REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 17 OF 2009

(An appeal against the Judgment of Hon. B. OCHIENG, SRM delivered on

22nd January, 2009 in Butere SRMS Civil Case No. 228 of 2006)

OTIENO NALWOYO …..... APPELLANT

VERSUS

MUMIAS SUGAR CO. LTD. …..... RESPONDENT

JUDGMENT

The appellant filed a suit in the Senior Resident Magistrate's Court at Butere seeking general damages, special damages, costs of the suit, interest, and any other or further relief. The allegation was that on 12/12/2003, as a masonary casual employee of the respondent, he fell on duty and was injured due to the negligence of the respondent.

The case was heard through *viva voce* evidence. On conclusion of the case, the learned magistrate found that the appellant did not prove a case of negligence against the respondent on the balance of probabilities. The magistrate found that the appellant did not establish that he was at work on the date of the alleged accident. The court dismissed the case with costs. It found however that, if the occurrence of the accident was proved, the respondent would have been found 100% liable in negligence. In that event, based on the injuries alleged, the court would have awarded Kshs.100,000/= as general damages and Kshs.3,500/= as special damages. It is from the above dismissal of the appellant's case that he brought this appeal through his counsel Wanyama & Company.

He listed six grounds of appeal as follows -

1. The learned magistrate erred in law and fact by dismissing the appellant's suit on ground that it was a fake claim which issue had never been pleaded in the defence and had been concealed contrary to the rules of pleadings.
2. The learned magistrate erred in law and fact by dismissing the appellant's suit on basis of an evasive statement of defence and on an unbelievable defence witness with unclear job title from an irrelevant section of the company and unable to tell his department codes and lacking the work schedule of the three eligible supervisors on the material date of the accident.
3. The learned magistrate erred in law and fact by laying emphasis on the photocopy defence exhibit lacking information on its face as to the origin, purpose, reference period and maker to the isolation of the appellant's information, physical evidence of injury and exhibits in support of the claim.
4. The learned magistrate erred in law and fact by misdirecting himself as to the standard of proof required of the defence to found a conclusion that the claim was fake which word imputed fraud or

deception in the conception of the appellant's claim.

5. The learned magistrate erred in law and fact by relying on the defence exhibits that had never been availed to the appellant during discovery and testimony and which lacked the original document for comparison before production of the photocopy to rule out any possibility of manipulation to suit the respondent's case.
6. The learned magistrate erred in law and fact by holding that the appellant could not be injured as no work was done on the date of the accident in the absence of the defendants resolution sending all workers in the company on holiday and contrary to the fact that the appellant and other casual employees earned wages and worked in shifts.

When the appeal came up for hearing, Ms Lunani appeared for the appellant. No appearance was recorded for the respondent. Before the hearing date, the appellant's counsel, Wanyama & Company had filed submissions on 22/7/2011 and the respondent's counsel, MS Wetangula, Adan & Makokha had filed submissions on 27/10/2011. I have perused the submissions filed.

The appellant's counsel emphasized that the learned magistrate dismissed the case by being erroneously influenced by evidence of the respondent which was the master roll for attendance to work that day. Counsel also argued that that document was produced as an ambush contrary to the Civil Procedure Rules. No pleading in the defence referred to that document nor was the document exchanged between parties.

The counsel also argued that the appellant had established his case on the balance of probabilities. It was clear from the evidence and documents that the appellant was in casual employment with the respondent from 10/11/2003 to 19/12/2003. Counsel relied on the case of ***Samson Emuru -vs- Suswa Farm Ltd. - Nakuru HCCA. No. 6 OF 2003*** and the case of ***Patel -vs- Lalji Kanji [1957] EA 314***.

The respondent's counsel contended that the appellant had not established that he was on duty on 12/12/2003. The master roll produced as a defence exhibit showed that there was no employee on duty that date. The appellant did not shake the evidence of DW1, his supervisor who said that the appellant was not on duty that date. The issue of the supervisor not remembering his own designation did not matter because the designation keeps changing. Counsel argued that the appellant was a professional mason since 1968. He also had diverse experience in that job. Assuming the accident took place, it could not be said that the respondent was negligent. Counsel argued that the defence exhibit was properly produced.

This being a first appeal, I am expected to reconsider the evidence afresh and come to my own conclusions and inferences. I am not bound to come to the same conclusions as those reached by the trial court. See ***Selle -vs- Associated Boat & Company Ltd. [1968] EA 123***.

