REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 94 OF 2012

MUMIAS SUGAR COMPANY LTD.....APPELANT

VERSUS

BENEA O. MWAMBAYI.....RESPONDENT

(Being an appeal from the judgment and decree of the Resident Magistrate, Hon. L. N. Kiniale delivered and dated 10/09/2013 in Butere PMCC No. 23 of 2011)

JUDGMENT

Introduction

The appellant herein was the defendant in Butere PMCC No. 23 of 2012 – Barasa O. Mwambayi –vs- Mumias Sugar Co. Limited. According to the plaint dated 15/03/2011, the Respondent herein sued the appellant for both special and general damages arising out of an accident that allegedly occurred on 28/06/2010 while the Respondent was undertaking his duties in the course of his employment with the appellant. The Respondent alleged breach of contract of employment and/or breach of statutory duty and/or breach of common law duty of care by the appellant and as a result thereof, he (Respondent) suffered the following injuries:-

a. Blunt injury to the chest
b. Blunt injury to the head
c. Severe pain incurred during and after injury

The Respondent alleged that the accident in which he was injured was caused solely by reason of breach of common law and/or statutory duty of care and/or breach of contract of employment and/or terms thereof. Particulars of which were given as follows:-

a. Failing to provide or avail the plaintiff with gloves, apparel, gumboots, masks, goggles or any other protective gear;
b. Exposing the plaintiff to the risk of injury;
c. Failing to prove a proper system of working/or prevent the said accident;
d. Failing to warn the plaintiff with impending danger or to take any measures to prevent the plaintiff from sustain the said injuries which the Defendant, its employees, servants and/or agents ought to have known;
e. Instructing the plaintiff to continue working without providing the necessary appliances to safety carrying out his duties (sic);
f. Failing to provide adequate supervisory mechanisms to the plaintiff.
g. Exposing the plaintiff to risk of harm and injury;
h. Instructing the plaintiff to work in an unsafe environment.

The respondent therefore prayed for judgment against the appellant for:

a. Special damages of KShs.3,500/=.
b. General damages to be assessed by the Honourable court.
c. Costs and incidental to this suit (sic).
d. Any other relief that this Honourable court may deem fit and just to grant.

The Appellant's Defence

The appellant entered appearance and also filed statement of defence in which it denied all the respondent's allegations and also averred that if any accident occurred, which was denied then the same was due to the sole and/or contributory negligence on the part of the respondent as follows:-

a. Being in a place he ought not to have been
b. Failing to make any adequate precautions for his safety.
c. Failing to make use of safety equipment previously issued.
d. Exposing himself to risk he knew or ought to have known.
e. Working while intoxicated and/or under the influence of alcohol or drugs.
f. Failing to apply common sense while conducting his duties.
g. Placing himself in a situation that was patently dangerous.
h. Ignoring the training and instructions of the supervisor.

The appellant also contended that the respondent had full knowledge and understanding accruing out of the risk referred to in the plaint and that he accepted the risk resulting from each and every one of the acts and omissions complained of in carrying out his work. The appellant therefore asked the trial court to dismiss the respondent's claim with costs.

Reply to Defence

The respondent filed a reply to defence and denied all the allegations leveled against him by the appellant. The respondent also contended in his reply to defence that the appellant's defence was a mere sham, was vexatious and only contained mere denials. He urged the court to strike out the same and to enter judgment for him.

The Judgment of the Trial Court

After carefully considering the pleadings, the evidence and the law the learned trial magistrate found that the respondent had absolutely no control over the forklift and the pallet that fell on him and secondly that because of the limited space in which the respondent worked, it was impossible for him to move freely in order to avoid being hit by the falling machinery. The learned trial magistrate found the appellant 100% liable for the accident and awarded the respondent KShs.120,000/= in general damages, KShs.4,520/- in special damages, costs and interest.

The Appeal

Being dissatisfied with the whole of the judgment of the learned trial magistrate, the appellant filed this appeal on grounds:-

1. THAT the learned trial Magistrate erred in Law and in Fact in finding that the Appellant was 100% liable for the injuries of the Respondent while it is apparent that the Respondent failed to prove the fact of employment.
2. THAT the learned trial Magistrate erred in Law and in Fact in finding that the appellant was 100% liable for the injuries of the respondent while it is apparent that the respondent failed to prove any negligence, breach of duty and or contract on the part of the appellant.
3. THAT the learned trial Magistrate erred in Law and in Fact in making an award in general damages that was so excessive as to amount to an entirely erroneous estimate of loss of damages

suffered by the respondent.

4. THAT the learned trial Magistrate erred in Law and in Fact in making such a high award as to show that the magistrate acted on a wrong principle of law.
5. THAT the learned trial magistrate erred in law and fact in failing to appreciate or take into account the appellant's pleadings, evidence and submissions or at all in the subordinate court.

Reasons wherefore the appellant prays that the judgment and decree in Butere SPMCC No.23 of 2011 be set aside and the suit be dismissed with costs to the appellant. In the alternative the appellant prays that this honourable court do apportion liability between the appellant and the respondent and that the award of special damages be reduced/substituted with an appropriate figure. The appellant also asks for costs of the appeal.

The Respondent's Evidence

The Respondent testified as PW2. He told the court that in 2010, he was working with the appellant at packaging section. He produced the contract of employment as PExhibit 2. His testimony was that on 28/06/2010 as he worked a pallet from a forklift fell on him. He then fell down on another pallet of sugar on which he was packing sugar. He sustained injuries on the head and chest. He was treated at Mumias Sugar Company clinic as per the sick sheet which he produced as PExhbit 3. Later he was treated at Makunga Rural Health Clinic as shown on PExhbit 4(a) and payment receipt as PExhibit 4(b). The Respondent further stated that he reported the accident which was recorded in the appellant's Occurrence Book. He further stated that he blamed the company for the accident because there was too little working space and further that he was not given a helmet.

