**West Kenya Sugar Company Limited v Mulela (Employment and Labour Relations Appeal 3 of 2023) [2024] KEELRC 706 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 706 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA**

**EMPLOYMENT AND LABOUR RELATIONS APPEAL 3 OF 2023**

**JW KELI, J**

**MARCH 14, 2024**

**BETWEEN**

**WEST KENYA SUGAR COMPANY LIMITED ..... APPELLANT**

**AND**

**TITUS CHIVUYI MULELA ..... RESPONDENT**

***(Appeal against the Judgment and /or Decree of Hon. E.W. Muleka (SRM) delivered on 18th February, 2019 in Butali SRMCC No. 11of 2017)***

**JUDGMENT**

1. The Appellant being dissatisfied with the Judgment and /or Decree of Hon. E W Muleka (SRM) delivered on 18th February 2019 in Butali SRMCC No. 11 of 2017 between *Titus Chivuyi Mulela and West Kenya Sugar Company Limited* filed Memorandum of Appeal dated 28th January 2022 and Record of Appeal received in Court on the 18th January 2024 seeking the following orders:-

    1. The appeal be allowed and the judgment and decree of the Court appealed from be set aside and in place, judgment be entered for the Appellant dismissing the Respondent's case in the subordinate Court.

    2. Costs of the appeal and the primary suit be awarded to the Appellant.

2. The Appeal was premised on the following grounds: -

    1. The Learned Trial Magistrate erred in fact and Law in arriving at a finding that the Appellant was 70% liable for the accident in the absence of any proof linking the Appellant to the said accident or proof that the Respondent was an employee of the Appellant and that there was a contract of employment at the time of the alleged accident between the appellant and Respondent.

2. The Learned Trial Magistrate erred in fact and law arriving at a finding that the Appellant was 70% liable for the accident and/or the Respondent's injuries when there was no evidence of negligence at all on the part of the appellant.

3. The Learned Trial Magistrate erred in fact and law in arriving at a finding that the Appellant was 70% liable for the accident and/or the Respondent's injuries when there was evidence of fraud speaking of non-existing injuries on the part of the Respondent.

4. The Learned Trial Magistrate erred in fact and law in arriving at a finding that the appellant was liable for the accident and/or Respondent's injuries when there was no evidence of breach of duty of care and/or contract at all on the part of the Appellant.

5. The Learned Trial Magistrate erred in fact and law in arriving at a finding that the respondent was injured at the appellant's place of work when there was no evidence at all placing the Respondent at the appellant's place of work.

6. The Learned Trial Magistrate erred in fact and in law in shifting the burden of proof to the appellant contrary to the law.

7. The Learned Trial Magistrate failed to appreciate sufficiently or at all that the evidence tendered in favour of the respondent was contradictory and could not warrant judgment in his favour.

8. The Learned Trial Magistrate failed to appreciate sufficiently or at all that the evidence tendered in favour of the appellant controverted and rebutted the Respondent's evidence thus lowering the Respondent's probative evidentiary value.

9. The Learned Trial Magistrate failed to appreciate sufficiently or at all that there was no causal link between the Respondent's accident and the injury and the appellant's breach of contract statutory duty or negligence.

10. The Learned Trial Magistrate erred in fact and law in finding that the Respondent had proved his case on the balance of probability.

11. The Learned Trial Magistrate erred in fact and law in treating the pleadings, evidence, and submissions by the defence before him superficially and consequently coming to a wrong conclussion on the same.

12. The Learned Trial Magistrate erred in fact and in law in finding that the Respondent had proved his case on a balance of probability.

13. The Learned Trial Magistrate erred in fact and law in failing to dismiss the Respondent's suit with costs to the Appellant.

14. The Learned Trial magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstance that it represented an entirely erroneous estimate vis – a – vis the respondent's claim.

15. The Learned Trial Magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.

3. The Appeal was canvassed by way of written submissions. The Appellant's written submissions drawn by L G Menezes & Company Advocates were dated 19th January 2024 and received in Court on the 22nd January 2024. The Respondent's written submissions drawn by Abok Odhiambo & Company Advocates were dated 22nd January 2024 and received in Court on the 29th January 2024.

**Background to the appeal**

4. The Respondent (Plaintiff ) filed a suit Butali PMCC Case No. 11 of 2017 against the Appellant for injuries alleged to have been suffered at the workplace vide a Plaint dated 7th February 2017 seeking the following reliefs:-

    a. General damages

    b. Special damages of Kshs. 10,000/=

    c. Costs of this suit

    d. Interest on (a) (b)and (c) above at Court rates

    e. Any other or further relief that this Honourable Court may deem fit and just to grant. (pages 3 & 16 of the record are all pleadings by the plaintiff before the lower Court)

5. The Respondent entered appearance and filed a defence and all their pleadings and documents (pages 17-27 of the record is the defence case). At pages 29 and 30 of the record of appeal were request for particulars and notice of non-admission of documents by the Defendants.

