IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, KARANJA & WARSAME, JJ.A)

CIVIL APPEAL NO 27 OF 2017

BETWEEN

JOHN MBUTA……..…….…...APPELLANT

AND

BOSKY INDUSTRIES……....RESPONDENT

(Being an Appeal against the Judgment and Decree of the High Court of Kenya at Nairobi (Sergon, J.) dated and delivered on 25th November 2016

in

H.C.C.A No. 141 of 2003)

****

JUDGMENT OF THE COURT

1. This is a second appeal from the decision of the Magistrates' Court delivered by Hon. Ougo, Principal Magistrate (as she then was) in **PMCC NO. 2720 of 2001** at Nairobi where the trial court, in its judgment delivered on 21st February, 2003, found that John Mbuta, (the appellant) had failed to prove his case on a balance of probabilities hence dismissing the suit with costs in favour of Bosky Industries (the respondent).

2. Being dissatisfied with the aforementioned judgment, the appellant preferred an appeal (**H.C.C.A No. 141 of 2003**) to the High Court (Sergon, J). The learned Judge found that the appeal had no merit and upheld the trial Court's findings hence dismissing the appeal in its entirety with costs in favour of the respondent.

3. A brief background of this appeal is that at all material time the appellant was an employee of the respondent. He was employed in the clothes department and his duties involved the ironing of clothes.

4. In his plaint dated 20th April, 2001 and filed the same day, the appellant averred that on or about 6th September, 1999 as he was carrying out his normal duties of ironing clothes, the valve of the boiler connected to the ironbox which he was working with, suddenly burst open releasing hot steam causing him bodily injury. He attributed this exclusively to the alleged negligence and/or breach of statutory and/or contractual duty on the part of the respondent. He maintained that the boiler was faulty.

5. He set out the following particulars of negligence and/or breach of statutory duty of care as against the respondent:

> ***"a) Exposing the plaintiff to dangerous working condition, thus providing unsafe system of work***
>
> ***b) Failing to take any or any adequate precautions for the safety of the plaintiff while engaged in his said work***
>
> ***c) Exposing the plaintiff to risk of damage or injury which they knew of ought to have known***
>
> ***d) Failing to provide the plaintiff with protective devices for him to use while in his duties with the defendant***
>
> ***e) Failing to provide the defendant with safe and adequate equipment for his use***

f) Failing to provide any or any suitable or industrial gloves and/or jacket and/or overall for the plaintiff to wear while carrying out the said work."

He also claimed special damages in the sum of 1,500, being the amount paid for the medical report; general damages and costs of the suit plus interest thereon.

6. In its defence, the respondent admitted that an accident had occurred in its premises but denied the appellant's claim and in particular, all the allegations of negligence and/or breach of duty of care leveled against it and put the appellant to strict proof. It averred that the accident and resultant injuries sustained by the appellant were caused by his sole and substantial negligence therefore he is not entitled to any damages as against the respondent.

7. Before the trial court the appellant relied on his own testimony and that of PW 1, one DR. C. Okoth Okere, who testified on the particulars of the injuries sustained by the appellant in detail and tendered into court the resultant medical report on the same. The appellant told the court that on 6th September, 1999 as he was ironing clothes as usual the boiler valve burst open releasing hot steam hence injuring him. He contended that the boiler was faulty and that he had not been issued with protective gear, or overalls to protect him from such eventualities although the other workers had been given overalls. He conceded that he had been warned against hitting the valve, which he denied as being the cause of the malfunction of the boiler maintaining that the boiler malfunctioned because it was faulty.

8. The respondent set out the particulars of the appellant's negligence as follows:

"a) Carelessly causing the iron he was using to knock against the boiler-gate valve and triggering the spewing out of the hot steam.

b) Failing to take adequate precautions for his own safety.

c) Failing to strictly follow safety instructions issued to him by the Defendant on how to use the iron and avoid contact with certain parts of the boiler.

d) Exposing himself to a danger that he knew or ought to have known."

