REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO.121 OF 2013

BETWEEN

JOSHUA BATISI MAKOMERE ……………………………..APPELLANT

VERSUS

LUBAO JAGGERY FACTORY LIMITED ………………..RESPONDENT

(Being an appeal from the decision of the Chief Magistrate's Court at Kakamega in Kakamega CMCC No.383 of 2005 delivered on 04/10/2013)

J U D G M E N T

Introduction

1. The appeal herein arises from the judgment and decree of the Principal Magistrate in Kakamega C.M. CC No.383 of 2015. In her judgment, the learned trial Magistrate dismissed the appellant's suit against the respondent with costs. The appellant being aggrieved and dissatisfied with the said judgment and decree raised the following six (6) grounds of appeal.

(a)That the trial Magistrate erred in law and fact in finding that the defendant was not liable for the accident when there was sufficient evidence to demonstrate that it was fully liable.

(b)The trial Magistrate erred in law and fact in misapprehending the Law as to occasion a travesty of justice.

(c)That the trial Magistrate erred in law and fact by failing to consider the applicable Laws in respect of the claim and completely disregarded and misapprehended the material placed before her by way of evidence and submissions.

(d)That the trial magistrate erred in law and in fact in awarding damages that was inordinately low considering the injuries suffered by the respondent.

(e)That the trial Magistrate erred in Law and fact in considering and taking into account issues that were not placed before her for determination and relying on extrinsic evidence and issues not before her as to occasion a travesty of justice to the appellant.

(f) The trial Magistrate occasioned a travesty of justice by misapprehending the law and facts placed before him.

The appellant prays that the appeal allowed, judgment and decree be set aside together with costs.

Appellant’s Case

2. The appellant herein was the plaintiff in CMCC 383/2005 in Kakamega. He filed his plaint on the 2/06/2005 claiming the following:-

a) General damages for pain suffering and loss of amenities

b) Special Damages aforesaid.

c) Costs and Incidentals to this suit.

d) Interests at Court rates.

e) Any other relief that this Honourable Court may deem fit and just to grant.

3. The appellant claimed to have been injured while working at the defendants (Respondent) jaggery within Kakamega District and blamed the Respondent for the same. He particularized the breach of contract and negligence in paragraph 6 of the Plaint.

4. During the trial, the appellant was the only one who testified. He told the trial Court that he was an employee of the respondent company and was working at the boiler Section making jaggery on 20/06/2003 when boiling sugar syrup poured on his left leg and burnt him. He explained to the trial Court that as he was cooling the sugar after it had boiled, the container slipped and poured on his left leg. He also stated that he sought treatment at Nala Hospital where he was admitted for one (1) month. After treatment he did not go back to work.

5. The appellant contended that he sued the respondent because he had not been paid and he had not been provided with gumboots which would have prevented him from being burnt. He stated that on the material day he was wearing only “Akala” shoes. He produced the treatment card for the Provincial General Hospital Kakamega where he was treated after leaving Nala hospital being P exh 1. He was examined by Dr. Mubisi who prepared a medical report marked Pexh 1 – 2. He also saw Doctor P.W. Oketch whose report was produced as DExh 1.

6. On cross examination the appellant stated that he was not issued with a letter of employment. He further told the Court that he got burnt at 10.00pm and that they were using lantern lamps and not electric light bulbs that night. He reiterated that he was the one who was stirring the sugar that night but denied that he poured the sugar syrup on himself. He told the Court that the treatment notes from Nala Hospital were taken by Hudson from the respondent company.

Respondent’s Case

7. The Respondent on their part filed their defence on the 26/09/2005. In the defence they denied the allegations by the appellant and asked him to prove the same. They alleged that if any accident occurred at all, then the accident was as a result of the appellant’s own negligence particulars thereof are set out in paragraph 5 of the defence.

8. At the hearing of the case the respondent did not call any witnesses. Upon careful consideration of the evidence that was placed before the learned trial Magistrate, the Court noted that the appellant’s testimony was at variance with his averments in the plaint dated 2/06/2005. She therefore found that the appellant’s testimony was not consistent with his pleadings and further that he did not produce any treatment records to show that he was treated at Nala Hospital. The learned trial Magistrate stated in her judgment that she could not tell whether indeed the appellant sustained any injury in the course of his employment on the 20/06/2013. She found that the appellant had not established liability against the respondent on a balance of probabilities and proceeded to dismiss the appellant’s claim with costs to the respondent

Hearing of the Appeal

9. The appeal herein was canvassed by way of written submissions which were exchanged between the parties who also filed authorities. In their submissions Counsel for the appellant stated that since the defence did not avail any witnesses the appellant's testimony remained unrebutted.They maintained that the appellant was the respondent's employee and that he was injured while working at the Respondents factory. Counsel also submitted that the fact that the appellant was treated at Nala Nursing Home was never challenged by the respondent.

