REPUBLIC OF KENYA

Court of Appeal at Kisumu

Civil Appeal 310 of 2006

DENMUS OIGORO OONGE.....APPELLANT

AND

NJUCA CONSOLIDATED LTD.....RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya atKisii (KaburuBauni J.) dated 5th October, 2006

in

KISII H.C.A NO. 239 OF 2004
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JUDGMENT OF MARAGA, J.A.

1. This is an appeal against the judgment of the late Justice KaburuBauni delivered on 5th October 2006 in Kisii HCCC No. 239 of 2004 in which he allowed the Respondent's appeal and thus dismissed the Appellant's case with costs.

2. The facts of the case are simple and fairly straightforward. At all material times the Appellant was employed by the Respondent as a general labourer. On 29th October 2003 the Appellant and other employees of the Respondent were assigned the duty of pushing the Respondent's tractor-trailer at a construction site in the premises ofItumbe Tea Factory in Kisii. In the course of doing that the trailer tilted, overturned and part of it fell on the Appellant's right leg thereby seriously injuring him.

3. The Appellant filed a suit against the Respondent in the subordinate court and claimed damages for the injuries he suffered. After hearing the case that court held the Respondent 100% liable for failure to provide the Appellant with protective gear like gumboots and helmet and assigning him the onerous task of pushing a trailer which should have been pulled by a tractor. With that finding the subordinate court awarded him Kshs.200,000/= and Kshs.2,000/= as general and special damages respectively.

4. Being aggrieved by that decision, the Respondent appealed to the High Court which found that pushing a trailer was not a mechanised or skilled task that required protective gear and that the Appellant and his colleagues were in full control of the trailer. It also found that the subordinate court erred in awarding the Appellant general damages on the basis of a fracture when he hadonly suffered a dislocation which was classified as a soft tissue injury. Consequently it held that had the Appellant proved his claim on the issue of liability, it would haveapportioned liability at 50/50 resulting in the net award of Kshs.50,500/= to the Appellant. This appeal is from that decision.

5. At the hearing of this appeal, Mr. Nyasimi, learned counsel for the Appellant, faulted the High Court decision on three points. The first one was that the Appellant, having not filed a reply to defence, under **Order 6 Rule 9** of the **Civil Procedure Rules** there was an automatic joinder of issues. He argued that the High Court therefore erred in finding that by failing to file a reply to defence and to traverse the particulars of negligence alleged against him in the Respondent's defence, the Appellant admitted that he was negligent as alleged. He cited this court's decision in **KatibaWholeseller Agency (K) Ltd. Vs United Insurance Co. Ltd., Nairobi Civil Appeal No. 140 of 2002 (C.A)** in support of that submission.

6. The second point Mr. Nyasimi took was the High Court's interference with the trial court's findings of fact. Citing the cases of **Peters Vs Sunday Post Ltd [1958] EA 424, Mumias sugar Co. Ltd. Vs FrancisWanalo, Kisumu Civil Appeal No. 91 of 2003 (CA) (Unreported)** and **Richard Kanyango& 2 Others Vs David MukuiMereka [2007] e KLR,** counsel submitted that it is now well settled that an appellate court should be slow in reversing the trial court's finding of fact, a point that the High Court in this matter appears to have ignored.

7. Thirdly, Mr. Nyasimi faulted the High Court for interfering with the award of damages. It is trite law, he further submitted, that an appellate court can only interfere with an award of damages if it is inordinately high or low. While conceding that the Appellant in this case suffered a dislocation and not a fracture as the trial court had found, he argued that the award of Kshs.200,000/= was, in view of that serious dislocation, nonetheless a fairaward and the High Court should not have interfered with it.

8. Opposing the appeal, Mrs. Asuna, learned counsel for the Respondent, cited the case of **Mt. Elgon Hardware Vs United Millers Ltd., Kisumu Civil Appeal No. 19 of 1996**(CA) and submitted that where the plaintiff does not file a reply to defence, he is deemed to have admitted the particulars of negligence alleged against him in the defence. She said the **KatibaWholeseller Agency Case** is distinguishable as it was based on contract and a reply to defence was filed.

9. Mrs. Asuna further argued that the Appellant having not said what caused the trailer to overturn, the Appellant's injury cannot be attributable to the negligence, if any, of the Respondent. As regards the award of damages, she contended that the trial court having based its award on a fracture, the first Appellate Court was justified in interfering with it. And with that she urged us to dismiss this appeal with costs.

10. Mr. Nyasimi's riposte was only on joinder of issues. He reiterated his earlier submissions that the provisions of **Order 6 Rule 9** are quite clear. Where no reply to defence is filed, there is an automatic joinder of issues. Unlike in the case of **Mt. Elgon Hardware** where no particulars of negligence were pleaded, in this case the Appellant pleaded and testified on particulars of negligence.

11. I have considered these rival submissions and carefully red the record of appeal. I would like to start with the issue of pleadings.

