REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 46 OF 2011

OGEMBO TEA FACTORY CO. LIMITED.....APPELLANT

VERSUS

EVANS NYABUTO BICHANGA.....RESPONDENT

(An appeal from the judgment and decree of Hon. LILY NAFULA (Principal Magistrate) dated and delivered on the 17th day of February, 2011 in the Original Ogembo PMCC No. 10 of 2010)

JUDGMENT

1. EVANS NYABUTO BICHANGA, (the respondent herein) filed a suit before the lower court at Ogembo seeking general and special damages arising out of injuries that he sustained on 29th June 2005 while in the course of his employment with the Appellant. The trial court apportioned liability at 80:20% in favour of the respondent and awarded the respondent Kshs. 60,000/= general damages and Kshs. 6,500/= special damages upon considering the evidence.

2. The appellant, being aggrieved by the trial court's said judgment, has appealed against it and has set forth the following grounds of appeal in its memorandum of appeal dated 14th March, 2011.

1. That the learned trial magistrate erred in law and in fact in finding that the plaintiff had proved his case on a balance of probabilities yet the plaintiff led scanty and contradictory oral evidence and produced incomplete and vague documentary evidence.

2. That the learned trial magistrate erred in law in delivering a purported judgment without writing the full body of the same detailing reasons for her findings on liability and award on damages thereof choosing to write the body of the judgment *ex post facto.*

3. That the learned trial magistrate erred in law and fact in failing to appreciate and to address herself on the examining Doctor's candid evidence on the treatment notes on record which was materially in variance with the plaintiff's oral testimony and as such the plaintiff could not be said to have proved the injury pleaded.

4. That the learned trial magistrate erred in law and fact in failing to frame the issues for determination analyzing the evidence on record and ultimately giving her reasons for reaching at a finding as she did against the Appellant.

5. That the learned magistrate erred in law and in fact in finding that the plaintiff was not provided with the necessary protective device (gumboots) contrary to the plaintiff's own admission in cross-examination that he was indeed provided with same.

6. That the learned trial magistrate erred in law and in fact in holding that the Respondent's account of incident giving rise to this suit (sliding and falling down) made out a case for negligence against the Appellant notwithstanding the fact that the Respondent neither established causation nor did he (sic) the aspect that could be attributed to negligence (blameworthiness) on the part of the Appellant.

7. That the learned trial magistrate failed to appreciate the totality of the evidence before her and address herself on or properly analyse the submissions made on behalf of the Appellant.

8. That the learned trial magistrate erred in applying erroneous standard of proof of negligence and failed to appreciate that the Respondent had failed to discharge the requisite standards the burden of proof of his allegations placed upon him as a matter of law.

9. That the learned trial magistrate erred in assessing general damages at Kshs. 60,000 and failed to apply the principles applicable in award of damages and comparable awards made for similar injuries.

3. The appellant's prayers on appeal were for costs and that the lower court's judgment/decree be reviewed and/or set aside.

4. When the appeal came up for directions before me on 15th October 2015, parties agreed to canvass it by way of written submissions.

5. In the written submissions filed by M/s Mukite Musangi & Co. Advocates, the appellant argued that even though it was not in dispute that the respondent was its employee and was at work on the material date of the injury, the injuries that he allegedly suffered could not possibly have been on account of his employment with the appellant. The appellant stated that the respondent was not injured at work in view of the fact that the appellant records, to wit, the accident register produced by DW1 as Dexhibit 1, did not indicate the respondent's name as one of the persons injured at work on the material date. On this point, the appellant referred to the case of **Timsale Limited vs Noel Agina Okello [2014] eKLR** in which it was held:

"I do not agree that the contents of the muster roll or accident register cannot be taken as conclusive proof of the fact of employment…when therefore a name of a litigant who claims to have been a casual or even permanent employee, who is required to have his name entered in the Muster Roll, or an Accident Register (in the event of an accident), does not appear in either the Muster Roll or Accident Register, the degree of proof of probability of having worked, or having had an accident on a particular day becomes much higher.

The Respondent says that his Supervisor was one Ogwenu who, the Respondent alleges to have entered his name in the Register, and that one Kamau and Omolo, were Respondent's workmates. The Respondent never asked the court's assistance to issue Witness Summons for any of these persons to attend court. The net result of that failure is that the court is left without material upon which to determine whether or not the Respondent was an employee of the Appellant. Having been given notice in the Defence…that the Respondent was not its employee, the onus of proof otherwise, shifted dramatically to the respondent. That proof cannot be made by the court or the Respondent by way of summations that because both the Muster Roll and the Accident register are prepared and kept by the Appellant, they must be false or otherwise manipulated. There must be evidential proof or basis for that imputation of "mala fides" (bad faith).

