REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 62 OF 2012

WEST KENYA SUGAR CO. LIMITED.....APPELLANT

VERSUS

GABRIEL OKUMU.....RESPONDENT

(An appeal arising from the judgment and decree of the Hon. SN Abuya Principal Magistrate

in Butali RMMCCC No. 129 of 2009 on 28th June 2012)

JUDGMENT

1. The appellant lodged herein, on 6th July 2016, a memorandum of appeal dated 5th July 2012, in which it was averred that the trial court had entered judgment in favour of the respondent on the basis of uncorroborated evidence, the court relied on contradictory evidence, the accident the subject of the proceedings was not established or reported or proved, the vehicle alleged in the judgment to belong to the appellant had not been pleaded nor had its ownership been proved, no police evidence or investigation report was availed, and the award of Kshs. 70, 000.00 was unjustified and was wholly unjustified and was not merited. It is sought that the decision of the lower court be replaced with one dismissing the suit, with costs of the appeal being awarded to the appellant.

2. The appeal before me is a first appeal. I am conscious of the requirement pronounced in such decisions as *Ephantus Mwangi and another vs. Duncan Mwangi* (1982-1988) 1 KAR 278, *Williamsons Diamonds Ltd vs. Brown* (1970) EA 1 and *Selle vs. Associated Motor Boat Company Limited* (1968) EA 123, that in a first appeal the court is obliged to reconsider the evidence, assess it and make appropriate conclusions about it, remembering that it has not seen or heard the witnesses and making due allowance for that.

3. According to the plaint dated 28th May 2009, the respondent was an employee of the appellant working as a cane loader. It is alleged that on 11th August 2007, while in the course of employment as such, he slipped and fell and suffered bodily injuries in the process, being a blunt injury to the left leg with cellulitis. He accuses the appellant of having been in breach of their contract of employment and of breaching statutory and common law duties of care to him, particulars whereof are set out in the plaint. He sought general and special damages, and costs of the suit.

4. In the defense dated 20th July 2009, the appellant denies all the allegations in the plaint, inclusive of the purported employment, the accident, the injuries, and the particulars of breach of contract and breach of statutory and common law duties. It is pleaded, without prejudice, that even if such accident did occur, the same was inevitable and beyond avoidance or prevention or management of the appellant, and accused the respondent of having wholly contributed to the same by his negligence, particulars of which are itemized in the defense.

5. At the trial the respondent testified and called three witnesses. He produced a work card as evidence that he was an employee of the appellant. He testified that on the material day, the 11th August 2007, the driver of the appellant's tractor, he was riding after loading cane on it, moved the same before the respondent had sat down properly on the head of the tractor whereupon he slipped and fell down and the tyre of the tractor stepped on his leg and waist. He blamed the appellant for his woes, saying that it ought to provide a safe place for employees to sit on the tractor. During cross-examination he said that he was injured before the driver of the tractor had started driving the same. He conceded to having made a statement after the accident in which he did not say he sat on the mudguard or that the tyre of the tractor went over his leg or that he had not sat properly. He conceded that in his statement he had said that the accident occurred when he started alighting from the tractor. He said that what he said in his statement was different from what he had told the court. He said the statement could be produced in court as an exhibit. On re-examination, he, however, said that the statement was recorded by another and was not read over to him before he was made to sign it.

6. The respondent's two witnesses were medical personnel. The first was a private clinic practitioner, Suzie Inyangala, who attended to him immediately after the alleged accident. He came to the clinic complaining of swollen calf muscles on his left leg, she diagnosed blunt injury

and put him on antibiotics. She categorized the injuries as minor. He did not go back for follow up treatment. The other witness was a medical doctor, Dr. Charles Andai, who prepared the medico-legal report put in evidence. He said the respondent had come to him with a history of having been run over by the rear tyre of a tractor. His classified the injuries as abrasions to the left shin and blunt injury to the left calf muscles.

7. The person who testified for the appellant was its transport officer. He confirmed that the respondent was in the employment of the appellant and that there was an accident involving him on 11th August 2007. He stated that the respondent had recorded a statement where he had explained how the accident had occurred. He conceded that the same was prepared by another but was translated to the respondent before he signed it. .

8. In the judgment delivered on 28th June 2012, the court found for the respondent. It held that he was the only eyewitness who testified and therefore his was the only available evidence upon which the court could act. The appellant was blamed for the accident as its driver moved the tractor before the respondent had properly settled on it. It was held that the appellant had failed to provide as safe means of transport for the respondent from his place of work and back. Liability was placed wholly on the appellant. General damages were assessed at Kshs. 70, 000.00.

