



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

CIVIL APPEAL NO. 592 OF 2013

(CORAM: F. GIKONYO J.)

SIMON NGUGI MACHARIA.....APPELLANT

Versus

STEEL STRUCTURES LIMITED.....RESPONDENT

(Being an appeal from the judgment of Hon. F. W. Andayi, SPM, delivered on 18th October 2013 in Nairobi CMCCC No. 563 of 2011)

JUDGMENT

1. This appeal arises from Civil Suit no. 563 of 2011 filed by the appellant against the respondent seeking General damages and special damages for injuries sustained on 20/8/2008. The trial court in the judgment delivered on 18/10/2013 dismissed the suit for reason that liability against the defendant had not been established.
2. The appellant being dissatisfied with the said judgment filed this appeal against the judgment of the trial magistrate on the grounds that;
 - a. The learned magistrate erred in law and in fact in dismissing the appellants case**
 - b. The learned magistrate erred in law and in fact in finding that the appellant had not discharged his evidential burden of proving liability**
 - c. The learned magistrate erred in law and in fact in his assessment of quantum of damages at Ksh. 80,000/= a figure that is manifestly low.**
3. The appellant prays that the judgment delivered on 18th October 2013 be set aside and substituted with a judgment on liability, general and special damages as well as costs for the suit

Facts

4. The facts of the case are that the appellant herein was an employee of the defendant. On 20/8/2008 the appellant was working at the Respondent's workshop cutting metal rods using a machine when the metal rod slid and squeezed his hand to the cutting edge of the cutting machine injuring him. The appellant was of the view that the Respondent is liable for the accident for negligence and/or breach of statutory duty or commercial obligations towards him.
5. The respondent on only admitted the fact that the accident occurred but denied allegations of negligence or breach of statutory or contractual duty.
6. The Appellant gave evidence and called one witness Dr. Theophilus Wangata while the Respondent did not call any witnesses at the hearing.

Submissions

7. This appeal was canvassed through written submissions where the appellants argued that liability is a matter of fact and the appellant gave his testimony in the trial to the effect that his supervisor on the day of the accident asked him to solely work on a machine which required two people to operate. It was argued further that, although the appellant had been issued with protective gear, it did not prevent him from being injured. He also relied on the fact that the respondent did not call any witnesses to rebut the appellant's evidence.

8. On damages, the appellant submitted that the trial magistrate applied the wrong principles in awarding damages and awarded a low amount. He referred to the medical report by Dr. Theophilus Wangata which indicated that the appellant suffered a deep cut wound in the left finger and blood loss, physical and psychological pains. Based on these findings, the Appellant proposed an award of Kshs. 250,000 as adequate compensate for pain and suffering considering the high cost of living, change in value of money and passage of time

9. The respondents argued that from the evidence on record it is very clear that the appellant is a negligent worker. They submitted that his only contention was that two people were supposed to work with the machine, yet he did not plead this allegation in his plaint and chose to blame his advocate for failing to plead it. In addition, the Respondent stated that there is nothing the respondent could have done to prevent the unreasonable and reckless act of the appellant. In support they quoted **Wilson NyanyuMusingi v. Sasini Tea & coffee Ltd KerichoHC Appeal No. 15 of 2003**

ANALYSIS AND DETERMINATION

10. This being a first appeal, I am bound to examine the evidence, the facts and the applicable law on the subject and draw my own conclusions from that analysis; except bearing in mind that this court did not hear the witnesses on their evidence or observe their demeanor. See **Selle & Another v Associated Motor Board Company Ltd [1968] EA 123.**

Liability

11. The appellant bears the burden of proof. He ought to prove on a balance of probabilities that the Respondent was negligent or breached a statutory duty or contractual duty as a result of which he was injured. See ***Halsbury's Laws Of England, 4th Edition at paragraph 662 at page 476*** that:-

“The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal connection must be established.”

12. See also ***Winfield and Jolowicz on Tort, Seventeenth Edition*** where the nature of an employer's duty is explained in detail in paragraphs 8-10 to 8-14 at pages 376 to 382. These readings convey that the duty to take reasonable care so to carry on operations as not to subject persons employed to unnecessary risk, and this includes the duty to provide competent staff, adequate plant and equipment, a safe place of work and a safe system of working.

13. The essentials of an action for breach of statutory duty are also stated in ***Clerk & Lindsell on Torts, Eighteenth Edition at paragraph 11-04 page 600*** as follows:

“1. The claimant must show that the damage he suffered falls within the ambit of the statute, namely that it was of the type that the legislation was intended to prevent and that the claimant belonged to the category of persons that the statute was intended to protect. It is not sufficiently simply that the loss would not have occurred if the defendant had complied with terms of the statute. This rule performs a function similar to that of remoteness of damage.