6. The Plaintiff filed reply to defence (page 28 of the record).

7. The Trial Court proceeded with the hearing of the Claimant's case. The defence case was closed by Counsel Samba on the 8th of November 2018 without the defence calling witnesses to produce their evidence (page 54). The proceedings are recorded at pages 48 -55 of the record of appeal.

8. The parties filed submissions in the lower Court after closure of defence. The Plaintiff's submissions (page 32-35). The Defendant filed written submissions (pages 36-41).

9. The trial Court (E W Muleka, SRM) delivered its judgment on the 18th of February 2019(pages 57-59). The trial Court rendered a decision on 4 issues for determination. The Court found proof of employment, the Respondent being on duty on the material date of the accident and proof of injury. On liability the trial Court apportioned liability at 70:30 in favour of the Plaintiff. On quantum the trial Court awarded Kshs. 70,000/- as general damages. Special damages were awarded as pleaded. Total award of Kshs. 59,000 with interest and costs of the suit (pages 58-59).

**Determination**

**Issues For Determination.**

10. The Appellant in their written submissions submitted on merit of the appeal challenging the findings on all issues.

11. The Respondent in his submissions identified specific issues for determination in the appeal as follows: -

    a. Whether there existed an employer-employee relationship between the Appellant and Respondent.

    b. If the answer to 1 is in the affirmative, whether the Appellant owed a duty of care to the Respondent while engaged in his duty.

    c. Whether the trial Court erred in apportioning liability between the Appellant and Respondent.

d. Whether the instant appeal should be dismissed with costs.

12. The Court sitting on appeal from trial Court is guided by the settled law that it must reconsider the evidence, re-evaluate the evidence itself, and draw its own conclusions bearing in mind it has neither seen nor heard the witnesses and should make allowance for that fact. See *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1948) EA 123.

13. The Court guided by *Selle's decision*, that the Court sitting at first appeal has to re-evaluate the facts and evidence before the trial Court while making allowance for not having seen the witnesses to reach their own conclusion, finds the issues for Determination in the appeal are as follows: -

a. Whether there was employer–employee relationship between the parties.

b. Whether there was evidence of injuries to the Respondent at the workplace.

c. If above in the affirmative, Whether the Appellant breached a duty of care;

d. Whether the Appellant is liable for damages;

e. Whether the award for the damages was justified and proper;

f. Whether the appeal is merited.

**Issue 1. Whether There Was Employer–employee Relationship Between the Parties.**

14. It was a ground of appeal that there was no proof that the Respondent was an employee of the Appellant and a contract of employment between the parties existed at the time of the alleged accident. In the written submission in the appeal, the Appellant did not address this issue.

15. The Respondent addressed the issue and submitted that the employer-employee relationship was proved as he testified he was a loader and produced a gate pass as P- Exhibit 1. He testified that he reported to duty on the 5th of July 2014 at the appellant's factory around noon when was joining the tractor and trailer, as he was pulling the hydraulics, the same malfunctioned and hit his left foot. He was taken to the hospital and produced a sick sheet as P-exhibit 2.

16. The Court on perusal of the proceedings found that during cross-examination, the Respondent told the Court he was employed in 2012 and involved in an accident in 2014 at work for the Appellant. (page 50 of the record was both the evidence in chief and cross-examination.)

17. The trial Court on the issue held that:-

> " on proof of employment and whether he was on duty on the material day the plaintiff relied on exhibits 1 and 2 which the defence failed to controvert by way of documentary evidence, therefore, I have no option but to believe the Plaintiff. So this is proved."

18. The Court agreed with the submission by the Appellant that even without the defence calling the witness, it was the claimant's burden to prove the case on a balance of probabilities. The Court having analysed the evidence finds that the defence did not controvert the evidence by the plaintiff of his employment as well as his testimony on employment through cross-examination.

19. The Court finds no basis to disturb the finding of the trial Court on this issue.

**Issue 2. Whether There Was Evidence of Injuries to the Respondent at the Work Place**

20. The respondent submits that the Respondent, before the trial Court produced a Medical Report as P-exhibit 4 (a) (page 12 of the record). The respondent never called the maker to produce it. The appellant submits that failure to call the maker of the said Report rendered the Court with nothing on which to ascertain if indeed the plaintiff sustained the alleged injuries and the extent of the injuries as held in *Rosemary Wanjiru Kungu v Elijah Githinji & another* (2014) eKLR. The Appellant further submits that failure to call the maker of the medical report renders it inadmissible in evidence as per section 35 of the *Evidence Act*.