During cross-examination, the respondent testified that when the pallet fell on him the forklift on which the pallet was just passing and was not destined to pick the sugar he was packing. He also confirmed that when the pallet on the forklift fell on him, he fell onto the pallet he was stalking with sugar and he got hurt on the chest and on the head. The respondent also told the court that his contract with the appellant expired before he was done with treatment for the injuries sustained during the accident.

PW1 was Dr. Charles Andai a private medical practitioner of Lubinu Medical Clinic. He stated that he examined the respondent on 02/04/2011 after the respondent got injured in an industrial accident on 25/06/2010 at the appellant's premises. PW1 testified that the respondent had a cut wound on the forehead, 2 small wounds anterior wall of the chest. According to PW1, the injuries were moderate soft tissue injuries with no resultant permanent impairment. He also stated that he charged KShs.4,500/= and also charged attendance costs as per PExhibits 1a and 1b.

On cross-examination PW1 confirmed that at time of examination, the respondent was fully healed with scar formation. That there was no permanent impairment.

The Appellant's Evidence

The appellant closed its case without calling any witnesses.

Hearing of the Appeal

This appeal proceeded by way of written submissions.The appellant's written submissions were filed belatedly on 20/02/2015 while the respondent submissions were filed on 04/12/2014. The court has carefully read through both sets of submissions and the authorities provided by each party.

Analysis of the Evidence and Issues for Determination

This is a first appeal. As was stated by Sir Clement Lestang V.P. in Selle –vs- Associated Motor Boat Co. Ltd [1968] E.A. 123 at page 126 para G

"An appeal to this court from 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 it 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 finding 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 demeanor of a witness is inconsistent with the evidence in the case generally."

According to the evidence by the Respondent while he was arranging the bales on the pallets in a bending position empty pallets which had been hoisted by a forklift slid and fell on him and he fell on his chest sustaining the injuries. He blamed the accident on the appellant as there was not enough space to warrant the movement of the fork lift simultaneously with people working around. He also blamed the operator of the forklift for being reckless. Further he claimed that no protective gears were provided.

The appellants on their part only filed the Defence and put in submissions but they did not call any witnesses to controvert the Respondent's case.

This court has had the opportunity of reading the appeal and the grounds contained therein together with the written submissions by the Respondents and the following questions arise for determination.

a. *Whether the Respondent was an employee of the Appellant.*
b. *Whether the trial Magistrate was wrong in finding that the Appellant was 100% liable for the accident.*
c. *Whether the award of damages made by the trial Magistrate was excessive as to amount to an entirely erroneous estimate of loss of damages suffered by the Respondent*

On issue number one it is submitted by the Respondent that the same was not contested by the appellant and therefore this court should uphold the decision of the trial Magistrate that indeed the Respondent was an employee of the appellant as at the time of the accident. Further that during the hearing on the 28/06/ 2010 the contract of employment was produced as an exhibit in proof of the same.

The issue of employment having not been contested by the Appellant at the trial stage, this court has no reason to interfere with the finding of the trial magistrate's court. This court holds that the Respondent was an employee of the Appellant as shown by the contract of employment produced and marked as being "Pex2"

As regards the issue of apportionment of liability, the principles upon which the appellate court can interfere with the decision of the trial court are well settled in various Court of Appeal decisions. (See the case of ***KARANJA –VS- MALELE*** *[1983] KLR page 142).*

"**Apportioning of blame represents an exercise of discretion with which this court will interfere only when it is clearly wrong or based on no evidence or on the application of a wrong principle."**

Similarly on the issue of assessment of damages the principles are well settled, although it would appear the appellant abandoned the fourth ground of appeal. Thus I find that the trial court properly considered the injuries suffered by the Respondent against previously decided cases of comparable injuries. In any case:-

"**An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was inordinately high or low."**

(See the case of ***Butt -Vs- Knin*** [1982-1988] Vol. I KAR 1).

For the reasons stated above, the material that was presented before the trial court, clearly shows the respondent was lawfully employed by the appellant; the appellant failed to provide him with a safe system and conditions of work and supervision. This court also finds that the environment where the Respondent was working space was too small to allow for the *free movement of the fork lift simultaneously with people working in the same space. A helmet would have been of great help in a place like this being that there were things being lifted and the probability of them falling on these under the forklift were high. Since the Appellant chose not to controvert the Respondents evidence I would also hold as the trial court did that the Appellant was 100% liable for the accident.*

Regarding at the injuries suffered by the Respondent the Doctor found that they were moderate soft tissue injuries with no resultant permanent impairment. I am of the considered opinion that the award of Kshs.120,000/= as General Damages for the said injuries was inordinately high. I find an award of Kshs.70,000/= to be adequate compensation for those injuries. This court will not interfere with the award on Special Damages.

In the premises, I allow the appeal on granting of damages by setting aside the award of KShs.120,000/= and substituting thereof the sum of KShs.70,000/= as general damages. The award on special damages shall not be disturbed. The appeal on liability is dismissed. The Respondent shall have the costs of the suit in the lower court. Each party shall bear its own costs for this appeal.

Orders accordingly.

Judgment delivered, dated and signed in open court at Kakamega this 11th day of June 2015

RUTH N. SITATI

JUDGE

In the presence of

Miss Willunda for Madialo……..for Appellant

Mr. Alwanga (absent)…….for Respondent

Mr Lagat……Court Assistant