Obiro v Maua Agritech Limited (Civil Appeal E175 of 2023)
[2025] KEELRC 463 (KLR) (20 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 463 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CIVIL APPEAL E175 OF 2023

JW KELI, J

FEBRUARY 20, 2025

BETWEEN

ERINEYO IKAMARI OBIRO ..... APPELLANT

AND

MAUA AGRITECH LIMITED ..... RESPONDENT

JUDGMENT

1. The Appellant herein, Erineyo Ikamari Obiro, dissatisfied with the Judgment of the Learned Trial Magistrate, Hon. Edgar Kagoni(S.P.M) in Kajiado Civil suit No. 40 of 2016 delivered on 31st August, 2023 filed a memorandum of appeal dated 14th September 2023 seeking for the following orders:-

    (a) The judgment dismissing the Plaintiff's suit and all sub sequential orders in Kajiado CMCC 40 of 2016 be set aside and substituted with one allowing this appeal.

    (b) The Respondent be ordered to pay costs for this appeal.

2. Grounds Of The Appeal

    1. The Learned Trial Magistrate misdirected himself in failing to make a finding against the Defendant.

    2. 2 The Learned Trial Magistrate erred in fact and in law by failing to appreciate the evidence tendered with regard to injuries sustained by the Plaintiff.

    3. The Learned Trial Magistrate erred in fact and in law by determining that Plaintiff reported to work the following day after the injury despite there being no evidence whatsoever.

    4. The Learned Trial Magistrate misdirected himself in totally disregarding the evidence by the plaintiff on the issue of negligence.

5. The Learned Trial magistrate erred by falling to appreciate that the Plaintiff had proved his case on a balance of probabilities which was uncontroverted by the Defendant.

Background To The Appeal

3. The Appellant alleged injury at the workplace and negligence/breach statutory duty by the Respondent filed a plaint dated 30th January 2016 seeking the following reliefs:-

   a. payment of general and special damages

   b. costs of the suit and interest.

4. The appellant in support of his suit filed verifying affidavit, list of witnesses, his statement and a list of documents and bundle the bundle of documents .(pages 3-18 of ROA was the Claimant's/Appellant's case before the lower court).

5. The suit was opposed by the respondent who entered appearance through the law firm of Muchui & Co advocates and filed a statement of defence dated 1st April 2016 , an intended list of documents being proposed medical report upon examination of the plaintiff by their appointed doctor of even date. Further filed by the Respondnet was a witness statement of Ann Laisha Saitoti and that of Vincent Nyongesa Wafula both dated 28th July 2016. The respondent further filed a supplementary list of documents being an accident register for the material time and produced copies of the same. The Respondent amended its defence on the 22nd of August 2016 filed 23rd of August 2016. The Respondent further filed another witness statement of Eunior Khaoma Sikunyi dated 24th August 2016(pages 1 -41 of the supplementary record of appeal dated 28th January 2025 was the defence case)

6. The Claimant/Appellant filed a reply dated 13th April 2016 to the defence. (page 19 of ROA)

7. The appellant's case was heard by the trial court on the 28th March 2017 where he testified on oath. He adopted his witness statement as his evidence in chief. He produced his documents being a copy of his National Identity Card , pay slip, NSSF statement , scan report , discharge summary from shalom community hospital and demand letter. The medical report and receipt of the medical report were objected to and marked for production by the Doctor. He was cross-examined by defence counsel. On 29th October 2019 it is recorded that the parties agreed to produce the medial report and receipt by consent.

8. The respondent's case was heard on the 29th October 2019 where RW1 was Rose Mbote who produced as defence evidence the accident register and payroll and was cross-examined by the appellant's counsel.

9. Only the appellant filed written submissions after the hearing.

10. The trial court delivered judgment on the 31st of August 2023 where the claim was dismissed by the trial court on the basis that the Magistrate was satisfied that the plaintiff was injured on 1st September 2015 as pleaded.

Determination

11. The appeal was canvassed by way of written submissions. Both parties complied.

12. This being a first appellate court, it was held in Selle v Associated Motor Boat Co. [1968] EA 123 that:- "The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must 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 this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

13. The court is further guided by principles at appeal set out in Mbogo v Shah [1968] EA where De Lestang V.P (as he then was) observed at page 94: "I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

Issues for determination

14. The appellant identified the following issues for determination in the appeal-

    1. Whether the Appellant proved his case on a balance of probabilities?

    2. Whether the Defendant should be liable for the injuries sustained by the plaintiff/Appellant?

    3. Who bears the costs?

15. The respondent identified the liability as the only issue for determination in the appeal and submitted that reading of the Memorandum of Appeal this appeal is on Liability. The Respondent submitted that the Appellant did not question and or bring to the fore of this court the trial court's proposed award of quantum. At the tail end they simply ask the court to award 'appropriate damages and costs'. That this amounts to submitting from the bar. They had a duty to demonstrate that, should this court be convinced to interfere with the finding of liability, then it should equally interfere with the award of quantum. This is not the case.