9. At the trial the defence relied on the testimony of 2 witnesses. Stephen Odundo Odera DW1, who testified that he was working as an electrical engineer and that the incident was reported to him on the material day. When he looked at the boiler, he noticed that the valve of the boiler had been knocked by an object and upon enquiries he was informed by the supervisor that it had been knocked by the operations iron. He contended that the boiler is located about 1½ meters from the ironing table and that there is a steam pipe that runs from the boiler to the iron box. He further testified that he had previously worked on the boilers for over 25 years and had never witnessed a valve disengaging without been tampered with and the only occasion it would disengage was if the threads were worn out which was not the position in this case. He deposed that the valve had been broken and the threads were intact therefore, the only logical inference was that it had been hit.

10. For the respondent, Zachary Bwala, (DW2) stated that he was working on the same shift with the appellant on the material day. He stated that his work station was about 2 meters from the appellant's and that he was facing him. He stated that while ironing he heard the noise of an iron hit against metal. That the appellant's iron hit the valve and steam came out toward the appellant. He testified that immediately after the incident, they had to cut open the appellant's overall, which was black in colour and long-sleeved. He stated that they had been previously warned against hitting the valve as this would disengage it. On cross-examination he confirmed that the respondent gave an overall to wear while at work but they never used to sign anywhere for the same.

11. Upon consideration of the case in its entirety, the learned Principal Magistrate entered judgment in favour of the respondent in which she pronounced herself as follows;

"The plaintiff has failed to adduce evidence of negligence on the part of the defendant and breach of statutory duty as breach of contract. The plaintiff ought to have pursued the defendants under the workmen compensation, this I find that the plaintiff has failed to prove his case and on a balance of probabilities and his suit is dismissed with costs to the defendant. Had the plaintiff proved his case I would have awarded general damages of Kshs. 150,000/- one hundred fifty thousand (sic) **plus specials** (sic) **of 1500/-making it 151,599/-. However on the reasons stated in this judgment the plaintiff's suit is dismissed with costs to the defendant."**

12. Aggrieved by the said decision the appellant proffered an appeal to the High Court being **Nairobi HCCA NO. 141 OF 2003**, challenging the judgment of the trial court. The appeal was premised on grounds i*nter alia*, that the learned magistrate erred in law and fact by: not finding that the appellant failed to prove his case on a balance of probabilities as required by the law; not finding the respondent negligent and/or in breach of the contract of employment with the appellant; admitting and considering the 1st and 2nd defence witnesses' evidence; failing to analyze the evidence placed before her in a keen and judicial manner and hence exercising her discretion erroneously while dismissing the suit and; hypothetically proposing damages for Kshs. 150,000/- which was inordinately low, hence erroneous.

13. The learned Judge upon re-assessing and re-evaluating the record before him found that the trial magistrate had properly analyzed the evidence before her and arrived at a proper conclusion hence dismissing the appellant's appeal.

14. Again, aggrieved by the above judgment of the High Court, the appellant filed the instant appeal premised on four (4) grounds to the effect that the learned Judge erred in law in failing to: fairly and/or properly analyze the evidence adduced in the subordinate court; uphold the legal obligation owed by the respondent to the appellant under the defunct Factories Act; consider whether the respondent was in breach or otherwise of its statutory duty of care to the appellant under the defunct Factories Act and; properly analyze the submissions made on

behalf of the appellant.

15. At the plenary hearing before us on 24th September, 2019, Mr. Muriuki appeared for the appellant while there was no appearance for respondent in spite of due service of the hearing notice. The appeal was canvassed by way of written submissions with brief highlights by Mr. Muriuki, buttressed by case law cited by the parties.

