REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 649 OF 2009

MORRIS MUNYASYA KITENGE ..... APPELLANT

VERSUS

BATA SHOE COMPANY LIMITED ..... RESPONDENT

(Being an appeal from the judgment of Hon. Murage (SPM) delivered on 22nd October 2009 in SPMCC No. 441 of 2004)

JUDGMENT

1. This appeal challenges the judgment of *Hon. Murage* (SPM) delivered on 22nd October 2009 in which she dismissed the appellant's suit with costs.

2. In the suit which gave rise to the impugned judgment, the appellant, *Morris Munyasya Kitenge* had sued the respondent his then employer seeking general and special damages as compensation for injuries sustained in an accident which occurred on 1st December 2001 in the respondent's premises in the course of his employment.

3. It was the appellant's case that the accident occurred as a result of the respondent's, its servants or agents negligence, breach of statutory duty or terms of his employment. The particulars of the respondent's negligence were pleaded in paragraph 5 of the plaint.

4. In its amended statement of defence dated 6th April 2006, the respondent admitted the occurrence of the accident and that the appellant was its employee at the material time but denied that the accident was caused by its agent's negligence or breach of statutory duty and put the plaintiff to strict proof thereof. The respondent asserted that the accident was caused or substantially contributed to by the negligence of the appellant. The particulars of the appellant's alleged negligence were pleaded in paragraph 6A of the amended defence.

5. After a full trial, the learned trial magistrate, as stated earlier, found that the appellant had not proved his case against the respondent to the standard required by the law and dismissed his claim with costs. The appellant was dissatisfied with the trial court's decision hence this appeal.

6. In his memorandum of appeal dated 18th November 2009, the appellant faulted the trial court's judgment on eight grounds which can be condensed into three main grounds as follows:

> *i. That the learned trial magistrate erred in law and fact in failing to properly appreciate the evidence on record and in finding that the appellant had failed to prove his claim against the respondent on a balance of probabilities.*
>
> *ii. That the award of damages which the trial magistrate indicated the appellant would have been entitled to had his claim succeeded was too low.*
>
> *iii. That the learned trial magistrate erred in her finding that the appellant had been adequately compensated through the Workmen Compensation Act.*

7. When the appeal came up for hearing, both parties consented to having it prosecuted by way of written submissions which they duly filed. The submissions were highlighted before me on 29th September 2019.

8. This is a first appeal to the High Court. It is therefore an appeal on both facts and the law. It is settled law that an appellate court is not bound to follow the findings of fact made by the trial court. Its duty as succinctly stated by the Court of Appeal in ***Selle & Another V Associated Motor Boat Company Limited, [1968] EA 123*** is to:

> ***"…. 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…."

9. Though an appellate court has power to interfere with findings of fact made by the trial court, this jurisdiction must be exercised with caution and in limited circumstances. The law is that an appellate court can only disturb the trial court's findings of fact if it is satisfied that the finding was not based on any evidence or that it was based on a misrepresentation of the evidence or on the wrong legal principles. See: ***Makube V Nyamoro [1983] KLR 403; Kiruga V Kiruga & Another, [1988] KLR 348***.

10. The rationale for the above principle was adequately captured in ***Peters V Sunday Post Limited, [1958] EA 424*** where the predecessor to our Court of Appeal stated as follows:

> ***"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."***

11. I have carefully considered the grounds of appeal, the parties' rival submissions as well as the evidence on record. I have also read the judgment of the trial court.

12. Given that the respondent had admitted that the appellant was injured in an accident in the course of his employment, I find that the key issue that arises for my determination is whether the learned trial magistrate erred in her finding that the appellant failed to prove on a balance of probabilities that the accident in which he was injured was caused by the respondent's or its agent's negligence or breach of statutory duty.

13. In his evidence, the appellant testified that on 1st December 2001, he was working on a bumper mixer machine feeding it with rubber spews when some of the rubber spews entangled his leg and pulled it into the machine; that the machine hammer crushed his leg when it was released suddenly but it finally moved up when he pressed the button. He blamed the accident on defects in the hammer and slippery floor due to oil spill.

14. His witness, PW2 testified that he was also on duty on the material day when he heard the appellant's machine go off. He went to check on him and found him on the floor with rubber spews around his foot. He did not witness how the accident occurred but he supported PW1's evidence that the floor was slippery due to oil spill.

15. To counter the appellant's case, the respondent called two witnesses. DWI and DW2 described in detail the machine the appellant had been working with and testified that given its mode of operation, it was impossible for the plaintiff to be injured on the leg unless he deliberately inserted his leg into the machine. They testified that the machine was hand operated and it was raised on a platform which was about 3 to 6 feet from the floor. Further, they stated that the appellant's working area was made of roughened steel which was meant to prevent skidding.