21. The Appellant further submits that besides not calling the maker of the medical report the respondent contradicted his pleadings by his testimonies on the injuries and even denied the pleadings were correct, in that he was hit and not cut as pleaded by the plaintiff in paragraph 5 on the particulars of the injuries. The plaintiff particularized the injuries he sustained as – cut wound to the left leg. However, during cross-examination on page 50 of the record, the Plaintiff said he was knocked by the trailer and not cut as per the injuries particularised in the pleadings.

22. To buttress the foregoing submissions the Appellant relied on the case of *South Nyanza Sugar Company v Augustine Juma Otieno* (2015) eKLR where the Court sitting on appeal having found there was a contradiction between the evidence and testimony and pleadings found the case was not proved on a balance of probabilities. In the case, *Nathan Nyongesa Lichungu v High Grove Holdings Limited* (2018) eKLR the Court held that considering the sharp contradictions between the claimant's pleading and his evidence the claimant did not prove his case on balance of probabilities. In the case of *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* (2018) eKLR where the Court held in part:

> " that any evidence adduced in a matter must be in consonance with the pleadings, any evidence, however strong, that tends to be at variance with the pleadings must be disregarded."

The Appellant further relied on a similar decision in *Nyansiogo Tea Factory Limited v James Nyabuti Nyamuyu* (2013) eKLR. The Appellant submits that due to the discrepancy between the respondent's evidence and pleadings, this Court to find the Plaintiff did not prove his case at the trial court.

23. The Respondent submits on his evidence in Court to effect that he testified that on the 5th July 2014 he reported to duty at the appellant's factory and at around noon while he was joining the tractor and trailer, as he was pulling the hydraulics, the same malfunctioned and hit his left foot. It was his testimony that he was subsequently taken to Shamberere and produced a copy of the medical sick sheet as P. exhibit 2.

24. The appellant challenges the foregoing based on contradiction of particulars of injuries in the pleadings and evidence on oath during cross-examination by the Plaintiff/Respondent and for failure of the medical report to be produced by the maker.

25. The Court noted that the Respondent had filed a request for particulars of the doctor who signed the sick sheet (page 29) to which the Plaintiff responded he did not know the doctor as he was not told the name (page 31). The plaintiff filed a notice to admit documents which included the medical report and a copy of the treatment notes (page 10). The Appellant responded to the notice by filing a notice of non-admission of documents under section 69 of the *Evidence Act* and stated the documents ought to be produced by the maker at the hearing (page 30).

26. At the hearing the Plaintiff during cross-examination by Counsel for the defence was questioned on producing a copy and he said the original remained with the company.

27. P-exhibit 2, the sick sheet, stated the sickness was a fresh cut on the left leg cut by a metal while on duty. (page 14). The Plaintiff produced a medical report( P-exhibit 4a) which relied on the same sick sheet and further, the medical report stated the doctor observed that the Plaintiff had a scar 3cm long on the anterior aspect of the left leg. The said doctor did not appear in Court to produce the medical report. At page 50 the Plaintiff produced the medical report and receipt. The appellant submits that this was contrary to provisions of section 35 of the *Evidence Act* to wit:

> " 35. (1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say - (a) if the maker of the statement either - (i) had personal knowledge of the matters dealt with by the statement; or (ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a per son who had, or might reasonably be supposed to have, personal knowledge of those matters; and (b) if the maker of the statement is called as a witness in the proceedings: Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable."

28. The Appellant submits that the attempt to produce the accident register by the defence was objected to for being filed out of time which objection was upheld by the trial Court and indeed the defence did not produce its evidence.

29. The trial Court on this issue held;

> " on proof of injury, the defence failing to put in a credible contrary evidence , I find this also having been proved on a balance of probability."

30. The Court finds in a trial where there is no defence the Court must be guided by the provisions of section 107 (1) and (2) of the *Evidence Act* to wit:

> " 107. (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.'' Further, the claim belongs to the Person filing it and hence the burden of proof of facts even in the absence of defence lies with the claimant. Section 108 of the *Evidence Act* provides: ''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."

31. The burden to prove the case on the balance of probabilities lay with the Plaintiff and on the discharge of that burden, the burden shifts to the defence to rebut that.

32. The Respondent pleaded in paragraph 5 of the plaint that:

> " a sharp metal rod pierced the plaintiff on his leg occasioning him severe bodily injuries which he holds the defendant liable."

The Respondent pleaded the particulars of the injuries as a

> " cut wound to the left leg."

This was consistent with the P-exhibit 2 sick sheet). During cross-examination, it is recorded the Respondent told the Court that:

> " The hydraulic metal knocked me. I was not cut I was knocked." (page 50)

33. The Appellant submits that the oral testimony having contradicted the pleadings, the claim was not proved on a balance of probabilities.