In this case, having failed to prove that he was an employee of the Appellant, and having also failed to prove that an accident occurred to him on the material day, there was no basis for finding the Appellant liable."

6. The appellant also cited the case of **Nyamache Tea Factory Co. Ltd vs Convas Ontomwa Buge**

[2010] eKLR in which the court observed that the claimant did not prove that he was in the appellant's employment in view of the fact that his names did not appear in the appellant's Muster Roll or accident register.

7. The appellant also took issue with the authenticity of the treatment card relied upon and produced by the respondent in view of the fact that the medical report produced by PW1 was done 5 years after the alleged injury and further, that PW3 who produced the treatment card was not an employee of Gucha District Hospital at the time that the respondent was allegedly treated at the said hospital. The appellant relied on the case of **Timsales Ltd vs Wilson Libuywa [2008] eKLR** in which it was held:

> ***"In any alleged factory accident which is disputed by the employer it is the duty of the employee, as the plaintiff, to prove on a balance of probabilities that he indeed suffered the alleged accident. A medical report by a doctor who examines him much later is of little, if any, help at all. Although it may be based on the doctor's examination of the plaintiff on whom he may, like in this case, have observed the scars, unless it is supported by initial treatment card it will not prove that the plaintiff indeed suffered an injury on the day and place he claimed he did. The scars observed on such person would very well relate to injuries suffered in another accident altogether."***

8. The appellant further relied on the case of **Amalgamated Saw Mills Ltd vs Stephen Muturi Nguru (Nakuru) HCCA No. 75 of 2005** in which the evidential value of a medical report prepared more that 3 years after the accident was discussed and found to be minimal if any.

9. The appellant contended that the respondent did not prove that he was injured in the course of his employment with the appellant or within the appellant's premises. To fortify its argument, the appellant, relied on the holding in the case of **Nandi Tea Estate Limited vs Eunice Jackson Were [2006] eKLR** in which the court held that the existence of an injury and subsequent treatment is not proof that the injury was sustained at the place of work.

10. The appellant maintained that in the event that the court finds that the respondent was injured at work, then the liability ought to be apportioned at 50:50% taking into account the fact that the respondent had worked with the appellant since 1991 and was expected to know that there was a metal nearby that could hurt him. The appellant reiterated that the respondent was expected to be cautious about his own safety at the work place as is envisaged by **Section 13 (1) (a) of the Occupational Safety and Health Act** and as was observed in the case of **Purity Wambui Murithii vs Highlands Mineral Water Co. Ltd [2015] eKLR** wherein it was held:

> ***"…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-***
> >
> > ***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."***

11. On negligence, the appellant submitted that the respondent was solely to blame for the occurrence of the alleged accident as he failed to show the causal link between the appellant's negligence and his injury. The appellant relied on the decision in **Statpack Industries vs James Mbithi Munyao Nairobi HCCA No. 152 of 2003** in which it was stated that a person making an allegation must prove the causal link

between someone's negligence and his injury. It was further observed that a plaintiff must adduce evidence from which, on a balance of probability a connection between the two may be drawn.

12. It was the appellant's case that the mere fact that the respondent was injured at the appellant's work place, with no proof of the appellant's negligence, was not enough to render the Appellant liable.

13. Lastly, the appellant submitted that the trial magistrate failed to set aside points for determination and consider the totality of the evidence before determining them according to the law, giving reasons thereof.

14. Through his counsel M/s T. O. Nyangosi & Co. Advocates, the respondent submitted that he had proved his case against the appellant on a balance of probabilities by proving that he was the appellant's employee on the date of the accident, that the was injured while on duty and was treated at Gucha District Hospital. On injuries, the respondent argued that the exhibits which he produced in court to wit, LD form 104/1 (exhibit5), Treatment Notes, and medical report, were sufficient proof thereof.