16. Urging the Court to allow the appeal, Counsel for the appellant submitted on grounds 1, 2 and 4 contending that the said grounds related to the failure by the superior court to properly exercise its duty as a first appellate court. Citing among other cases the case of **Abok James Odera T/A AJ Odera & Associates v. John Patrick Macharia T/A Macharia & Co. Advocates (2013) eKLR** counsel submitted that the High Court had a duty to carefully examine and analyze afresh the evidence on record and come up with its own conclusion and not to interrogate whether there was enough evidence to support the findings and conclusions of the trial court. He contended that all the learned Judge did was to set out a summary of the evidence adduced before the trial court but he failed to re-analyse or re-evaluate the same with a view to arriving at a reasoned independent conclusion. According to counsel, the learned Judge failed to consider that there was no evidence to show the issuance of the alleged overall to the appellant as pleaded. He also contended that the learned Judge failed to properly analyze the evidence on record hence arriving at a misconstrued finding that the appellant had been provided with protective gear. In conclusion, he argued that both courts below came to the wrong conclusion that the incident was due to the appellant's own negligence and the court failed to consider the evidence on record in its entirety.

17. On grounds 2 and 3, learned counsel citing the **Factories Act** and *inter alia* the case of **Ngera & Anor. v. Kenya Wildlife Services (1998) 1 KLR** urged that the High Court failed to appreciate the legal and/or statutory duty of an employer to provide a safe system of work so as not to subject employees to unnecessary risk. He contended that the respondent ought to have ensured that the boiler was enclosed in a manner to avoid any injuries that may be caused by its contents. In conclusion he submitted that the High Court had failed in its duty hence the appeal had merit and ought to be allowed and that the appellant's prayers be granted as sought.

18. Although learned counsel for the respondent did not appear in court on the hearing date, they had filed brief submissions on 7th November, 2017 in opposition to the appeal. In the brief submissions, counsel submittedthat the issues for determination are: whether this Court has powers to delve into issues of fact and whether it should; whether this Court should disturb concurrent findings of fact by the two courts below and; whether the High Court failed in carrying out its duty.

19. On the first issue, counsel relying on the case of **Kenya Breweries Limited v. Godfrey Odoyo (2010) eKLR,** submitted that this Court's duty as a second appellate court is confined to addressing issues of law only and it ought not depart from the findings of fact of the two courts below unless it is shown that the two courts below considered matters they ought not to have considered or failed to consider matters they ought to have considered or the entire decision is perverse. He further cited the case of **Gatirau Peter Munya v. Dickson Mwendwa Kithinji & 2 Others (2014) eKLR** urging that the grounds raised by the appellant are clearly on issues of fact, which cannot be interrogated and determined on second appeal.

20. On the second issue, citing the case of **DWM v. Republic (2016) eKLR,** counsel posited that this Court's interference with the concurrent findings of fact by the two courts below was only permitted where it was apparent that such findings were based on no evidence, a misapprehension of the evidence or that the courts acted on wrong principles in making their findings. He maintained that the appellant had failed to demonstrate why this Court ought to interfere with the findings of the two courts below and therefore urged us to dismiss the appeals as being without merit.

21. Being a second appeal, **Section 72 (1)** Civil Procedure Act restricts this Court to consideration of matters of law only. That position has been amplified in several decisions of this Court among them **Kenya Breweries Ltd v. Godfrey Odongo, Civil Appeal No. 127 of 2007** and **Stanley N. Muriithi & Another v. Bernard Munene Ithiga (2016) eKLR**, where this Court held *inter alia* that, a second Appellate Court ought to confine itself to matters of law only, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

22. Having carefully considered the entire record of appeal, the rival submissions of counsel and the applicable law espoused in the authorities relied upon by the respective parties, we identify only two issues for determination;

1. Whether the High Court failed to properly carry out its duty as a first appellate Court.

2. Whether there is any issue fit for consideration by this Honourable Court.

23. On the first issue, it is trite that a court carrying out its duty as a first appellate ought to be guided by the principles set out in the case of **Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates** *(supra),* where this Court pronounced as follows:-

"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kustron (Kenya) Limited (2009) 2EA 212 wherein the Court of Appeal held, inter alia, that:-

"On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"

24. In determining whether the High Court followed the principles set out above, it is imperative that this Court scrutinizes the learned

Judge's findings that informed the impugned decision. The appellant faults the learned Judge for failing to properly analyze and consider the evidence on record in its entirety, hence arriving at a misconstrued finding that the appellant had been provided with protective gear/the respondent had failed in its duty of care to the appellant and that the incident was due to the appellant's own negligence.