2. It must be proved that the statutory duty was breached. The standard of liability varies considerably with the wording of the statute, ranging from liability in negligence to strict liability.

3. As with other torts, the claimant must prove that the breach of statutory duty caused his loss, which he will fail to do if the damage caused his loss, which he will fail to do if the damage would have occurred in any event.

4. Finally, there is the question whether there are any defences available to the action.”

14. The relevant statute in Kenya on employer's statutory duty of ensuring safety at the workplace is the Occupational Safety and Health Act (Chapter 514 of the Laws of Kenya). See application of the Act as stated in section 3:

“(1) This Act shall apply to all workplaces where any person is at work, whether temporarily or permanently.

(2) The purpose of this Act is to—

(a) secure the safety, health and welfare of persons at work; and

(b) protect persons other than persons at work against risks to safety and health arising out of, or in connection with, the activities of persons at work.”

15. Section 6 and 13 of the said Act sets out the employer's as well as employee's obligations. These two sections were considered by the Court of Appeal sitting in Nyeri in the case of ***Purity Wambui Murithii v Highlands Mineral Water Co. Ltd, [2015] eKLR*** where it stated as follows:

“Section 6(1) of the Occupational Safety and Health Act provides:-

“Every occupier (employer) shall ensure the safety, health and welfare at work of all persons working in his workplace.”

It, therefore, follows that as a general rule the employer is liable for any injury or loss that occurs to his employees while at the workplace as a result of the employer’s failure to ensure their safety. Does this mean that the employer would always be liable in all circumstances regardless of what caused the accident in question? We do not think so. We say so because where an accident happens due to the employees own negligence it would be unfair to hold the employer liable. Further Section 13(1)(a) of the Occupational Safety and Health Act provides:-

“13(1) Every employee shall, while at the workplace –

(a) ensure his own safety and health and that of other persons who may be affected by his acts or omissions at the workplace.

Therefore, the employee is also required to take reasonable precaution to ensure his/her safety at the workplace while performing his/her duties.”

16. Did the Appellant prove negligence or breach of statutory duty or contractual obligation on the part of the Respondent to the required standard? Or is this a case of author of own misfortune? The appellant admitted that the respondent provided the workers with protective gear. He was also provided with protective gear. His quarrel however was that on the day the accident occurred he operated a cutting machine alone, yet, the machine was meant to be operated by two people. It was argued by the Respondent that this allegation was not pleaded as one of the particulars of negligence or breach of statutory duty or contractual duty. That notwithstanding, from his own evidence, the appellant knew that the machine he claims he was operating alone at the material time ought to be operated by two people. He must therefore have been aware of the dangers involved in operating the machine alone as well as the high likelihood of being injured in the circumstances. He owed himself a duty of care for his own safety which included refusing to work alone on such machine or filing a protest with the supervisor or asking for another person to work with him on the machine. If the machine was supposed to be operated by two people, one wonders why he did not tell the court why on the material day the machine was assigned to only him. He did not also tell the court whether in some instances the said machine was operated or had been operated by a single individual and why. He did not even claim that it was the practice of the company to assign or force a single individual to operate the particular machine which should be operated by two persons. To say the least, he did not substantiate these issues which are important in a claim for negligence or breach of statutory duty by an employer; he left everything to obscurity. Thus, the Appellant did not prove that he alone was assigned to work on a machine that should be operated by two people or any negligence or breach of duty or contractual obligation on the part of the Respondent as a result of which he was injured.

17. But before I close, I should set the law straight. The Appellant seems to suggest in his submissions that his case should succeed because the respondent did not call any witnesses to rebut the appellant’s evidence. The law, the way I understand it, is that the plaintiff’s case does not succeed because the defendant did not call any witness or adduce any evidence. The plaintiff’s case succeeds because he has proved his case on a balance of probabilities. This is his legal burden of proof. In any case, there is no evidential burden which was raised upon or shifted to the Respondent for no prima facie case that has been established against the Respondent such that the Respondent would fail if no further evidence is called by him. Nothing of the measure of prima facie case has been established by the Appellant against the Respondent in this case.

18. In the upshot, I find this appeal to lack merit and is dismissed. Each party to bear its own costs.

Dated and signed at Meru this 7th day of November 2019

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F. GIKONYO

JUDGE

Dated, signed and delivered in open court at Nairobi this day 13th of November, 2019

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L. NJUGUNA

JUDGE