15. On negligence, the respondent submitted that the appellant did not furnish him with protective clothing such as gum boots and gloves which could have prevented from sliding or falling. The respondent relied on the following cases:

1. MOMBASA HCCA NO. 31 OF 2003 KILIFI PLANTATIONS LTD VS JETH AWUOR ODAWA.

2. NBI HCCA NO. 211 OF 2003 KHILNA ENTERPRISES VS CHARLES MAINA MIGWI.

16. On quantum, the respondent submitted that the trial court's award of Kshs. 60,000/= general damages was made in accordance with the principles of assessing damages as were spelt out and emphasized by Justice Asike Makhandia in **Kisii HCCA NO. 125 of 2008 Josephine Angwenyi vs Samuel Ochillo**.

17. The respondent sought the dismissal of the appeal with costs.

Determination

18. I have considered the record of appeal and the parties respective submissions. The issues for determination can be summarized as follows:

a) Whether the respondent proved his case against the appellant to the required standards.

b) Whether the trial court's judgment qualifies as a valid judgment within the meaning of the mandatory provisions of order 21 Rule 4 of the Civil Procedure Rules.

c) Whether the trial court, in making its award, complied with the principles of assessing general damages.

19. On the first issue, it is trite law that any party seeking orders of the court bears the burden of proving his case against his opponent on a balance of probabilities. In the instant case, it was not disputed that the respondent was an employee of the appellant and that he was in fact on duty on the date that the alleges that he was injured. What was in dispute, however, was whether the respondent was injured at work and whether the said injuries or accident could be attributed to the appellant's negligence.

20. The respondent testified that on the material day, he was engaged in his duties and was feeding tea leaves into a drier when a 60 kilograms sack of tea leaves fell on him from behind thereby causing him to fall down whereupon a metal plate that had been left behind by the mechanics who were doing maintenance work on the drier cut him. The respondent blamed the appellant for the accident while stating that its mechanics had left metal plates haphazardly and further that the appellant did not provide him with gum boots which could have protected his leg from getting cut. The respondent added that he was treated for the said injuries at Gucha District Hospital.

21. PW3, a registered clinical officer produced the respondent's treatment card No. 15601/05 dated 29th June 2005 as Pexhibit 4.

22. The respondent produced a copy of LD 104 form as Pexhibit 5.

23. On cross examination, the respondent stated that he was alone in the tea drying section at the time of the accident and that his supervisor at work one Onuko to whom he reported the accident had already left the appellant's company before 2009. The appellant conceded that his name did not appear in the appellant's accident register.

24. PW1 Dr. P. N. Ajuoga, a consultant surgeon examined the respondent on 6th January 2010 and prepared a medical report which he produced as Pexhibit 1. PW1 also produced Pexhibit 2, a copy of a receipt for the sum of Kshs. 6,500/= in support of his charges for the preparation of the medical report.

25. In its defence filed on 28th January 2010 the appellant, denies ever having employed the respondent or that he was on duty on the material day. The appellant further denied that any accident occurred on the said date or that the respondent sustained any injuries. The appellant further accused the respondent of fraud and denied the particulars of injuries attributed to it and stated that if any accident occurred, then the same was solely caused or contributed to by the respondent's sole negligence.

26. The appellant called one witness in support of its case. DW1 Zablon Mbera, a supervisor at the appellant's company testified that the respondent was one of the appellant's employees working at the drier section. He stated that one cannot slip and fall while feeding the drier and that the entries made in the accident register for the material date did not show the respondent as one of the people injured on the material date. DW1 denied that the plaintiff was injured as alleged because his name did not appear in the appellant's accident register.

27. On cross-examination DW1 stated that he had nothing to show that he was on duty on 29th June 2005 and that he did not know who the respondent's supervisor was on the material date. He however conceded that one Onuko was a supervisor at the time of the accident and that he could not tell if the respondent reported the accident to his supervisor.

28. From the above evaluation of the evidence tendered before the lower court, I am satisfied that the respondent established his case against the appellant on a balance of probabilities for the following reasons.

29. It was not in dispute that the respondent was an employee of the appellant and was infact on duty on the day of the accident. The respondent was able to prove that he fell when a sack fell on him from behind as he was working at the drier whereupon a metal plate that had been left behind by the appellant's mechanics cut him. From the respondent's evidence on the cause of the accident, I am satisfied that he proved negligence on the part of the appellant on a balance of probabilities as the cause of his fall was attributed to the fall of the 60kg bag of tea.