25. A careful perusal of the learned Judge's decision however shows that the learned Judge went through the evidence on record in detail as he was enjoined by law to do, and having done so, arrived at his independent decision. For instance, the learned Judge noted that the trial magistrate relied on the testimonies of the respondent's witnesses, DW1 and DW2, to come to the conclusion that: the boiler burst due to the appellant's own negligence and not because it was faulty; the appellant had been warned of the danger of hitting the valve connected to the boiler and; the appellant was provided with safe and adequate equipment for his use.

26. A close reading of the learned Judge's decision clearly demonstrates how he re-evaluated and re-analyzed the entire evidence on record before deciding to uphold the trial court's findings. He found so for the reasons that despite the appellant's argument that the trial magistrate had failed to take into consideration his allegations, there was credible evidence showing that both workers i.e. the appellant and DW2 had been warned in advance not to hit the boiler valves and that the appellant hit the boiler valve hence causing steam to escape from the valve, causing him bodily injury. Both courts below are in agreement in that conclusion, which was factual determination of the dispute. We do not understand the appellant to be saying that is not a reflection of the evidence tendered by the parties. Again, it is not the case of the appellant, that both courts below considered an irrelevant matter or failed to consider a pertinent matter that sought to have been considered. More importantly, that factual conclusion can only be changed based on the factors we have enumerated above. From the above analysis, we are persuaded that ground 1 of the appellant's memorandum of appeal has no merit and it therefore fails.

27. On the second issue, it is evident from the memorandum of appeal that that ground raises issues of fact. A careful perusal of the record shows that the two courts below made concurrent findings of fact in arriving at their decisions. The manner in which this Court ought to evaluate concurrent findings of the courts below is guided by the principles set out in the case of **Njoroge v. Republic [1982] KLR 388**, where this Court held: -

> **"On a second appeal, the Court of Appeal is only concerned with points of law. On such an appeal, the court was bound by the concurrent findings of fact made by the lower courts, unless those findings were shown not to be based on evidence."**

See also **John Onyango & Another v Samson Luwayi [1986] eKLR** where this Court expressed itself as follows:-

> **"This court will not interfere with the findings of fact of the two lower courts unless it is clear that the magistrate and the judge have so misapprehended the evidence that their conclusions are based on incorrect bases: Abdul v Rubia 1917/1918 7 EALR 73."**

28. The law therefore enjoins us to exercise deference to concurrent findings of fact by the two courts below, if they meet the criteria set out in the cases we have referred to hereinabove. The two courts below having reached the concurrent findings that the boiler valve burst and released steam causing bodily injuries to the appellant due to his own negligence and that the respondent had provided the appellant with the necessary protective gear, this Court is bound by such findings of fact. These findings meant that the appellant had failed to prove the acts of negligence attributed to the respondent to the required standard. We have no reason to depart from those findings.

29. The appellant has not demonstrated how the two courts below misapprehended the evidence on record hence arriving at a wrong decision. We are not persuaded that the two courts below in arriving at the concurrent findings of fact considered extraneous or irrelevant matters, or failed to consider relevant material placed before them that could have influenced the outcome of the case. In the circumstances, we find no reason to interfere with those findings of the two courts below. We find this appeal devoid of merit and dismiss it accordingly with an order that each party bears its own costs.

Dated and delivered at Nairobi this 20th day of December, 2019.

E. M. GITHINJI

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M. WARSAME

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR