REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 199 OF 2011

BONFACE WITABA SHIVACHI ..... APPELLANT

VERSUS

ELDORET STEEL MILLS LIMITED ..... RESPONDENT

(Being an Appeal arising from the Judgment and decree of the Hon. Nathan Shiundu (Senior Resident Magistrate) in Eldoret Chief Magistrate's Civil Case No. 347 of 2010 d elivered on 5th December, 2011)

JUDGMENT

The Appellant herein was the Plaintiff and the Respondent the Defendant in a suit before the Chief Magistrate's Court, being Civil Suit No. 347 of 2010. He sued for special and general damages for injuries sustained in the course of his duties at the Respondent's workplace on 26th January, 2010.

The Appellant in his Plaint had stated that on the material date he was lawfully on duty operating the machine when due to the negligence or carelessness of the Defendant, its servants and/or agents and contrary to their contractual agreement that the Respondent would take all reasonable measures to ensure his safety, the Appellant was cut his right hand middle finger and left thumb by the Respondent's machine thereby causing him severe bodily injuries.

Particulars of injuries were listed under paragraph 5 of the plaint as follows:-

(a) Deep cut wound on the right middle finger.

(b) Deep cut wound on the left thumb.

(c) Swelling and tenderness on the injured fingers.

The Appellant's claim was for general and special damages, costs of the suit and interests thereon.

In a judgment delivered on 5th December, 2011, the trial Magistrate found that the Appellant had not proved his case on a balance of probability and the suit was dismissed with each party to bear its own costs of the suit.

The Appellant was dissatisfied with the judgment, hence this appeal. In a Memorandum of Appeal dated 14th December, 2011 he has raised the following grounds of appeal.

1. The learned Trial Magistrate erred in law and fact in finding that the Appellant had not

proved his case on a balance of probability and thereby dismissing the same.

2. The learned trial Magistrate erred in law and fact in failing to address the evidence and submissions tendered by the Appellant and therefore failed to take into account relevant facts while dismissing the suit.

3. The learned trial Magistrate erred in law and in fact and misdirected himself in finding in favour of the defendant even though the defence did not tender any evidence to rebut that of the Appellant.

4. The learned trial Magistrate erred in law and in fact in considering matters which were not in issue thereby arriving at the wrong decision.

5. The learned trial Magistrate erred in law and in fact in finding that the Respondent had provided the Appellant with protective gears and a safe working place and yet no sufficient documentary evidence was tendered in Court by the Respondent to support that finding.

6. The learned trial Magistrate erred in law and fact in failing to find that the Respondent was negligent.

The above grounds of appeal can be summarized as follows:-

- That the learned trial Magistrate failed to examine the evidence adduced by the Appellant and disregarded the fact that the Respondent did not have any substantial evidence to support his claim that it had provided protective gear to the Appellant.

- The learned trial Magistrate erred in considering matters which were not in issue hence failed to find that the Respondent was negligent for the injuries the Appellant suffered.

- The Appellant had proved his case on a balance of probability.

It is now the duty of this court to reconsider and re-evaluate the evidence adduced before the trial court and come up with its own conclusions. This court will also not interfere with the Subordinate Court's findings unless it finds that the court relied on wrong principles in arriving at its decision and that the conclusion was not based on the facts and evidence before the court.

Two witnesses testified for the Plaintiff's case while the defence did not call any evidence. The Appellant testified as PW1. He testified that on the material date, he reported to work at 8.00 a.m. where he worked for the Defendant (Respondent) in carrying metal rods. He stated that the Machine Operators did not put the rods in the right channel and that the metal rod was thrown out of the machine and it injured both his arms and legs. He said that he had not been provided with protective gear by the Respondent and it was not true that he refused to wear them. He identified in court both the treatment chit and the doctor's medical report.

On cross-examination the Appellant insisted that the metal rod jumped from the machine and suddenly hit his both legs and hands. He said the machine was being operated by a machine operator and was set at a low level. He said he had never worked as a machine operator and his work was only to carry the rods into the machine. He also said that he was not provided with any protective gear.

PW2, Patrick Kiprono, a Clinical Officer at Uasin Gishu District Hospital testified that the Appellant was treated at the hospital on 26th January, 2010. He said he treated him for deep cut wounds on both hands and soft tissue injuries on the left thumb and right middle finger. He also produced as exhibits the Plaintiff's treatment chits and medical reports as P. Exhibits 1 and 2 respectively.

I will address the summarized grounds of appeal simultaneously as they focus on liability. And once the issue of liability is settled, the court can then determine what percentage of quantum of damages is payable to the Appellant.