30. It is clear to me that the respondent's leg would not have been cut if he had protective boots or if the metal plates that cut him had not been left lying about at his work place by the appellant's employees (mechanics) in which case, the appellant is vicariously liable for its mechanics negligence. That the respondent was injured while on duty at the appellant's factory was further proved by his production of the duly filled and executed LD 104 form as Pexhibit 5. The authenticity of the LD 104 form was not challenged by the appellant at the trial. It is my finding that the said form emanated from the appellant and it clearly conforms with the respondent's claim that he was injured at work and therefore, the mere fact that the respondent's name did not feature in the appellant's accident register cannot wash away the contents of the LD 104 form that is clear on the respondent's injuries and their cause. Proof of injury was also established through the medical report and treatment notes which were produced as exhibits.

31. Turning to the validity of the lower court's judgment, the appellant submitted that the trial court failed

to set aside the points for determination and consider the totality of the evidence before making its decision. On this point, **Order 21 Rule 4 of the Civil Procedure Rules** stipulates as follows:

> **"4. Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision."**

32. I have perused the trial court's judgment and I am satisfied that it conforms with the above provisions of Order 21 Rule 4 of the Civil Procedure Rules. I note that the trial magistrate set out the facts of the case, analyzed in detail, the evidence tendered before her after which she set out the issues for determination before making her decision. In my view, the trial court's judgment is in tandem with the mandatory provisions of the Order 21 Rule 4 of the Civil Procedure Rules as it contains all the essential ingredients of a good judgment. The trial court, upon analyzing the evidence not only found that the appellant was to blame for the respondent's injuries but went ahead to apportion blame at 8% to 20% in favour of the respondent.

33. On the assessment of damages, I find that the trial court adhered to the principles of assessing general damages as were set out in the court of Appeal in the case of **Kemfro Africa t/a Meru express & Another vs A. M Lubia & Another (1982-88) IKAR 727** in which it was held that the Appellate court will interfere with the exercise of discretion by the trial court when assessing damages if the trial court;

> **a) Took into account an irrelevant fact or,**
>
> **b) Left out of account a relevant fact or,**
>
> **c) The award is so inordinately high that it must be a wholly erroneous estimated the damages.**

34. In the instant case, the trial court award the respondent the sum of Kshs. 60,000/= general damages for the respondents injuries that were stated to be "a deep cut wound on the left tibia region."

35. As has already been stated in this judgment, the trial magistrate found that the respondent was partly to blame for the injury and the said award to 20% contribution of liability by the respondent.

36. The trial magistrate had the following to say on her award of damages:

> **"On general damages….I proceed to enter judgment for the plaintiff as against the defendant in the sum of Kshs. 60,000/= on general damages."**

37. On general damages, the medical report lists out one injury being a deep cut wound on the leg at the tibia region, this is further supported by the treatment notes and the evidence in court of the plaintiff, the doctor opined and concluded that the plaintiff had sustained soft tissue injury which has healed with no permanent disability; Regard being had to this injury comparatively with the injuries sustained by the plaintiff in the plaintiff's cited authority **FLORENCE WAIRIMU**, I find that **FLORENCE WAIRIMU's** injuries were more severe requiring not only admission to hospital but leading to damage to the vein and lymphatics, it even resulted to a condition known as pro-myositis requiring further management, on the other hand the defendant's cited authority is more persuasive herein, however the decision of Kshs. 30,000/= was made in 2006, almost five years ago, taking all the relevant circumstances into consideration putting in mind the issue of inflation at the fore, I find an award of Kshs. 60,000/= a modest figure to compensate the plaintiff herein. I proceed to enter judgment for the plaintiff as against the defendant in the sum of Kshs. 60,000/= on general damages.

38. From the above extract of the trial court's judgment, it is clear that in arriving at its award, the trial court took into account the nature of the injuries suffered by the respondent, the judicial authorities cited by both parties and the inflationary trends on the Kenya shilling. It is my finding that the award of Kshs. 60,000/= general damages was modest and commensurate with the respondent's injuries.

39. The trial magistrate complied with the principles of assessing general damages and I find no reason to interfere with the award for general damages.

40. Having regard to the above findings and considerations, I find that the appeal herein lacks merit and I hereby dismiss it with costs to the respondent.

Dated, signed and delivered in open court this 22nd day of February, 2017

HON. W. A. OKWANY

JUDGE

In the presence of:

Mr. Nyagesoa for Mukite Musangi for the Appellant

Mr. Bosire for Ingosi for the Respondent

Omwoyo court clerk