16. The trial court on finding the appellant was not injured on the 1st of September 2015 stated that were he to be successful in his claim and considering the injuries he alleged to have sustained he would have been awarded Kshs. 100,000 as general damages. The court having perused the grounds of appeal by the parties found that the issue for determination in the appeal was whether the trial court erred in finding no proof of injury on the 1st of September, 2015 hence no liability.

Appellant's submissions

17. The Appellant submitted that he presented substantial evidence before the trial court to demonstrate that the injuries were sustained in the course of his employment, meeting the standard of proof on a balance of probabilities. The Appellant testified that he reported to work on the day of the incident, during which the injury occurred. The workplace attendance records confirm his presence on that day. Additionally, there is evidence suggesting that the injury register was tampered with, which the Respondents failed to address or explain satisfactorily. This interference casts doubt on the Respondents' credibility and bolsters the Appellant's version of events. Medical records submitted in evidence corroborate the Appellant's claims of injury, specifically detailing soft tissue damage to the left knee and lower back. These documents were admitted without any objection from the Respondents, and thus remain unchallenged as valid evidence of the injuries sustained. According to the medical report from Dr. Mwende Ndibo, the injuries were consistent with the type of work the Appellant performed, indicating they were indeed work-related. Testimonies from the Appellant provide further

support that the injury occurred at the workplace and during working hours. The supervisor, as per workplace policy, was responsible for reporting any injuries. However, the failure to report the incident is unexplained, and this lack of adherence to protocol suggests possible negligence or oversight on the part of the Respondents. This evidence, taken together, clearly indicates that the Appellant sustained the injuries at the workplace during his employment duties. On the balance of probabilities, this evidence sufficiently demonstrates that the Appellant's injuries were a direct result of workplace conditions, and thus the Respondents should bear responsibility.

18. To buttress the foregoing submissions the appellant relied on the decision in Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR where the it was held that: "As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden...is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of Act that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side." The proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 as follows: -"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities". The appellant submitted that the had established that it is probable than not that the allegations that he made occurred.

19. The appellant further relied on the decision in Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) e KRL, where the judges of Appeal held that:- "Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties... are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained." Further in the case of the burden of proof in civil cases on the balance of probability was elucidated in the case of Kanyungu Njogu vs Daniel Kimani Maingi [2000] eKLR that when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other. The Appellant, produced evidence that corroborated that indeed an accident occurred at the work place. The documents proving the Appellant's injuries were admitted into evidence without any challenge from the Respondents but the court totally disregarded the said evidence. That it was clear that the Appellant sustained soft tissue injuries to the left knee and lower back and that the said injuries were sustained at work, therefore it is on a balance on probability that the Respondents. It was not in dispute that the Appellant was injured, hence the question is what was the nature and extent of the injuries and what award should they attract. This was stated on the plaint and supported by the medical report of Doctor Mwende Ndibo. In the case of Mwangi v Siloma *& another (Civil Appeal E102 of 2022*) [2023] KEHC 26140 (KLR) (27 November 2023) The Honorable Judge in setting the lower court Judgement stipulated that "Once the reports had been admitted, the duty of the trial court was to examine them and give them due weight depending on the analysis and conclusion."

20. On whether the Defendant is liable for the Injuries sustained by the Plaintiff/Applicant, the appellant submitted that in addition to the evidence already discussed, the Respondent's failure to meet their statutory duty of care toward the Appellant further supports his case. Under Kenyan workplace safety laws and the *Work Injury Benefits Act* (WIBA), employers have an obligation to maintain a safe working environment and adhere to reporting procedures for workplace injuries. This duty of care is foundational, and its breach is evident through the Respondents' failure to maintain accurate records of workplace incidents and to provide an explanation for the tampering with the injury register. This lack of accountability is not only procedural negligence but a breach of statutory obligations. Additionally, the appellant relied on the doctrine of res ipsa loquitur, where the circumstances speak for themselves and shift the evidentiary burden to the Respondents to explain why the injury occurred despite the said workplace safety protocols. The tampering of the injury register, lack of reporting by the supervisor, and unchallenged medical records collectively indicate negligence by the Respondents. Given this prima facie evidence of a workplace accident, the Respondents' silence or lack of counter-evidence further supports the conclusion that the injury was indeed sustained due to their failure to uphold statutory safety standards.

