



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. 48 OF 2015

BETWEEN

TOM OYIEYO ODUOR.....APPELLANT/APPLICANT

AND

SWAN INDUSTRIES LIMITED.....RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. B.Kasavuli (SRM) in Winam SRMCC NO.46 of 2010 delivered on 22nd May, 2015)

JUDGMENT

1. Tom Oyieyo Oduor (hereinafter referred to as appellant) sued Swan Industries Limited (hereinafter referred to as respondent) in the lower court claiming damages for injuries allegedly suffered on 13.10.08 when he was working for the respondent allegedly due to the negligence of the respondent.

2. The defendant/respondent filed a statement of Defence and denied the claim and urged the court to dismiss it with costs.

3. In a judgment delivered on 22nd May, 2015, the learned trial Magistrate found that the appellant had not proved his case on a balance of probability and dismissed it with costs to the respondent.

The Appeal

4. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 17th June, 2015 filed the Memorandum of Appeal dated 15th June, 2015 which set out 6 grounds of appeal which I have summarized into 3 grounds to wit:

1. The learned trial magistrate misapprehended the evidence on record as a result of which he arrived at a wrong decision

2. The learned trial magistrate failed to take into account material evidence on record

3. The learned trial magistrate erred in law and fact in raising the burden of proof to that of beyond reasonable doubt

SUBMISSIONS BY THE PARTIES

5. When the appeal came up for mention on 22nd November, 2018, the parties' advocates agreed to canvass it by way of written submission which they had dutifully filed.

Appellant's submissions

6. Appellant holds the view that his evidence that he was injured while working for the defendant was not controverted and that the dismissal of his case was against the weight of evidence.

7. The appellant placed reliance on the following authorities:

1. Mercy Njoki Kamau v Tiny M Royal Company & Another [2017] eKLR

2. Benard Mutisya v Swaleh Hashi [2017] eKLR

3. Faith Mumbua Kiio v Patel Devika [2018] eKLR

The courts in these cases ruled in favor of the appellants on the ground that the respondents did not tender any evidence to rebut the appellant's case.

Respondent's submissions

7. Respondent submitted that the appellant did not discharge the burden of proof that he was injured while working for the respondent and in support thereof placed reliance on Alfred Kioko Muteti v Timothy Miheso & Another [2015] eKLR and Nandi Tea Estates V Eunice Jackson Were [2006] eKLR which reiterated the principle that the burden of proof lies on he who alleges.

8. It was also submitted that the appellant exposed himself to danger. In this respect the respondent relied on the case of John Karanja Njuguna v Eastern Produce (K) Limited (Savani Tea Estate) [2014] eKLR where the court held that:

“The duty of the employer to ensure the safety of an employee is not absolute; it is one of reasonable care against a foreseeable risk or one that can be avoided by taking reasonable measures or precautions.”

Analysis and Determination

9. As a first appellate court the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect.

The evidence

10. This court has considered the parties' pleadings evidence on record and the submissions.

11. After evaluating the appellant's evidence, the trial court duly found that his evidence that he was injured on 13th October, 2008 was well corroborated by PW2 and PW3.

12. Regarding the issue of whether the appellant was injured at his place of work, he told court that he was a casual employee and was not issued with any employment letter. On that ground, the trial court found that the appellant had not proved that he was an employee of the respondent.

13. Section 74 of the Employment Act Chapter 226 Laws of Kenya provides:

(1) An employer shall keep a written record of all employees employed by him.....

14. The appellant stated that he was not issued with an employment letter. By the application of the doctrine of burden of proof, the burden shifted from the appellant to the respondent to produce its employment record to disapprove the appellant's claim that he was its employee. The respondent failed to discharge and the trial court therefore fell into error when it found that the appellant had not discharged the burden of proof.

15. As regards the issue of liability, I have considered the case of NKU HCCA 168/05 Live Wire Company Ltd v Felistua Wamaita where Justice Koome cited with approval the following opinion from Winfield and Jolowicz on Tort by W.V.H. Rogers, 14th Edition, London Sweet & Maxwell at 213:

if a worker is injured just because no one has taken the trouble to provide him with an obvious necessary safety devise, it is sufficient and in general satisfactory to say that the employer has not fulfilled his duty...

16. I have also considered Mercy Njoki Kamau v Tiny M Royal Company & Another [2017] eKLR ; Benard Mutisya v Swaleh Hashi [2017] eKLR and Faith Mumbua Kiio v Patel Devika [2018] eKLR cited by the appellant. The respondent in this case did not tender any evidence to explain why the machine was not repaired after the appellant reported its defect. I therefore find that the respondent did not fulfill its duty of care and was therefore negligent.

17. The appellant is however not without blame for exposing himself to danger by attempting to repair the defective machine he was working on after the engineer he had reported the defect failed to show up. From the foregoing analysis, I find both the appellant and the respondent liable and apportion liability at 50:50%.

18. With reference to quantum, I notice that the trial court failed in its duty to assess damages even after it had formed the judicial opinion in dismissing the suit. The medical report produced as PEXH. 4 shows that the appellant suffered a cut wound on the right index finger. At the time of examination by PW2 on 29.10.10, the injury had healed with a deformed nail and permanent incapacity was assessed at 1½ %.

19. The appellant asked for Kshs. 250,000/- and cited cases where plaintiffs suffered fractures and permanent loss of phalanges. Respondent

offered Kshs. 50,000/- and relied on Eastern Produce (K) Limited v Joseph Mamboleo Khamadi [2015] eKLR where plaintiff suffered a cut wound on the right middle finger and severe pains which healed with a permanent scar.

20. In the case of Kigaraari vs Aya(1982-88) 1 KAR 768, it was stated as follows:-

“Damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford. Large awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden, in the form of increased insurance or increased fees.”

21. It is the duty of the advocates to avail relevant authorities to guide the court in arriving at a fair award for the injuries suffered the respondent’s advocate here did. The case cited by the respondent’s counsel is about 5 years old. Remaining faithful to the doctrine of *stare decisis* and after considering lapse of time, I find that an award of Kshs. 60,000/- would be adequate compensation.

DISPOSITION

22. Consequently, the appeal succeeds and the trial court’s order dismissing the plaintiff’s case is set aside and substituted with an order on liability at **50:50** % as between the appellant and the respondent and on quantum at **Kshs. 60,000/-**. Each party shall bear its own costs of this appeal.

DELIVERED AND SIGNED IN KISUMU THIS 13TH DAY OF DECEMBER 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

For the Appellant -

For the Respondent -