



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**CIVIL APPEAL NO 3 OF 2013**

**PATRICK LUTOMIA.....APPELLANT**

**VERSUS**

**CHETAMBE JAGGERY.....RESPONDENT**

[An appeal from the judgment and decree of in original Webuye PMCC NO.29 of 2012 delivered on 9.01.2013 by Hon E.C.CHERONO - SPM]

**JUDGEMENT**

The appellant has moved this court on appeal seeking to have judgment and orders of Senior Principal Magistrate at Webuye in civil suit number 29 of 2012 be set aside with costs and appellant be awarded damages resulting from injuries he sustained.

The background of this appeal is that by plaint, the Plaintiff herein the appellant in this appeal sued the Respondent and seeking general damages for pain and suffering and loss of amenities, special damages incidental, cost and interest. The basis of the claim in paragraph 4 of the plaint was that it was expressed term of the employment between plaintiff and Defendant that the defendant would take all reasonable measures to ensure plaintiff against any to risk/or damage that defendant ought to have known and to take all reasonable measures to ensure that workplace in which the plaintiff carries out his duty was safe for workers, plaintiff in particular. The Respondent/Defendant entered appearance and subsequently did file his statement of defence dated 18<sup>th</sup> April 2012 denying the Plaintiff's claim. Both parties were heard and Plaintiff called one witness who is Plaintiff/Appellant herein and Defendant called on witness who is a supervisor at Defendant's company. The judgment was delivered on 9/01/2013 dismissing the plaintiff suit.

The appellant being dissatisfied with the judgement then filed this appeal on the following grounds:

- i. That the learned trial magistrate erred in law and fact by finding that the appellant had failed to prove his case against respondent on liability and negligence notwithstanding his appreciation that the appellant sustained injuries resulting from an accident while in the cause of his employment.**
- ii. That learned trial magistrate failed to appreciate the evidence rendered that the appellant was injured while on duty and the respondent was clothed with statutory, contractual and common law duty of care towards the appellant which it failed to discharge under the circumstance.**
- iii. That the learned magistrate erred in law and fact by holding that the appellant did not show why he alone was injured and not other seven people he was assigned duties with shifting the Appellants burden of proof to extraneous matter outside the Appellant's case.**
- iv. THAT the judgement and/or decision of the learned trial magistrate is contrary to the weight of the evidence on record and arrived at a wrong decision.**
- v. That the learned magistrate erred in law and fact by failing to assess the damages he would have awarded had the appellant succeeded.**

The evidence before the trial court was that PW1 Patrick Lutomia testified that he used to work with Chetambe Jiggery for 4 years and that on 3.8.2011 while working he was assigned to carry metal bars and one of the metals hit him on the right leg and he got fractured. was taken to Webuye District Hospital for treatment and he has not healed. He produced treatment notes as P-MF1.1 and medical report as P-MF1.2. On cross examination he testified that he used to work at Makanda section which has metal bars.

The defence testified through DW1 Michael Wanjala Katamu and he testified that he is supervisor at Chetambe jiggery and that on the 3.8.2011 he was on duty and plaintiff was working at the Makanda section and there about eight people who were assigned to carry the metal bar and the metal bar fell on the right leg of plaintiff and he took him to Webuye District Hospital and they advised plaintiff and he stated that the company was to be blamed to some extent and company was meeting his expenses.

By consent of the parties and court directions, this appeal was canvassed by way of written submissions. Mr. Kwayumbi for the appellant submits that the learned trial magistrate erred in law and fact by finding that the appellant had failed to prove his case against the respondent on liability and negligence notwithstanding his application that he sustained injuries from an accident while in the course of duty. He submitted the magistrate problem was that why was he the only one injured while on duty among the 8 people. He submitted that had the respondent exercised his duty well and allow appellant work in a safe environment the metal bar would not have slipped from one of the other employees thereby causing injuries to him. He submitted that the court had duty to ascertain the extend of liability the respondent as duty bound to shoulder.

The Respondent advocate Mr. Kalya submitted that the magistrate was right in finding as appellant failed to prove his case on liability and negligence and the same was arrived at on evidence tendered by both parties. He submitted on liability that he who alleges must prove stating supporting authority of *Simon Mumo Malonza Vs British American Tobacco(K) Ltd Nairobi HCCA No.633 of 2002* among others.

He submitted that the employer owes no absolute duty of the employee and the only duty owed is that of reasonable care against risk of injury caused by events foreseeable. He finally submitted that the appellant has not proved his case on a balance of probabilities and did not prove any breach of duty on the part of respondent and trial court was right in dismissing the Plaintiff/Appellant suit.

I have carefully considered the evidence adduced and as analyzed by the trial court in the judgment. I have also considered the submissions made before this court by the appellant and the respondent taking into account all the decisions relied on. In my view, the issues for determination in this appeal is whether the learned magistrate erred in law and fact in failing to find liability and negligence on part of the Respondent in the Applicant's claim.

The appellant evidence in the trial court was brief and he stated that he used to work with Chetambe Jiggery for 4 years and that on 3.8.2011 while working he was assigned to carry metal bars and one of the metals hit him on the right leg and he got fractured. He was taken to Webuye District Hospital for treatment and he has not healed. He produced treatment notes as P-MF1.1 and medical report as P-MF1.2.

On being cross examined by M/s Maina for the respondent he stated that there were 7 people carrying the metal bar On cross examination he testified that he used to work at Makanda section which has metal bars and it became too heavy and fell on him. The learned trial magistrate in his judgement stated;

***“I agree with the wisdom of the judges of the court of appeal in the above decisions. The plaintiff has stated that he was assigned with other employees numbering about eight to carry metal bars. The Plaintiff has not shown why he alone got injured and not the other seven(7) employees. The plaintiff has also failed to demonstrate that the accident he sustained was foreseeable and what the defendant company ought to have reasonably done to avoid the occurrence of the alleged accident. I wish to reiterate that our law has not yet reached a stage of liability without fault. I find the plaintiff has failed to prove any sort of negligence against the defendant to warrant this court held it liable. In the result and with a deep heart I dismiss this suit for want of negligence”.***

A plaintiff who seeks the court to find in favour of him on a claim premised on negligence must not only plead the particulars of negligence but also give evidence to prove the same.

In Kiboswa Tea Estate Vs. Alfred Juma Bilauni C.A No.302/2000 the court of appeal stated;

***“It is not sufficient for a plaintiff to rely solely on the fact that he is employed by defendant .....for Plaintiff to succeed against his employer in establishing negligence or some breach of contract, it is necessary for the plaintiff to adduce evidence as to what happened unless it is a case where res Ipsa loquistic applies there is still as yet no liability without fault in law”.***

From evidence of the appellant in court reproduce above, he does not state how the respondent was negligent or does not show what was not done by the respondent and how accident happened. In the absence of such evidence I find that there was no basis upon which the trial magistrate would find the Respondent liable. I therefore do not find any merit in this appeal and dismiss the same. Each party to bear its own costs.

**Dated and Delivered at BUNGOMA 22<sup>nd</sup> this day of July, 2019.**

**S.N.RIECHI**

**JUDGE**