12. As pointed out, basing itself on this court's decision in the **Mt. Elgon Hardware Case** the High Court held that the Appellant having failed to file a reply to defence and traverse the particulars of negligence alleged against him in the defence, the trial court should have found that he admitted the negligence and dismissed his claim or at least apportioned liability at 50/50.

13. In his plaint, the Appellant attributed the cause of the accident to the negligence of the Respondent and pleaded particulars thereof, which included one that the Respondent exposed him to risky work and failed to provide him with a safe system of work. In its defence the Respondent denied any negligence on its part and in the alternative attributed the Appellant's injury to his own negligence. In the particulars thereof it pleaded *inter alia* that the Appellant failed to keep a proper look out and/or to take precautions for his own safety. The Appellant never filed a reply to that defence. The issue here therefore is whether or not by failing to file a reply to defence the Appellant admitted the negligence alleged against him in the defence.

14. Having examined this court's decision in the **Mt. Elgon Hardware Case**, I have reached the

conclusion that it was decided on its own peculiar facts an per incuriam. In response the defendant denied any negligence on its part and in turn alleged negligence against the Plaintiff and gave particulars thereof. The Plaintiff did not file a reply to defence to traverse that negligence. The courtthen held:-

"In those circumstances, the learned judge was perfectly entitled to conclude that the appellant had admitted the negligence alleged in the defence, in terms of Order VI rule 9(1) of the Civil Procedure Rules."

15. In my view in giving that construction of **Order 6 Rule 9(1)**of the **Civil Procedure Rules** the court was influenced by the fact thatthe Plaintiff in that case alleged negligence against the Defendant but contrary to **Order 6 Rule 9 (1)** of the **Civil Procedure Rules** he did not plead particulars of that negligence.Order 6 Rule 9 (1)provides that:-

"Subject to sub-rule (4), any allegation of fact made by a party in his pleading shall be deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue under rule 10 operates as a denial of it."

Sub-rule (4)referred to in this provision is not relevant in the present case. **Rule 10(1)** of that Order which is also referred to provides that:-

"If there is no reply to defence, there is a joinder of issue on that defence."

16. The proper construction of the Rule 8 (1), in my view,is the one stated in **KatibaWholesellers Agency (K) Ltd Vs United Insurance Co. Ltd., Civil Appeal No. 140 of 2002** where this court stated that:-

".....where a defence contains an allegation of fact, and a reply is filed, ...it is necessary for the plaintiff to deny in the reply any allegation in the defence which he intends to dispute. If he fails to do so then he is deemed to have admitted the defence allegations.

It is only if the plaintiff does not file any reply that there is joinder of issue on the defence which operates as a denial of all allegations contained in the defence."

In the light of the provisions of **Order 6 Rules 9(1)** and **10(1)** and this authority, the Appellant having not filed a reply to defence, there was clearly a joinder of issues with the effect that the Appellant denied the negligence alleged against him in the defence just as the Respondent denied the negligence alleged against him in the plaint. The High Court therefore erred in deeming the Appellant as having admitted the allegations of negligence in the defence against him.

17. The Appellant testified that he was pushing the trailer with other employees of the Respondent. The Respondent never called any evidence. The Appellant's testimony remained uncontroverted while the Respondent's allegations of negligence against the Appellant remained unproved. In the circumstances, the High Court again erred in suggesting that liability should have been apportioned at 50/50 or at any fraction at all.

18. In the absence of any evidence of say uneven or sloppy ground, I find that the other employees who were pushing the trailer with the Appellant must have tilted it causing it to overturn and fall on the Appellant. The Respondent is vicariously liable for their act. In the circumstances, I concur with the subordinate courtthough on different grounds, that the Respondent was 100% liable.

19. On the issue of damages, it is true that the subordinate court based it on the claim that the appellant had suffered a fracture. Given the fact that the Appellant suffered a serious dislocation, a sum of Kshs.150,000/= would, in my view, be reasonable compensation.

20. In the upshot, I would allow this appeal, set aside the High Court decision but reduce the award of damages from Kshs.200,000/=to Kshs.100,000/= and order that Appellant shall have the costs of this

appeal.

Dated and delivered at Kisumu this 10th day of October, 2012.

D.K. MARAGA

JUDGE OF APPEAL

JUDGMENT OF ONYANGO OTIENO, JA:

I have had the opportunity of reading in draft the judgment of my brother, *Maraga, JA*. I agree with him fully and have nothing useful to add. In the event, the judgment of the Court shall be in the terms proposed by *Maraga, JA*. The appeal is allowed as proposed and the appellant shall have the costs of the appeal.

This judgment is delivered pursuant to ***Rule 32 (3) of this Court's Rules*** as *Omolo, JA* is not on duty in the Judiciary.

Dated and delivered at Kisumu this 10th day of October, 2012.

J. W. ONYANGO OTIENO

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR