. The witness was not availed and there was no reason given as to why the witness was not called. The claim, through the written submissions, that the witness could have chicken out because of fear of reprisals from the employer cannot aid the Respondent's case. There is no evidence on record to show that there was any attempt to secure the attendance of the witness. The maker of the treatment notes was also not called as a witness. These omissions raised doubts about the Appellant's case.

54. The Respondent's witness produced an attendance sheet showing that the Appellant worked the whole day and even did overtime for two hours. The Appellant did not state at what time he sustained the alleged injury. He claimed that he did not work overtime due to the injury but that is only his word against a document presumably prepared in the ordinary course of business. The fact that the attendance sheet is

normally generated by the employer does not make it a doctored document unless evidence of interference with the document is placed before the Court.

55. Although the document containing the treatment notes was not formally produced as evidence, the same was part of the Appellant's exhibits. The stamp on the Mazeras Dispensary out-patient record has the date of 4th December, 2015 meaning that the Appellant was seen on the date of the alleged accident. This contradicts the Appellant's evidence-in-chief that he went to the dispensary a day after the incident.

56. Considering the evidence that was adduced at the trial, I reach the same conclusion with the trial Court that the Appellant did not sustain any injury while working for the Respondent on 4th December, 2015.

57. As for the proposed award of Kshs.130,000 I find the same reasonable. PW2 told the Court that the Appellant had fully healed. The trial magistrate gave reasons as to why the award was appropriate in the circumstances of the case. It has not been shown that he took into account irrelevant factors or failed to take into account relevant factors or that the proposed award was inordinately low that he must have acted on the wrong principles.

58. The outcome is that this appeal is without merit. It is therefore dismissed with costs to the Respondent.

Dated and Signed at Nairobi this 24nd day of April, 2019

W. Korir,

Judge of the High Court

Dated, Countersigned and Delivered at Malindi 23rd day of July, 2019

R. Nyakundi,

Judge of the High Court