REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 56 OF 2009

(An Appeal From The Judgment Of Hon. E. K. Makori, Principal Magistrate

In Mumias Principal Magistrate's Court Civil Case No. 188 Of 2006)

ABDALLA SHIKUKU OKELLO …..... APPELLANT

VERSUS

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

JUDGMENT

This is an appeal arising from the decision of the subordinate court delivered on 26th May 2007 in which the court dismissed the case of the appellant with costs. The appellant was the plaintiff while the respondent was the defendant.

Aggrieved by that decision, the appellant has come to this court through an appeal filed on his behalf by his counsel M/S Wanyama & Company advocates. The grounds of appeal are as following -

1. The learned magistrate misdirected himself by improperly analysing the evidence and pronounced an unfair decision against the appellant.
2. The learned magistrate erred in law and fact by failing to satisfy himself as to the proper standard of proof required on the availability of hot water which issue was only introduced at the hearing.
3. The learned magistrate erred in law and fact in dismissing the appellant's claim when the plaintiff's exhibits having traceable original records in possession in adverse respondent had been admitted in evidence.
4. The learned magistrate erred in law and fact in dismissing the appellant's claim by making improper observations on the entries of the sick sheets made by the respondent's agents.
5. The learned magistrate erred both in law and fact by basing his decision on the inadequate contentions of a defence witness of questionable identification testifying in support of evasive statement of defence.
6. The learned magistrate erred in law and fact by failing to take into account all relevant factors in awarding damages and awarded an amount that was excessively low in regard to the circumstances of the appellant's case.

The appellant's counsel filed written submissions to the appeal. The respondent's counsel, M/S Wetangula, Adan and Makokha advocates also filed written submissions.

On the hearing date, counsel for the respondent did not attend court. Ms Lunani, learned counsel who appeared for the appellant, relied on the written submissions filed. I have considered the submissions as well as the authorities relied upon.

The case in the subordinate court was commenced by way of a plaint. In the plaint dated 2/2/2006, the appellant claimed to have been an employee of the respondent on contract basis between May and July 2005 inclusive. He claimed to have worked in the boiler section. He alleged that on 5/7/2005, when he was on duty carrying out repairs and welding, a hot water pipe unfastened and splashed hot water on him occasioning him severe injuries. He blamed the accident on the negligence of the respondent. Particulars of negligence and particulars of injuries as well as particulars of special damages were pleaded. The appellant asked for judgment against the respondent for general damages, special damages, costs and interest.

The respondent filed a defence denying that the appellant was its employee or that he was injured as claimed. The particulars of injuries, particulars of negligence and particulars of special damages were denied. In the alternative, the respondent pleaded that the accident was wholly caused by the appellant. Particulars of negligence of the appellant were listed.

The appellant filed a reply to the defence. He reiterated the particulars of injuries, particulars of negligence and particulars of special damages. He denied being contributory negligent. He also denied the reliance by the respondent on the doctrine of *res ipsa loquitor*.

Before the case was set down for hearing, the appellant sent a notice to admit documents to the respondent. The notice asked for admission by the respondent of the gate pass, contract form, sick sheet, medical report and receipt for the medical report. The appellant also served a notice to produce on the respondent for certain documents. These were the appellant's treatment notes and the record withheld by the respondent; treatment record from Mumias Medical Centre for 2005; the appellant's sick sheet, accident reports register and worksheet reports for the month of July 2005; and the register for casual employees for July 2005. Lastly, the appellant asked for all books, papers, letters and other writing and documents in the custody of the respondent or in their possession or power, containing any entry, memorandum or minutes relating to the suit. No response was received from the respondent's or his advocate in respect of these two requests.

At the hearing of the suit, the appellant called two witnesses. PW1 was the appellant himself. He stated that he was currently engaged in farming. However from 16th June to 25th July 2005 he was a casual employee of the respondent. He worked on contract basis and had a gate pass. He stated that he was involved in an accident on 5/7/2005 at 1 p.m at the boiler section, when a machine pipe containing warm water, got cut and the water spilled out burning him. He stated that the pipe hit him on his back before the water poured on him. That he was taken to the medical centre of the respondent, treated and given a sick sheet but the respondent retained the original sick sheet and gave him a photocopy. He later saw Dr. Andayi who prepared a medical report. He paid the doctor Kshs.3500/=. He sustained scars from the burns, as he was not provided with head gear. He stated that the pipes were not in good condition. He asked for damages, and costs. After being cross-examined, he was again recalled and produced the original contract form.

