



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 94 OF 2010

ATTA KENYA LIMITED APPELLANT

VERSUS

PHILIP MWANIARESPONDENT

(An appeal from the Judgment and decree of Hon. Yator, Resident Magistrate delivered on 4th May, 2010
in Mombasa SRMCC No. 1767 of 2004)

JUDGMENT

1. The appellant, Atta K. Limited filed a memorandum of appeal on 18th May, 2010 against the Judgment of Hon. Yator, Resident Magistrate, delivered on 4th May, 2010 on the following grounds:-

- (i) That the Learned Magistrate erred in fact in holding the defendant liable for the purported accident to the plaintiff;
- (ii) That the Learned Magistrate erred in fact and in law in failing to find the plaintiff's claim as frivolous, vexatious, bad in law, fraudulent and fake;
- (iii) That the Learned Magistrate erred in fact and in law in awarding any damages to the plaintiff;
- (iv) That with greatest respect the Learned Magistrate misdirected himself on the principles applicable in a cause of action based on a negligence;
- (v) That the Learned Magistrate erred in disregarding the submissions and evidence tendered by the defendant; and

The appellant prays that:-

- (a) The appeal be allowed with costs;
- (b) The Judgment of Hon. Yator delivered on 4th May, 2010 in SRMCC No. 1767 of 2010 be set aside on liability, quantum and that this appeal be allowed with costs.

APPELLANT'S SUBMISSIONS

2. It was Mr. Omwenga's submission that as per the plaint, the accident in issue occurred on 16th February, 2004. The plaintiff (respondent) testified that the accident occurred on 12th February, 2004. He submitted that parties are bound by their pleadings. There was no amendment of the plaint to show that

the accident happened on 12th February, 2004. The Hon. Magistrate made no finding on when the accident happened.

3. Counsel further stated that treatment notes were marked but not produced in evidence, yet the said notes would have shown the date of the accident. It was contended that the Doctor on cross-examination confirmed that the date of the accident was not recorded. According to the notes, the respondent went to the hospital after 5 days of the accident. It was argued that if the respondent was injured on 16th February, 2004, five days thereafter adds up to the 21st February, 2004. The respondent however said he went to hospital on 23rd February, 2004. In Mr. Omwenga's view, the contradiction shows that the respondent was not injured.

4. It was submitted that the appellant has a well established system of how accidents are recorded but none was reported in respect to the respondent. Counsel stated that the Hon. Magistrate failed to make a finding on the issue. In Mr. Omwenga's view, had the Hon. Magistrate taken into account the foregoing factor he could have found that the respondent did not prove his case on a balance of probabilities. Counsel urged the court to allow the appeal.

RESPONDENT'S SUBMISSIONS.

5. Mr. Tarus on his part submitted that civil cases are decided on a balance of probabilities. He stated that the lower court was satisfied that the respondent proved his case to the required standard. He relied on the case of **Bohar Singh Khara vs Secretary of State for Home Department** [1983] 2 WLR 321 to illustrate that proof is on a balance of probabilities. In his view, when a court is deciding on a matter of this nature, it is not the strictness or the perfectness of the documents that carry the day but the demeanour of a witness is also relevant. The Hon Magistrate had the opportunity of seeing the witnesses as they testified and were cross-examined.

6. Counsel submitted that the date of the accident was not in issue in the primary suit, a fact discernable from the submissions of Counsel for the appellant in the lower court. As such, the issue of the date of the accident was an afterthought on the part of the appellant. Mr. Tarus explained that the plaint and medical report bear the date of 16th February, 2004 as the date of the accident. He stated that the case of **George Kebaso Mabeya vs Crown Industries Ltd**, Mombasa Civil Case No. 126 of 2004, cited by Mr. Omwenga on the above issue was of persuasive value and not binding on this court.

7. Mr. Tarus relied on the case of **Timsales Limited vs Penina Achieng Omondi**, Civil Appeal No. 192 of 2008 where Wendo J. was of the view that it is up to a litigant to decide the documents they should produce. Counsel argued that Dr. Ndegwa produced a medical report to show that the date of the accident was 16th February, 2004. He added that failure to produce treatment notes does not indicate that the respondent's case is fake, and that this is not an issue that was in contention in the lower court.

8. He relied on the case of **Nkube vs Nyamiro** [1983] KLR 403 to show what the duty of the first appellate court is. He also urged the court to refer to the other authorities cited in his written submissions. He prayed for the appeal to be dismissed.

ANALYSIS AND DETERMINATION

The issue for determination is if the respondent discharged his burden of proof.

DUTY OF FIRST APPELLATE COURT.