10. It was also submitted that issues like inconsistencies in the appellant's pleadings and testimony with regard to the nature of injury suffered by the appellant and the failure to produce treatment notes from Nala Hospital were not placed before the trial Magistrate. Lastly that the amount of kshs.200,000/= awarded as quantum was insufficient taking into account the degree of injuries/burns suffered. On whether or not appellant the appellant suffered burns at his place of employment, the appellant invoked the provisions of Article 159 of the Constitution and Sections 1A and 1B of the Civil Procedure Act which provisions dictate that every case should be heard and determined on merits and no case should be thrown out on mere technicalities.

11. On his part the Respondent submitted that there was no evidence to corroborate the allegations by the appellant that he had been injured on the 20/06/2003; there was no letter of employment produced to show that he was an employee of the Respondent and no sick chit was drawn by Respondent to show that the appellant had been injured at the Respondents premises.

12. Counsel for the respondent also submitted that the appellant did not prove that he was an employee of the Respondent as at the time of the accident. It was also submitted that this Court cannot award damages where the lower Court deemed it fit not to make an award because the law is well settled that an appellate Court cannot interfere with the assessment of damages by a trial Court except if the trial Court had acted on wrong principles of law or misapprehended the facts, or made an erroneous estimate of the damages suffered.

13. It was also submitted that the evidence by the appellant was at variance with his pleadings and that since parties are bound by their pleadings which is the position in law, a party cannot shift its case from the one set out in his pleadings. It was thus contended that it was mere speculation that the appellant was injured on 20/08/2003.

Issues for Determination

14. In my considered view, the following are the issues for determination:

a) Whether the appellant proved his case to the required standard.

b) Whether damages were awarded by the trial Court and whether the same were inordinately low considering the injuries suffered by the Respondent.

Analysis and Findings

15. This being a first appeal, this Court as the first appellate Court is bound to re-assess and evaluate the evidence on record afresh and come to its own conclusions remembering that it did not have the opportunity to see the witnesses testify and determine their demeanor. See the case of **Selle –vs- Associated Boat Co. Ltd & others [1968] E.A 123**.

16. I have re-assessed and considered afresh the evidence on record and note that the respondent did not call any witness to prove its allegations contained in the statement of defence.I have also noted that the appellant's advocate on the 9.11.12 requested that paragraph 8 of the plaint be amended to read burns to the left leg instead but he did not amend paragraph 5 of the same plaint. The appellant filed a reply to the defence wherein he reiterated the contents in the plaint as originally drawn and filed.

17. It is on record that the appellant was the only one who testified. The medical reports by the two Doctors who examined him were produced by consent namely "PEx 2" and "DExh 1.". He produced treatment notes from Kakamega Provincial General Hospital which were marked as "PExh 1". The appellant mentioned a number of people who he worked with at the respondent's premises but none of them was called as a witness in these proceedings. He also mentioned his supervisor but did not call him as a witness.

18. The trial Court found the appellant's evidence to be at variance with his pleadings. Just like the trial Court did, I also find that the appellants evidence is at variance with his pleadings. Pleadings are very crucial in civil cases. They are what the Courts rely on in determining whether a case has been established or not. Pleadings can be amended at any stage of the proceedings before judgment, but in this case the appellant's advocate only amended the plaint partially and did not therefore bring out the appellant's case to agree with the evidence adduced.

19. When a party gives a testimony that is at variance with what is contained in his pleadings then the said testimony speaks of a totally different case or complaint. In the instant case, the appellant averred at paragraph 5 of his plaint that he sustained a blunt injury to his left leg when a metal bar hit him. In his testimony he told the Court "………………….as I was cooking the sugar, it slipped and fell on my left leg and burnt me". These statements are very different from each other and the advocate should have sought leave to amend the plaint so as to avoid this big variation. Though the particulars of injury were amended the statement remained unchanged, and this Court cannot assume the intention of the appellant in not amending paragraph 5 of the plaint. Am amendment cannot be made through the testimony or during the submissions. The actual amendment must be done to give effect to a party's intention.

20. The Law is clear when it states that parties are bound by their pleadings. As properly stated in the case of **Vijay Marjaria –vs- Nansingh Madhusingh Darbar, Hulashib Nansingh Darbar, Civil Appeal No.106/2000** "a party is bound by his or her pleadings and must either succeed or fail within those pleadings. He is forbidden from shifting his case from that he set out in his pleadings."

21. So it is not certain in this particular case whether the appellant was hit by a metal bar or burnt by molten sugar. For the above reason, I find that the appellant did not prove his case against the respondent on a balance of probability on how he was injured and therefore cannot blame the Respondent who dealt in sugar and not metals.

22. On the issue of quantum the trial Court held that had the claim succeeded and had it been established that the appellant suffered burns to the left leg she would have awarded him (appellant) kshs.200,000/= general damages. The trial Court did not award any amount as damages in this case.

23. For the above reasons I find the appeal herein as being unmeritorious and the same is therefore dismissed with costs to the Respondent.

24. Orders accordingly.

Judgment delivered, dated and signed in open Court at Kakamega this 19th day of October 2015.

RUTH N. SITATI

J U D G E

In the presence of:

M/s Edhiambo Ouma (absent) for Appellant

Miss Wilunda (present) for Respondent

Mr. Okoit - Court Assistant