He produced a number of documents as exhibits which included a temporary pass for Mumias Sugar Company which showed that he was to work from 16th June to 16th July 2005. He produced a sick sheet dated 5th July 2005 as exhibit 2. He produced a medical report from Lubinu Medical Clinic as exhibit 3. He also produced the receipt for payment to Lubinu Medical Clinic of Kshs.3,500/=. He produced a letter of contract employment from the respondent as exhibit 5.

In cross-examination, he stated that the machine was not running on that day as maintenance was going on and it was being tested. According to him, the repairs were due the fact that the machine had rusted. He stated that he had now healed but had a scar on his back. That apart from Dr. Andayi's clinic, he had attended Shianda Medical clinic and was seen by a Dr. Oketch who prepared a report on 5th July 2005.

PW2 was Dr. Charles Masinde Andayi. It was his evidence that he saw the appellant on 14th January 2006. That the appellant gave a history of an industrial accident which had occurred on 5th July 2005 while on duty at Mumias Sugar Company in the boiler section. He noticed a scar about 6 cm long in the back region of the appellant. According to the doctor, the appellant had suffered a minor tissue injury.

The doctor prepared a medical report and charged Kshs.3,500/=. It was the doctor's opinion that the appellant would have healed fully without any complications within one year.

In cross-examination he stated that he relied on the sick sheet as he did not see any other document. He could not tell whether the injuries were caused by a burn from hot water.

The respondent on their side called one witness DW1, Joseph Wanyonyi Shiundu. It was his evidence that he was the supervisor of the respondent and was employed in 1983. He knew the appellant. He also knew that he was working in June and July 2005 with the respondent. On the 5th July 2005, the appellant was working at the boiler section, and told him that he had been burnt by hot water, though he never witnessed the incident. He stated that as far as he knew, there was no hot water in the factory as it was under maintenance. He denied issuing the appellant any sick sheet. Such a sick sheet would have to be issued by him as the supervisor. According to him, the sick sheet numbers at that time would be 4448 instead of 4201 produced by the appellant. In his view therefore, the appellant's sick sheet had been manipulated.

In cross examination, he stated that he had been a supervisor since 1988 though he did not have any document to confirm the same. That he knew the existence of several departments in the company's production section. The boiler section had about 7 supervisors, each with his own area of work. They were not answerable to him. He stated that when accidents occurred the respective supervisors would prepare sick sheets before the patient was sent for treatment. He stated that he had a file listing employees who had been treated, but did not bring the file to court. He also did not bring to court the accident form records, though they had them. He confirmed that he did not have any document to back his testimony. He stated that he did not know whether the appellant had asked for various documents though he was still working for the company (respondent).

That was the close of the defence case.

On the basis of the above evidence, the learned magistrate delivered a judgment dismissing the suit of the appellant with costs. The appellant having been aggrieved by the decision of the learned magistrate filed this appeal.

This is a first appeal. As a first appellate court, I am duty bound to reconsider the evidence afresh. I am not bound to arrive at the same conclusions reached by the trial court. See the case of ***Selle -vs- Associated Boat Co. Ltd. [1968] EA 128***.

I have re-evaluated the evidence afresh. The appellant claims that the accident did occur and that he was injured on duty. The respondent denied, in the defence, that it employed the appellant. They also denied that the accident occurred. In evidence however, DW1 admitted not only that the appellant was an employee of the respondent, but that he was actually on duty on the date of the alleged accident.

The standard of proof required in civil cases is the balance of probabilities. The burden of proving a case on the balance of probabilities, is always on the plaintiff. In the case of ***Kirugi & ano. -vs- Kabiya & 3 others [1987] KLR 347*** the Court of Appeal clearly stated that such burden is always on a plaintiff and that such burden is not lessened even if the case is heard by way of formal proof. The present case was of course not heard by way of formal proof.

Did the appellant prove his case on the balance of probabilities? The appellant had to prove firstly that he was on duty on the date of the accident. The respondent admitted that he was on duty on that day. Therefore the appellant established that he was on duty that day.