16. It was DW1 and DW2's further evidence that the appellant's work was to load by hand rubber spews and other substances into the machine for them to be crushed to make sheets of rubber; that the rubber spews were put in sacks and were about $1\,^1/_2$ to 3 feet long and in terms of texture, the spews were so weak that they could be cut by hand; that due to their nature, the spews were not strong enough to pull or drag a leg; that the machine had a door which was closed before the machine could start working which was 3 feet away from the point at which the appellant operated the machine and that once that door was closed, it was impossible for his foot to go into the machine; that for his leg to be crushed, he had to put it inside the machine and then switch it on.

17. In addition, the defence witnesses denied the appellant's claim that the machine was defective or that the respondent was responsible for the appellant's injury. DW2 who was the appellant's supervisor testified that besides the raised platform on which the machine was placed which was about six metres high, the machine itself was about 12 feet high. He confirmed the appellant's evidence that he had been issued with gumboots and that he had worn them when the accident occurred.

18. In dismissing the appellant's suit, the learned trial magistrate reasoned as follows:

> ***"I have considered the evidence on its entirety I find that the evidence of the plaintiff does not support the particulars pleaded in the plaint. Plaintiff never pleaded the machine was defective and neither did he plead that the floor was slippery due to oil spill. This evidence was only raised during the hearing. The spews he alleged entangled his leg and pulled it to the chamber were never pleaded in the plaint. The machine was raised high on a platform and it was hand operated. The plaintiffs evidence on how it landed there is not possible unless he deliberately raised it up.. plaintiff was bound by his pleading and could not prove what he had not pleaded. All in all I find that he has not proved his case on a balance of probability. He appears to be the author of his misfortunes and was well compensated under the workmen's compensation act. Consequently I dismiss this suit with costs."***

19. After my assessment of the pleadings and the evidence on record, I find that although the appellant did not specifically plead in his amended plaint that the accident occurred because the machine he had been assigned to work with was defective or that the floor surface was slippery due to oil spills or that the rubber spews entangled his leg causing the accident, it is my view that failure to specify those details was not fatal to the plaintiff's case. *Order 2 Rule 3* of the *Civil Procedure Rules* makes it clear that pleadings should contain only brief statements of facts on which a party relies on in his claim or defence and not the evidence required to prove those facts.

20. In any case, the particulars regarding the respondent's alleged negligence pleaded in paragraph 5 of the amended plaint attributed

causation of the accident to the respondent's failure to *inter alia* take adequate protection for the safety of the appellant while at his place of work or exposing him to the risk of damage or injury which it knew or ought to have known and failure to maintain a suitable system of work all which incorporated the appellant's claims in his evidence that the respondent allegedly allowed him to work with a defective machine and on a floor surface which was slippery. The learned trial magistrate therefore erred in her finding that the appellant's pleadings were not supported by the evidence he presented in court.

21. It is however instructive to note that the alleged deficiency in the appellant's pleadings was not the only reason which informed the trial court's decision to dismiss the appellant's suit. The trial magistrate carefully evaluated the evidence adduced by both the appellant and the respondent and concluded that given the evidence regarding the mode of operation of the machine and the height at which it operated from, the accident could not have occurred in the manner described by the appellant; that it could only have occurred if the appellant deliberately raised his leg and put it inside the machine and that therefore the appellant was the author of his misfortune.

22. Given the evidence adduced by DW2 on the texture of the rubber spews which the appellant was supposed to load into the machine by hand and the description of the raised platform on which the machine sat as well as the height of the machine itself, which evidence was not challenged or disputed by the appellant, I am unable to fault the above findings by the learned trial magistrate. I find that her decision that the appellant had failed to prove on a balance of probabilities that the accident was caused by the respondents or its agent's negligence was based on the evidence on record and was sound in law.

23. Although there was evidence to show that the appellant was compensated under the Workmen Compensation Act (the Act), whether or not the compensation was sufficient was not an issue for consideration before the trial court and the trial magistrate's apparent off the cuff remark that the appellant had been sufficiently compensated under the Act is neither here nor there since it had no bearing on her finding on liability.

24. In view of the foregoing, I am satisfied that the learned trial magistrate was right in her finding on liability and the same is hereby upheld. Having upheld the trial court's finding on liability, I find that it would be unnecessary for me to enquire into the appellant's complaint regarding the sufficiency or otherwise of the amount the trial court assessed as damages that would have been payable to him had he succeeded in his suit.

25. For all the foregoing reasons, I have come to the conclusion that this appeal lacks merit and it is hereby dismissed with costs.

It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI this 5th day of December, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Maina holding brief for Mr. Ambani for the appellant

No appearance for the respondent

Mr. Salach: Court Assistant