REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 47 OF 2016

EMMANUEL CHILIBA ARAKA..............................APPELLANT

VERSUS

DEVIR INDUSTRIES LIMITED...........................RESPONDENT

(Being an appeal from the judgment and decree of the Principal

Magistrate's Court at Kikuyu (Hon. D. Musyoka) delivered

on 30/08/2016in Kikuyu PMCC No. 22 of 2015)

JUDGMENT

1. The Appellant in this Appeal is Emmanuel Chiliba Araka. He filed a Plaint in the Magistrate's Court at Kikuyu in Civil Case No. 22 of 2015 suing the Appellant for general and special damages for injuries he claimed he suffered while in the course of employment at the Respondent's premises.

2. The Appellant's claim was straightforward. He claimed that he was employed by the Respondent. On 06/11/2014, he alleged, he was at work when he was asked to open up the grinder machine which had broken down. This was so that the machine could be repaired. As he was so opening the grinder machine, the Appellant claimed that the tight belt attached to the machine injured his left index finger. He says he sustained a deep cut wound on that finger and lost his finger nail.

3. The Respondent filed a Defence in the Lower Court. In it, it admitted that the Appellant was, indeed, its employee and was at work on 06/11/2014 assigned to duties as a sweeper. The Respondent denied that the Appellant was in any way injured on that day or on any other day while at work. Indeed, the Respondent claimed that the Appellant did not report any such injury to his Supervisor or any senior at work, and that he continued working throughout the day and the next few days.

4. The suit went to hearing. The Appellant testified on his own behalf and called a doctor to testify on his behalf. The Respondent sent one witness – the Supervisor – to testify. At the conclusion of the case, the Learned Trial Magistrate dismissed the suit in its entirety. In pertinent part, the Learned Trial Magistrate stated as follows:

> *The evidence adduced in this case shows that the defendant used to give its employees including the plaintiff herein protective gear including the particular gloves. It is not clear why the Plaintiff chose to go to a hospital outside the recommended medical facility that the defendant refers its employees. From the medical receipts produced who an event that four days to be addressed. This is not conduct of a person who was injured in his environment where there are supervisors. I do not belief (sic) the story of the plaintiff and for that reason, I do hereby dismiss his case but with no order as to costs*.

5. The Appellant is aggrieved by this decision and has appealed. He has stated two grounds of appeal:

> *1) THAT the Learned Magistrate erred in law and in fact by holding that the Appellant failed to prove negligence on the part of the Respondent.*
>
> *2) THAT the Learned Magistrate erred in law and in fact by holding that the Appellant was 100% liable for an injury that took place at the Respondent's premises while in the ordinary course of his employment*.

6. As a first appellate court, this Court's duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the court

in a first appeal such as this one was stated in ***Selle & another –vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123*** in the following terms:

> *I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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 Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270**).*

7. This same position had been taken by the Court of Appeal for East Africa in ***Peters –vs- Sunday Post Limited [1958] EA 424*** where Sir Kenneth O'Connor 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. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt –vs- Thomas (1), [1947] A.C. 484.*

> *"My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."*

8. The appropriate standard of review established in these cases can be stated in three complementary principles:

> 1) First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
>
> 2) In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
>
> 3) It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

9. These three principles are well settled and are derived from various binding and persuasive authorities including ***Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No. 172 of 2000***: Tunoi, Bosire and Owuor JJA); ***Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another*** (Civil Appeal No. 345 of 2000: O'Kubasu, Githinji and Waki JJA); ***Virani T/A Kisumu Beach Resourt v Phoenix of East Africa Assurance Co. Ltd*** (Kisumu High Court CC No. 88 of 2002).

10. I will, presently, proceed to apply these principles to the Appeal at hand.

11. The whole case turned on a single issue: believability of the Appellant's narrative that he was injured while at work on 06/11/2014. The Appellant insists that he was so injured; the Respondent vehemently denies that there was any such injury on the specific day. The Learned Trial Magistrate disbelieved the Appellant's narrative.

12. After combing through the trial Court record, I am unable to conclude that the Learned Trial Magistrate was in error in dis-believing the Appellant in this case. I say so for at least six reasons:

13. First, the Respondent tendered documentary evidence that the Appellant had been given, and signed for protective gear which included gloves. While the Appellant denied this, no questions were asked of the Supervisor, DW1, when he testified and produced documents to demonstrate that protective gear had been given to the Appellant and he signed for them. The Court is entitled, on a balance of probabilities, to believe that protective gear was, indeed, given to the Appellant.

14. Second, as the Learned Trial Magistrate pointed out, it appears implausible that the Appellant got injured on Thursday, 06/11/2014 while at work and only went to seek treatment on Sunday, 09/11/2014 – three days later. The incredulity of this narrative is compounded by the claim that the Appellant continued working for the rest of that Thursday and the following two days only to seek medical attention on the Sunday.

15. Third, it is curious that Dr. Mwaura of Kinoo Medical Clinic who was the treating doctor does not testify to seeing the Appellant on 09/11/2014. Instead, he testified to examining the Appellant on 10/01/2015 for purposes of preparing the medical report. If, indeed, the doctor had treated the Appellant on 09/11/2014, he would have alluded to that fact in his testimony.

16. Fourth, the scant details in the Appellant's testimony about the alleged injury raises serious doubts. One, the Appellant does not say who else was present when the injury occurred. Two, he does not say who told him to open the grinder. Three, he does not recall which supervisor he reported to. Four, he does not mention the time of the day when the alleged incident happened.

17. Fifth, the Appellant reports paying the doctor Kshs. 3,000/- for his treatment. In fact, the receipt produced showed that the Appellant paid only Kshs. 1,500/- for his treatment. Kshs. 3,000/- was paid for the medical examination report which was only prepared in January of 2015.

18. Lastly, there is also the unresolved question of why the Appellant elected to go to Kinoo Medical Clinic while the undisputed evidence showed that employees of the Respondent Company who were injured on duty had been instructed to seek treatment at PCEA Kikuyu Hospital.

19. All these factors raise doubts about the credibility of the Appellant's narrative that he was injured in the course of employment. It is my finding that the Learned Trial Magistrate was entitled to conclude that the Appellant's case was not established on a balance of probabilities and to dismiss the suit.

20. In summary, I find and hold that given the evidence presented in the case, there was insufficient proof on a balance of probabilities to establish the Appellant's case.

21. I am aware that the law requires me not to interfere with the lower court's estimate of general damages unless it is "*so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the (court) proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low*." (*See* ***Butt –vs- Khan, Nairobi Civil Appeal NO. 40 of 1977***). If the injuries in the Medical Report had been established to have been the injuries caused by the negligence of the Respondent in this case, I would have found the award of Kshs. 10,000/- to have been so inordinately low to warrant my interference. Instead, I would have awarded Kshs. 75,000/- as general damages.

22. **Consequently, for the reasons stated above, this appeal is dismissed.**

23. Orders accordingly.

Dated and delivered at Kiambu this 4th day of June, 2018.

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JOEL NGUGI

JUDGE