21. The appellant asked the court to exercise its mandate to safeguard the rights of employees who have suffered workplace injuries. In Mwangi v. Siloma, as cited earlier, the court underscored the duty of lower courts to assess and give due weight to uncontested evidence. Here, the trial court's dismissal of the Appellant's unchallenged medical evidence contradicts this principle, demonstrating a misapplication of the law and denying the Appellant a fair consideration of the injuries sustained.

Response submissions

22. On whether the injury occurred the Respondent submitted that, according to his witness statement which was adopted as his evidence in chief, the Appellant testified at the subordinate court that the accident occurred when he '...was tending bananas when a strong wind blew a banana plant that had a heavy banana fruit down. The banana plant had been propped up with a heavy piece of metal which also fell down.' He further testified that 'The following day I was in so much pain, I could not get out of bed. I sent a colleague to report my predicament to the supervisor.' The Respondent on the other hand called Ms. Rose Mbote as its witness. She testified that the Respondent maintains an accident register where all accidents are recorded. According to the records, and more specifically the accident register, there was no record of the Plaintiff having been injured at all. Only one injury is recorded as having occurred on 1st September 2015 to one Daniel Namulata. From the said register all accidents are not only recorded but also reported to the Director of Occupational Safety. This underscores the importance that the Respondent placed on not only properly reporting but also recording any and all injuries and incidents at the workplace.

23. The Respondent contended that the Appellant testified that he was in so much pain the days after the alleged accident that he was unable to get out of bed. He apparently sent a colleague to report the predicament to the supervisor. He had the obligation to not only plead but prove. He did not call this alleged colleague to testify to this fact if indeed this was true. He also did not call the alleged supervisor to whom he had allegedly reported the accident to. The Respondent produced not only the attendance register evidencing the fact that the Appellant was on duty the days following the accident but that he had been supplied with the appropriate PPE. The appellant further contends that he was unwell and could not get out of bed after he was allegedly injured on 1st September 2015. This does not tally with the Respondent's records indicating that the Appellant only took a sick-off from 16th September 2015.

24. The Respondent submitted that it appeared the appellant seemed to be turning the tables on the Respondent by placing the burden of proof on it. They did not plead res ipsa loquitor at trial. They

are attempting to sneak it in at this point. In rebutting this submission, the Respondent relied on the *Evidence Act* as follows; Section 107. Burden of proof (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person. 108. Incidence of burden The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. 109. Proof of particular fact The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. The Respondent submitted that the appellant did not prove his case. There was no proof of the occurrence of the accident. Despite the alleged serious nature of injuries, and an allegation that he was on bedrest, he reported to work upto and until 21st September 2015. He had been issued with all appropriate PPE as required.

25. The Respondent further relied on decision in Frida Kimotho -vs- Ernest Maina HCCC No. 3720 of 1995, where the court held that: "the happening of an accident is not in general prima facie evidence of negligence. The plaintiff must ordinarily give affirmative evidence of negligence on the part of the defendant which caused the accident." That the Appellant's duties were of a manual nature. He was a farmhand. There was no special skillset that he was expected to have. That even if the accident had occurred (which is denied), the employer was not expected to constantly babysit its employees and relied on the decision Amalgamated Saw Mills -V- David K. Kariuki [2016] KEHC 5548 (KLR) the High Court on appeal held thus; 'The work at hand was manual in nature. From the above statement, the respondent needed no supervision on how to split timber or how to hold it. An employer cannot babysit an employee especially in manual tasks that need no special training or supervision. He must work and at the same time take precautions on his own security and safety.' (Emphasis added)

26. The Respondent submitted that it was not enough for the Appellant to allege that the accident occurred but also had a duty to prove that it actually did. This is a court of law. The court should shy away from the Appellant's invitation to create a very dangerous precedent where court's will ignore proper attendance records, accident registers and PPE registers just because the employer is expected to have an insurance cover that will 'pay'. Guided by the decision in Mbogo -V- Shah (Supra), the Respondent submitted that the Appellant had failed to demonstrate that the trial court fell into error warranting this court's interference. He ought to have demonstrated that the trial court: misdirected itself, or acted on matters on which it should not have acted, or it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.