First, the Appellant needed to prove that he was, at all material times an employee of the Respondent company. He needed to bear in mind that his assertion that he worked for Respondent was denied by the latter and that he was put to strict proof thereof. According to the Appellant, he had been assigned the duty of carrying the metal rods from the twisting machine when a piece of metal bar was thrown from the machine hitting his both hands and legs and injuring him.

For this reason, the burden of proving that the Respondent owed the Appellant any duty of care remained solely in the hands of the Appellant himself. It was not the duty of the Respondent as the Appellant's counsel submitted to produce their register to show that the Appellant was not their employee. The onus lay on him to seek the assistance of the court to compel the Respondent to allow the Appellant to access their employee duty register to prove that he indeed worked for the Respondent company. He failed to seize this noble opportunity that would have enabled him to crystalize his case. In any case, the cardinal principle of law is that "***he who alleges must prove***." The same is well captured in Sections 107 to 109 of the Evidence Act which provide as follows:-

"107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

This law clearly demonstrates that the fact that the Respondent did not tender any evidence did not make the Appellant's burden of proving that he was an employee of the Respondent company any lighter. It was still incumbent on him (Appellant) to call evidence in support of his assertion.

Having regard to the above observation, I also note that, the Appellant having failed to prove that he was working for the Respondent company could not also prove for instance, that he was not provided with protective gear or that the Respondent should have exercised a standard of care over him. A court cannot assume a non-existent fact. It arrives on its findings upon evaluating the facts and evidence presented before it. The Appellant failed in this test and could not thus successfully prove that the Respondent was liable for his injuries.

The Appellant also argue that the trial Magistrate addressed himself to extraneous issues thus arrived at the wrong finding. In particular, he submits the court noted in its judgment that the Appellant did not file a Reply to Defence and for that reason was deemed to have admitted the particulars of negligence attributed to him. This aspect has been quickly borrowed by the Respondent's counsel who concurs with the trial court in this respect. It is on this ground the Respondent's counsel submitted that a party is bound by its pleadings; and that the failure by the Appellant to rebut the averments attributed to him in defence amounted to their admission. But a scrutiny of the Record of Appeal at page 13 shows that the Appellant filed a Reply to Defence on 24th May, 2010 and the same was received by the Respondent's counsel on 25th May, 2010. Therefore, that observation by the trial court was wrong and not based on facts. I thus dismiss the submission by the Respondent's counsel in this regard.

Counsel for the Respondent cited the case of **GITAHI AND ANOTHER -VS- MABOKO**

DISTRIBUTORS LTD & ANOTHER (2005) 1 EA, 65 that emphasizes the cardinal principle that a party is bound by its pleadings. But the case cannot aid the Respondent given the findings of the existence of the Reply to Defence on record.

But I find the case of **BENEDICT MWAZIGHE -VS- BANDARI TRANSPORTERS LIMITED & DAVID WAMBUA - CIVIL APPEAL NO. 284 OF 2000 (Court of Appeal sitting in Mombasa)** very relevant to the instant case. The learned Judges said as follows:-

"The Plaintiff did not even attempt at the trial, to dispute the Defendant's version of the cause of the accident which had attributed negligence to him. In our judgment, to require the Plaintiff to displace the allegations of negligence made against him in the defence, is not the same thing as requiring him to prove his case beyond reasonable doubt as is required of the prosecution in a criminal trial. It is simply that the Plaintiff has not proved his case to the required standard on a balance of probability."

It is for this reason, I find that, since the Appellant failed to prove he worked for the Defendant company, he could not as well prove the Respondent was negligent in causing the injuries he sustained. The Appellant's case remain far proved to the required standards. It would not at this point serve any purpose to evaluate what quantum of damages would be payable to the Appellant. But it is important to note, contrary to the Respondent's submissions, PW2 did not give any contradictory evidence. His testimony was that, in addition to the severe injuries on the Appellant's both hands, he also suffered soft tissue injuries on the left thumb and right middle finger. His evidence and the medical report he produced though sharply contrasts the Appellant's evidence that he also suffered injuries on both legs. PW2's evidence focuses only on injuries on the hands. Therefore, any damages awardable would be gauged on injuries to the hands only.

In the end, I find that the Appellant failed to prove his case to the required threshhold - on a balance of probability. This appeal must fail and I dismiss it with costs to the Respondent.

DATED and **DELIVERED** at **ELDORET** this 6th day of March, 2014.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

Mr. Rop holding brief for Ombati for the Appellant/Plaintiff

Mrs. Khayo for the Respondent/Defendant