The duty of the first appellate court is to re-evaluate and analyze the evidence tendered in the lower court and arrive at its own independent decision. **In the case of Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212, the Court of Appeal held, inter alia, that:-**

“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

9. The respondent testified as PW1. He recounted how he was at the appellant's go down at Chaani on 12th February, 2004 where he was carrying 90 Kg sacks of wheat which were being thrown from the vehicle and being put at stake (sic). He ascended the lorry to offload the bags but a string tied to the stakes snapped and he fell down. He was injured on the big toe, left hip, left elbow and the ribs.

10. He testified that he went to hospital after 7 days after the appellant refused to take him there. He identified his treatment notes as MFI-1. He went to see Dr. Ndegwa as per MFI-2 and MFI-3 was a receipt for payment he made of Kshs. 1,000/= to Dr. Ndegwa. The respondent blamed the appellant for the accident by not caring for the welfare of the employees. He stated that there was nothing he could have done to prevent occurrence of the accident. He prayed for general damages, costs and interest.

11. On cross-examination, he stated that he did not know why his name was not on a schedule of those injured between January to 16th February, 2008 (sic). He knew those who were injured as his co-work mates. He admitted that his name did not appear on the sheets of paper. The respondent stated the clerk for the appellant refused to issue him with a sick sheet. He testified that he went to hospital on 23rd February, 2004 after recovery.

12. On re-examination, the respondent stated that his name was erased because he sued the company and that that Mr. Omollo who took down their names had died. There were 45 people who worked at the night shift but the list showed 21 people.

13. Doctor Ndegwa testified as PW2. He examined the respondent on 21st February, 2008. He was injured while on duty in the year 2004 as a casual worker at the appellant company. The respondent sustained soft tissue injuries to the left tip toe, left hip and left elbow. He had completely healed with a small scar on the posterior elbow. He suffered multiple tissue injuries with no permanent disability. PW2 produced the medical report as plf. exh 2, a receipt for Kshs. 1,000/= as plf exh. 3 and another receipt for Kshs. 3,000/=, for court attendance, as plf. exh. 4.

14. On Cross-examination, PW2 stated that no date was indicated on when the respondent was injured. It took the respondent five days before medication. If the injuries were serious, he could not have stayed for five days.

15. In its defence, the appellant called DW1 (whose name was not given), who worked for the appellant and dealt with workers' claims. They had no records of the respondent being at work on 10th February, 2014. He produced records of the 1st gang of workers as D. exh. 1 and the 2nd gang as D. exh. 2. The respondent's name was not on D. exh. 3. He also produced D. exh. 5, being a list of injured workers. DW1 testified that the appellant was not among the said workers. He concluded his evidence by stating that the respondent's claim was fake.

16. The Hon. Magistrate considered the evidence adduced and held that the respondent had proved his case on a balance of probabilities. He found the appellant 100% liable for the accident and awarded general damages of Kshs. 80,000/= and special damages at Kshs. 4,000/=.

17. Having gone through the evidence adduced before the lower court and having looked at the plaint dated 14th April, 2004, it is clear that there is a mismatch between paragraph 5 of the respondent's averment that he was injured on 16th February, 2004 and his evidence in court which was to the effect that the accident happened on 12th February, 2004. PW2 wrote a medical report based on treatment notes that were given to him by the respondent. He thus stated in his report that the respondent was injured on 16th February, 2004. It is my finding that the inconsistency as to the date when the accident happened fundamentally affected the respondent's case. It does not matter that the issue of the date when the

accident occurred was not raised by Counsel for the appellant in the lower court. The duty of the 1st appellate Court is to consider both facts and the applicable law at the hearing of an appeal.

18. This inconsistency leaves a doubt in the mind of this court as to why the respondent would testify that an accident happened on 12th February, 2004 and thereby scatter his pleadings that an accident happened on 16th February, 2004. The appellant was bound by his pleadings. In **Galaxy Paints Company Ltd v Falcon Guards Ltd, Civil Appeal No. 219 of 1998**, the Court of Appeal held that:-

“The issues for determination in a suit generally flowed from the pleadings and the trial court could only pronounce judgment on the issues arising from such issues as the parties framed for the court’s determination.”

19. The foregoing decision was also adopted with approval by the Court of Appeal in the case of **William Muthee Muthami v Bank of Baroda [2014] eKLR**, when it restated the principle thus:-

“It is a firmly established rule of evidence that the evidence produced in court to prove a claim must flow from the pleadings.”

20. The inconsistency on the part of the respondent as to when the accident happened can only go to the benefit of the appellant. I do bear in mind that the burden of proof is on a balance of probabilities. It is my finding that’s the Hon. Magistrate misdirected himself by holding that the respondent had discharged the burden of proof to the required standard.

21. The end result is that the appeal is hereby allowed. I note that the respondent is a casual labourer and I hereby order that each party will bear its own costs of the case in the lower court and of this appeal.

DELIVERED, DATED and SIGNED at MOMBASA on this 6th day of April, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Chamwanda for the appellant

Mr. Tarus for the respondent

Oliver Musundi - Court Assistant