Decision

27. The trial court at page 53 (ROA) observed:- '' the plaintiff stated that the accidents was not reported as it happened after everyone else had left for the day. That he went home and remained immobilised due to pain. That he sent a colleague to go report the injury and after one week the company sent a car to take him to hospital. That means he was not at work for a about a week after the alleged accident. The contents of the defendant's staff register however show that the plaintiff was on duty." The trial court held that the defence document were not disputed meaning the fact that the plaintiff reported to work for two weeks remained unchanged. That as to the failure of the accident to be captured in the accident register , the plaintiff's explanation was persuasive but for being on duty continuously for two weeks yet he was in serious pain and could not walk lend doubts to the claim of injury as pleaded. The court found that on balance of probabilities the appellant did not prove the alleged injury of 1st September 2015.

28. Did the trial court misdirect itself, or act on matters on which it should not have acted, or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion?(Mbogo v Shah)

29. The Appellant at trial adopted as his evidence in chief his witness statement dated 30th January 2016 (page 7 of ROA). The statement stated that the appellant working in a banana plantation at the respondent's Kisaju farm on 1st september 2015 when strong wind blew a banana with heavy fruit that was propped with a heavy metal, and the heavy metal his left leg slightly above the knee joint. He was alone, lost consciousness for a long time and when he woke up every one had left. He was in pain and the following day he could not get out of bed and sent a colleague to report to the supervisor. He stated that the supervisor said he would fill on a leave form for him to enable him to recuperate. He had no money for treatment for a week. The company sent a car after one week where the driver took him to Sukos but had no money for treatment. He was admitted at shalom on 11th September 2015 to 17th September 2015 where he was treated using NHIF card.

30. The appellant produced a left knee radiograph dated 24th October 2015 and the conclusion by Dr. Micah Silaba was ''features of mild knee osteoarthritis with quadriceps tendon enthesopathy.''(C-exh 4 page 12 of ROA)Exhibit 5 was a discharge summary. No doctor was called to produce the same. The appellant had stated he was admitted to this hospital pursuant to injury at work place. The injury at work place was pleaded as left knee injury in the witness statement adopted as the appellant's evidence in chief. In the clinical summary it was indicated he was admitted with lower backpain, joint pains with numbness of lower limbs. (C-exh 5)

31. The appellant filed a medical report of a medical officer of health Dr. Mwende K. Ndibo. The appellant had during the hearing stated he could not comment on the contents of the report and would call the Doctor. On subsequent date the report was produced by consent of parties. The Court in Mwangi v Siloma *& another (Civil Appeal E102 of 2022*) [2023] KEHC 26140 (KLR) (27 November 2023) stated that "Once the reports had been admitted, the duty of the trial court was to examine them and give them due weight depending on the analysis and conclusion." What was the weight of the medical reports not produced by the authors? The medical report indicated a history of an accident at work on the 1st of September 2015. The injuries were :- '' blunt trauma to lower back Mild left knee osteoarthritis with quadriceps tendon enthesopathy.''On local examination the report indicated mild tenderness on the left knee and lower back. (C-exh 6 at pages 14 and 15 of ROA). On prima facie basis, the court found contradiction between the witness statement narration of the accident to have been injury of the left leg just above the knee joint and the said medical report of blunt trauma to the lower back and mild left knee osteoarthritis. The plaintiff in witness statement and at trial never mentioned blunt trauma of lower back. During the hearing the appellant stated he was knocked on the leg near the ankle. The court held that the said medical report had no probative value to the appellant's case.

32. DW1 confirmed the appellant was at work on the 1st September 2015. He took sick off on 16th September 2015. She produced the staff attendance register indicating the appellant was at work on 1st September 2015 and the entire week. The accident register had some alterations which she could not explain. The supervisor was responsible for reporting the accident. The appellant did not call any witnesses to corroborate his claims including the alleged colleague whom he sent to report the accident. The court having evaluated the evidence finds that the attendance register was produced by the human resources officer of the respondent without any objection. It was uncontroverted evidence of the appellant's presence at the workplace on the date of the alleged of injury, the next day, and indeed the entire week. The court found it was not probable that a worker would work all through and claim to have been injured. The court noted the medical documents had injuries, on face value, at variance

with the alleged injury on the left leg near the ankle or even the knee joint and held the same to lack any probative value.

33. Taking into consideration of the foregoing analysis and findings the court found no basis to interfere with the decision of the trial magistrate court. There was no proof on balance of probabilities that the Appellant was injured at the Respondent's farm on the 1st of September 2015 as alleged.

34. The appeal is dismissed.

35. To temper justice with mercy this having been employment claim of a farm worker the Court made no orders as to costs.

36. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 20TH DAY OF FEBRUARY, 2025.

J.W. KELI,

JUDGE.

In the presence of:

Court Assistant: Otieno

Appellant:- Munanie h/b Namiinda

Respondent: -Ndegwa