9. Directions were taken on 1st November 2017 to the effect that the appeal be disposed of by way of written submissions. By the time it was placed before me on 18th June 2018 only the submissions by the appellant were on record, having been filed on 31st October 2017.

10. I have read through the same and noted the arguments made therein. The appellant abandoned all the other grounds, and l argued its appeal on the ground that the evidence presented by the respondent was contradictory and there was therefore no basis of the trial court to find the appellant wholly liable for the accident.

11. Before I consider the arguments made by the appellant in its submissions I think I need to say something about the evidence and the pleadings herein. The evidence presented revolves around a tractor owned by the appellant wherein the respondent was a passenger. It was alleged that the driver moved the same in a manner that can only be described as negligent resulting into a fall by the respondent, from which he sustained injury. It was alleged that he had sat on a mudguard and that the appellant ought to have provided alternative means of transport. This is no doubt a traffic matter. The pleadings on the other hand make no mention of the tractor or of the alleged act of the driver of driving off before the respondent had fully settled on his seat and thereby causing him to fall off. The pleadings merely allude to the plaintiff slipping off and suffering injury, the circumstances of the said slipping off are not pleaded. The respondent's case as presented at trial was fully built on the negligence of the appellant's driver, yet negligence not alleged nor pleaded, the pleadings were built on a case of breach of contract and of statutory or common law duty.

12. The foundation or base of any cause or suit is its pleadings. The pleadings originate it. They form the base from which the conduct of the case is generally directed. The nature of the evidence to be presented or produced or adduced is guided by what has been pleaded. That then means that the evidence presented must be geared to prove the allegations made in the pleadings, and therefore the evidence must be in tandem or sync with the pleadings. Evidence, however well-presented is irrelevant and useless so long as it does not tend to prove the matters pleaded.

13. It was said by the Court of Appeal in *Galaxy Paints Company Ltd vs. Falcon Guards Ltd* (2000) 2 EA 385, that it is trite law that issues for determination in a suit generally flow from the pleadings and unless the pleadings have been amended in accordance with the provisions of the Civil Procedure Rules, the trial court may only pronounce judgment on the issues arising from the pleadings or such other issues as the parties have framed for the court's determination. The court further stated that unless the pleadings are amended, the parties must be confined to their pleadings; otherwise, to decide against a party on matters which do not come within the issues arising from the dispute as plodded clearly amounts to an error on the face of the record. It was added that a civil case is decided on issues arising out of pleadings and if no allegation of negligence, for example, is made; it is not open to the court to find negligence on the part of the appellant. The same court in *Sarah Wanjiku Mutiso vs. Gedion M. Mutiso* (1986) KLR 846 held that cases must be decided on the issues on record; and if it is desired to raise other issues, they must be placed on record by amendment. It was pointed out that the judge must not decide a case on an issue raised by himself without amending the pleadings. Then in *Francis Moranga vs. Zephania Moronga Nyamacha and another*, civil appeal number 308 of 1998, it was said that the law is settled that matters raised by the pleadings or issues framed for the court during the trial must be proved within the standards of probability in a civil case before judgment can be entered pursuant to the same pleadings.

14. From the record before me, it would appear that the case that the respondent set out to prove before the trial court was different from that which was pleaded in his plaint. No effort was made to demonstrate the nature of the contractual or statutory duties that the appellant was subject to, which he had breached. Understandably, the trial court did not make any finding as to whether there was breach of contract or of statutory or common law duty or to define the nature of the contractual or statutory or common law duties to which the appellant was subject, and which it could be held liable for breaching. Breach of these duties was the foundation of the case that faced the court as pleaded in the plaint, and that ought to have been the case presented at the trial. But then the accident was conceded by the appellant, who even raised a defence of contributory negligence.

15. I have perused through the defence of the appellant. I have noted that the appellant, while denying any responsibility for the accident, attributed its occurrence to the negligence of the respondent. By so doing the appellant made negligence an issue for determination at the trial, and the court quite properly made findings founded on the tort of negligence. The defence raised was that of contributory negligence. The appellant did not call any eyewitness to controvert the evidence of the respondent which blamed the driver of the tractor for the accident.. It does not surprise therefore that the trial court found that the appellant was wholly to blame.

16. The pleadings filed at the lower court were woefully crafted and the case equally poorly prosecuted. However, as I have noted above, the accident was conceded, yet the appellant did not call a witness who was at the scene to counter the testimony of the respondent regarding the circumstances. In the end I shall hold that there is no merit in the appeal herein. I shall and hereby dismiss the same with costs to the respondent. The appellant has a right of appeal to the Court of Appeal within twenty-eight (28) days.

DATED, SIGNED and DELIVERED at NAIROBI this 17th DAY OF July, 2018

W. MUSYOKA

JUDGE