REPUBLIC OF KENYA

High Court at Kakamega

Civil Appeal 99 of 2010

(Appeal against the judgment of [MR. P. O. OOKO, R.M.] delivered on 19.07.2010 in the Chief Magistrate's Court Kakamega in Civil Case No. 121 of 2007)

AGGREY MANDU ENOCK ……..…… APPELLANT

V E R S U S

WEST KENYA SUGAR CO. LTD. ……. RESPONDENT

J U D G M E N T

The appellant was injured on the 15.4.2004 while working for the respondent. He filed civil case number Kakamega CMCC 121 of 2007 seeking general damages arising from the accident. The suit was dismissed by the trial court leading to the filing of this appeal. The grounds of appeal are that the trial court arrived at the wrong judgment, that the trial court held that the appellant lied when testifying, that the trial court failed to take cognizance of the doctrine of strict liability, that the trial court relied on fake defence exhibits and that there was miscarriage of justice by failing to balance the scale of justice.

The appeal proceeded by way of written submissions. The appellant contends that the defendant did not provide protective gears including boots, gloves and helmet. The respondent produced a document purporting that the appellant received the protective gear but that was not true as the signature on the document was not that of the appellant. The defence produced documents that were tampered with such as a master roll and the court found the documents to have been tampered with. The finding of the court on the tampering of the documents ought to have discredited the defence evidence. The respondent failed in its statutory duty under the Work Injury Benefits Act and the Factories Act by failing to provide the relevant protective gear and should be held 100% liable. Counsel for the appellant relied on the case of **KILIFI PLANTAITON V JETH ODAWA Mombasa High Court Civil Appeal No.31 of 2003** and the case of **ROCK MASTERS LTD. V MICHAEL MUNGAI Nairobi High Court Civil Appeal No. 580 of 2002.**

On its part the respondent concurs with the findings of the trial court. Counsel for the respondent submitted that the appellant failed to prove negligence or bridge of statutory duty of care against the respondent. The appellant simply stated that he slipped and fell while carrying a 50 kilogram bag of sugar but did not state the cause of his falling. The appellant did not describe the working environment at the place of work. Counsel relied on the cases of **KIEMA MUTHUKU V KENYA CARGO HANDLING SERVICES LTD. [1991]2 KAR** and that of **BALDER KAUR MANN V ROBERT BILINDI WEKALAO [2006] eKLR.**

The record of the trial court shows that one witness testified for each party. The appellant's evidence before the trial court was that he was employed by the respondent on permanent basis in 2003. On the 15.4.2004 he was at his place of work when he slipped and fell down. He was injured on his left knee and toes. He blamed the respondent for the accident because the working environment was not clear that is why he slipped. He also testified that he was not provided with any protective gear. He denied that he had been supplied with an overall, safety shoes and a helmet. After the accident he was treated at Kakamega Health Center. He left employment in 2004. He was employed as a stitcher of sugar sacks. On the material day he was carrying sacks of sugar as his supervisor could deploy him anywhere. On that date his supervisor was Mr. Simiyu.

The respondent gave evidence through Robert Nabiranga who was a supervisor in the processing

department. The witness confirmed that the appellant was employed by the respondent as tailor of sacks (sacks sticher) but he could be deployed to other departments. He produced the master roll for the month of April 2004 and testified that there was no report of the accident. The appellant was sacked in September 2004 for absconding duty. The witness further testified that the work environment was safe as the floor is always dry without any moisture as the sugar is not required to absorb any moisture. The witness produced an undated document showing that the appellant was supplied with protective gear.

The main issue for determination is whether the appellant proved his case against the respondent. Being a civil case the standard of prove is that of on a balance of probabilities. The appellant contended that on the material day he slipped and fell down. He also testified that the working environment was not clear. Other than the above information the particulars of negligence as stated in the plaint contend that the appellant was not provided with boots and helmet, that the respondent did not maintain the factory floor in a suitable way for the safety of its workers, that the respondent provided poor working conditions, facilities and environment thereby exposing the appellant to risk.

The trial court evaluated the evidence and on the issue of negligence held that the appellant did not prove any negligence against the respondent. The trial magistrate found that it was incumbent upon the appellant to have proved that the working environment was unsafe and by informing the court what made him to slip. The trial court concluded that it could not ascertain with precision as to whether the working environment was unsafe. Taking the totality of the evidence adduced by the appellant relating to the manner in which the accident occurred, it can be concluded that the appellant was in the course of his employment when he slipped and fell down. The appellant was carrying a 50kg bag of sugar when he slipped. The appellant contends that he was not supplied with gumboots or helmet. In his evidence it is not established that the floor was wet. It is common knowledge that sugar cannot be stored on a wet floor. DW1 testified that the floor was not wet as the sugar is supposed not to absorb moisture. The appellant did not specifically state what made him to slip and whether he was barefooted. Even if he was not supplied with gumboots it was upon him to carry out his duties carefully. He had worked at the premises for almost one year and was conversant with his work. The mere fact that the appellant got injured while working for the respondent cannot impute negligence on the part of the respondent. The appellant did not prove any negligence on the part of the respondent and his claim ought to have been dealt with under the usual Workmen's Compensation procedures which do not require negligence on the part of the employer. The contentions by counsel for the appellant that the trial court ought to have held the respondent strictly liable cannot apply. The appellant had a duty of care to undertake his work carefully. He was not pushed by another worker and there is no evidence that the floor was slippery. On a balance of probabilities the appellant failed to prove his case.

In the end, I do find that the appeal lack merit and the same is hereby dismissed with no orders as to costs.

Delivered dated and signed at Kakamega this 9th day of May 2013

SAID J. CHITEMBWE
J U D G E