The appellant claims that he was injured on duty. The respondent denies this. DW1 who testified for the respondent stated that on that day, the appellant actually told him that he had been burnt by hot water. DW1 however, did not witness that incident himself. He disbelieved the story because according to him, there was no possibility that hot water would spill from a pipe from a machine which was under maintenance.

The appellant on the other hand, stated that he was given a sick sheet by the respondent. He produced a copy of the same which contains the allegations about the accident. I have perused the document and it so confirms. The appellant stated that the respondent retained the original. DW1 stated that the sick sheet produced was a manipulated document.

I note however, that the appellant asked for production of original documents by the respondent or admission of the same. The respondent neither produced the documents nor admitted, nor denied the same. In effect, the respondent created an inference that it was withholding important information and documents from the court, which were in its own possession. They could not have their own cake and eat it at the same time. In that event the appellant's version was more probable. In my view, the appellant established that indeed an accident did occur on that date at the place of work. He also established that he was injured on duty, as the report of Dr. Andayi was not controverted. The injuries were however soft tissue injuries which would have healed fully within a year as found by the doctor.

The learned magistrate wrote a short judgment. He came to the finding that the appellant did not prove his case on the balance of probabilities, on the basis of one paragraph of about twelve typed lines. In my view, the learned magistrate did not weigh the case for the appellant against that of the respondent before reaching a conclusion. The trial court therefore in my view did not reach the correct conclusion.

Was the respondent regligent?

The duty of an employer to provide a safe place of work to an employee was aptly described in the textbook entitled **Charlesworth on Negligence 4th edition page 1036** as follows –

> ***"The duty of employers to provide servants with a safe place of work is not merely to warn against unusual dangers known by them …. but also to make the place of employment …. as safe as the exercise or reasonable skill and care would permit. The duty thus described is higher..... the master is under a duty to make its servants to take reasonable steps to avoid harm....."***

I find that the respondent herein as employer did not meet the above standards. I find that the appellant suffered the injuries alleged on duty and that the respondent was negligent. I will therefore allow the appeal and enter judgment for the appellant.

The appellant's counsel has argued that the amount of damages assessed by the learned magistrate was inordinately low. He has submitted that during the submissions at the trial, even the respondents had asked for a higher figure of damages than that assessed by the learned trial magistrate. That the respondent asked for an award of Kshs.70,000/= while the appellant's counsel asked for an award of general damages of Ksh.230,000/=.

The above cited figures are correct.

In my view, courts are not obliged to adopt any of the figures for damages proposed by parties or their counsel. The courts may disagree with the figures proposed by any or both parties. In assessing damages, courts have to make sure that a consistent and uniform approach, depending on the injuries suffered. Each case has to be considered on its own merits depending on the facts and type of injuries suffered.

Appellate courts are usually slow to interfere with the assessment of damages made by a trial court unless such award is either too low or too high or was based on wrong principles of law. As was stated in the case of ***Butler -vs- Butler [1984] KLR 225*** the assessment of damages is the exercise of discretion by a trial court, and appellate courts should be slow to interfere unless either the trial court acted on wrong principles or awarded so excessive or so low damages, that no reasonable court would have done.

In the present case, the injuries were superficial soft tissue injuries. PW2 Dr. Andayi stated that they would heal completely within a year. In my view, what was suffered by the appellant was mere

inconvenience of pain from the accident. Since the doctor found that the injuries would heal completely within one year, there could be no other aggravating factors.

Though the learned trial magistrate did not give detailed reasons on how he arrived at the assessed figure of Kshs.40,000/= for general damages, in my view, that was a reasonable award for the injuries suffered. I find no basis to disturb the assessment of damages done by the trial court. The special damages don't appear to have been challenged in evidence or even on appeal. I confirm the same.

In the result, I allow the appeal and set aside the judgment of the trial court. I instead enter judgment for the appellant against the respondent. I award general damages of Kshs.40,000/= and special damages of Kshs.3,500/= with interest. Interest on general damages will accrue from today's date and interest on special damages will accrue from the date of judgment in the subordinate court. The respondent shall pay the costs of this appeal and the costs of the proceedings in the trial court.

Dated and delivered at Kakamega this 5th day of June, 2014

George Dulu

J U D G E