34. It is a trite law that parties are bound by their pleadings. Cross-examination is to test the evidence produced in Court by the other party during evidence in chief. The Respondent confirmed to the trial court, during cross-examination, that he was not cut but knocked down. The makers of the sick sheet and medical report produced as P-exhibits 2 and 4a respectively, were not called despite notice of non-admission of the two documents by the appellant in writing. The two documents were contrary to the Respondent's testimony on oath. Whose evidence was relevant in the circumstances? I find it is the testimony of the Respondent on oath and not of the said documents whose makers never appeared in court to produce the same.

35. The Court agreed with the decision cited by the appellant in *Milka Akinyi Ouma v Kenya Power Lighting Co Ltd & another* (2020) eKLR to wit:-

> " it is hence not automatic that when a Defendant does not call any witness then the suit is unopposed or evidence uncontroverted. Filing a defence in a civil case in opposing that suit., cross-examining witnesses is likewise an act in opposition to a suit. Even in instances where the defendant does not call any witnesses still a Court must be satisfied that the evidence has attained the required standard of proof for the burden to shift. The standard of proof in civil cases required to discharge the evidential burden is on the balance of probability."

This was the case in the instant case where the cross-examination successfully controverted the evidence of the Respondent on the alleged pleaded injuries particulars.

36. The Court finds that the sick sheet and the medical report (P-exhibits 2 and 4a respectively) having not been admitted by consent and the appellant having filed a notice of non–admission under section 69 of the *Evidence Act* and specifically requested for the maker to produce the sick sheet and medical report the said documents were inadmissible. Section 69 reads:

> " Secondary evidence of the contents of the documents referred to in section 68 (1) (a) shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his advocate, such notice to produce it as is required by law or such notice as the Court considers reasonable in the circumstances of the case."

The Court does not find the basis on which the Claimant issued notice to the Respondent to produce a medical report he had procured himself. The said medical report in absence of consent of parties

must be produced by the Doctor who prepared it on request by the claimant under section 35 of the *Evidence Act* (*supra*). Failure by the maker to produce it the Court can draw an adverse inference that the report is not genuine. The Respondent's testimony at trial was in proof of his case. He testified on oath during cross-examination that he was not cut contrary to the produced and relied on P-exhibits 2 and 4a being copies of sick treatment sheet and medical report respectively. The Court finds that since P-exhibits 2 and 4a were not produced by the makers they were inadmissible and evidence of the Respondent during cross-examination on nature of the injuries prevailed. The trial court thus erred in its finding for failure to note the contradiction in the pleadings, P-exhibits 2 and 4a and evidence of the Plaintiff during cross-examination.

37. The Court upholds the holding in *Daniel Otieno Migore v Sugar Nyanza Sugar Co. Ltd* (2018) eKLR and in *Nyansiogo Tea Factory Limited v James Nyabuti Nyamuyu* (2013) eKLR that parties are bound by their pleadings and variance between the pleadings and evidence must lead to the conclusion that the case is not proved on a balance of probabilities. The Court found that the testimony of the Claimant during cross-examination being that he was not cut but knocked down contrary to the particulars of injury in the plaint rendered the claim untrue. The Court returns that the claim of injury having occurred of cut to the left leg of the Respondent was not proved on a balance of probabilities.

**Issues 3, 4 and 5**

38. Whether the Appellant breached a duty of care, Whether the Appellant was liable for damages, and Whether the award for the damages was justified and proper, the Court holds that, issues 3,4 and 5 can only arise once the Plaintiff has discharged his burden of proof on being injured at a place of work. The Court holds there was no proof of injury at the workplace of the Respondent as pleaded on a balance of probabilities. The Court then has no basis to make findings on issues 3, 4 and 5. The case rests.

**Conclusion and Disposition.**

39. The Court holds there was no proof of injuries having occurred as pleaded on a balance of probabilities and hence the claim before the lower Court ought to have been dismissed.

40. The Court enters judgment for the Appellant and sets aside the entire judgment of E W Muleka (SRM) delivered on 18.2.2019 in Butali SPMCC No. 11 of 2017 between *Titus Chivuyi Mulela v West Sugar Company Limited* and in place enters judgment that the claim dated 7th February 2017 is dismissed with costs to the Defendant.

41. To temper justice with mercy I order each party to bear own costs in this appeal.

42. It is so Ordered.

**DATED, SIGNED AND DELIVERED ON THE 14TH MARCH 2024 IN OPEN COURT AT KAKAMEGA**

**J. W. KELI,**

**JUDGE**

In the presence of;

C/A Lucy Macheso

For Appellant: - Muhindi Advocate

For Respondent: - Mulama Advocate