The case herein was in respect of an alleged industrial accident which occurred on 12/12/2003. It is public knowledge in Kenya that 12th December is a public holiday going by the designation Jamuhuri Day. When the respondent was served with the plaint, they filed a defence. They did not state in their defence that the date was a public holiday and therefore no employee could be at work. They however denied the occurrence of the accident under paragraph 4 of the defence. At the hearing of the case however, they came up with the evidence that the date was a public holiday. They produced a photo copy of a master roll which showed that there was nobody at work on that date.

The standard of proof in civil cases is on the balance of probabilities. The appellant claimed to have been an employee of the respondent. This evidence was not contested. Infact, the evidence of DW1 confirmed that the appellant was a casual employee in the year 2003. The only contention is that he was not on duty on 12/12/2003. It is therefore clear to me that employment was established and therefore master and servant relationship was established even if there was no formal letter of appointment.

The next issue is whether the accident did occur on 12/12/2003 while the appellant was on duty. This is the subject of contest between the parties. The appellant says he was on duty. The respondent claims that that was a public holiday and employees were not on duty. I note that the appellant was treated at the

clinic provided by the respondent on the same 12/12/2003 when the respondent claims that employees were not on duty. No explanation was given why he was treated on that public holiday if the dispensary of the respondent. The appellant was forced to produce merely a photocopy of the treatment card because the respondent had the original which they did not produce.

With regard to the master roll, DW1 himself admitted that there were other two supervisors and their master rolls were not produced. The master roll produced by DW1 was also in photocopy form and was not availed to the appellant or his counsel before it was produced in court. Though the learned magistrate relied on this master roll, in my view that was an error. Firstly it was an ambush as it was not either pleaded in the defence nor availed to the plaintiff before the attempt to produce it in court. Secondly, it was merely a photocopy. Thirdly, DW1 himself admitted that there were two other master rolls which were not produced. No explanation given for failure to produce all master rolls. Obviously, the appellant could not force the respondent to produce those master rolls. In my view, it was wrong for the respondent to go into a hiding game, and then benefit from it by producing doubtful and peace meal documents, without any explanation for so doing.

Balance of probabilities is merely providing evidence which is more believable than the other, with regard to proof of an incident. The evidence tendered before the trial court, in my view, it is more probable that what the appellant stated with regard to his being on duty on 12th December 2003, and that his injury therein what happened. Therefore, his evidence is more believable than that of the respondent. I find that the evidence established that the appellant was on duty and was injured therein.

The next issue is with respect to negligence. An employer is duty bound to provide a safe working environment for all employees. In Charleworth on Negligence 4th Edition page 1036, the author states as follows -

"The duty of employers to provide the servant with a safe place of work is not merely to warn against unusual dangers known to them …. but also to make the clothes of employment as safe as the exercise of reasonable skill as the case would permit. …..... The duty thus describe is a higher duty..... the master is under a duty to make his servants to take reasonable to avoid harm ….....

In the present case, the appellant clearly described how the accident took place. He fell because of inadequate or weak scaffolding, and got injured. That evidence was not controverted by any evidence tendered in court. The allegations of negligence by the appellant in the defence, were not supported by any evidence tendered in court. They remain allegations. The respondent did not provide a safe place of work.

I agree with the finding of the trial court that assuming that the accident occurred, the respondent would be 100% to blame. I so find from the evidence on record.

On damages, the trial court assessed the quantum of damages. The court was correct to do. An appellate court will be slow to interfere with an award of damages unless it is either inordinately high or low as to represent an entirely erroneous estimate. In the case of ***Butler -vs- Butler [1984] KLR 225*** it was stated as follows -

"Assessment of damages is an exercise of discretion and an appellate court will be slow to reverse the decision of the trial magistrate (Judge) unless he either acted on wrong principles or awarded so excessive or too little damages that now reasonable court would, or he has taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered and in the result arrived at a wrong decision."

With the facts and evidence before the trial magistrate, I find nothing wrong with the exercise of discretion by the trial court in assessing damages.

In conclusion, I find that the appeal herein has merits. I allow the appeal, set aside the decision of the trial court. Instead, I enter judgment in favour of the appellant against the respondent. I find that the

respondent is 100% liable for the accident.

I award general damages of Kshs.100.000/= and special damages of Kshs.3,500/=, as assessed by the trial court. The respondent shall pay the costs of the appeal and the subordinate court proceedings.

Dated and delivered at Kakamega this 15th day of May, 2014

George Dulu

JUDGE