West Kenya Sugar Company Limited v Bushuru (Employment and Labour Relations Appeal E009 of 2022) [2023] KEELRC 549 (KLR) (2 March 2023) (Judgment)

Neutral citation: [2023] KEELRC 549 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA

EMPLOYMENT AND LABOUR RELATIONS APPEAL E009 OF 2022

JW KELI, J

MARCH 2, 2023

BETWEEN

WEST KENYA SUGAR COMPANY LIMITED ..... APPELLANT

AND

EVANS BUSHURU ..... RESPONDENT

JUDGMENT

1. The Appellant aggrieved by the judgment and order of Honourable H. Wandera Senior Principal Magistrate Delivered on the 26th October 2021 in Kakamega CMCC No. 66 of 2017 brought the instant Appeal vide Memorandum of Appeal dated 1ST April 2022 2021 and record of appeal received in court on the 6th October 2022 seeking for the appeal to be allowed with costs and the judgment of the trial learned magistrate be set aside with costs.

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

    i. The Learned Trial Magistrate grossly misdirected himself in treating the evidence and submissions on liability before him superficially and consequently coming to a wrong conclusion on the same.

    ii. The Learned Trial Magistrate did not in the alternative consider or sufficiently consider the demand for contributory negligence based on the evidence adduced and the submissions filed by the Appellant.

    iii. The Learned Trial Magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same.

    iv. The Learned Trial Magistrate misdirected himself in ignoring the principles applicable and the relevant authorities cited in the written submissions presented and filed by the Appellant.

v. The Learned Trial Magistrate erred in not sufficiently taking into account all the evidence presented before him in totality and in particular the evidence presented on behalf of the Appellant.

vi. The Learned Trial Magistrate erred in failing to hold that the Respondent had failed to prove negligence on the part of the Appellant while the onus of proof lay with the Respondent.

vii. The Learned Trial Magistrate proceeded on wrong principles (if any) when assessing the damages to be awarded to the Respondent and failed to apply precedents and tenets of law applicable.

viii. The Learned Trial Magistrate erred in awarding a sum 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.

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

3. The Court directed that the appeal be canvassed by way of written submissions. The appellants written submissions drawn by L.G Menezes & Company Advocates were dated 24th November 2022 and received in court on the 29th November 2022. The respondent's submissions drawn by V.A Shibanda & Company Advocates were dated 18th January 2023 and received in court on the 24th January 2023.

Background to the appeal

4. The Respondent/Claimant filed a suit Kakamega CMCC CASE NO. 66 OF 2017 against the Respondents (Appellants) for injuries alleged to have been suffered at the workplace vide a Plaint dated 20th February 2017 seeking the following reliefs:-

a. General damages for pain and suffering

b. Special damages of Kshs. 55,000/-.

c. Costs of this suit.

d. Interest on the (a) and (b) above at court rates

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

5. The Respondent entered appearance and filed defence (pages 17-20 and pages 22).

6. The trial proceeded on formal proof 104-111 without the defence who were absent and further filed defence after entry of interlocutory judgment which they did apply to set aside.)

7. The trial court rendered its judgment after the hearing and written submissions by the plaintiff dated 14th January 2020.

8. The trial court entered judgment for plaintiff against the defendants jointly and severally in the sum of General damages KES 200,000 and special damages of Kes 55,000/-

Determination

Issues for determination.

9. The Appellants in their written submissions identified the following issue for determination in their appeal :-

    a. Liability

    b. Quantum

    c. Special damages

10. The Respondent in his written submissions addressed the merit of the decision of the trial court with regard to the liability , quantum and special damages.

11. The Court having read the impugned judgment, the memorandum of appeal and the having considered the submissions by the parties is of the considered opinion that the issues for determination are whether appeal is merited in terms of :-

    a. Liability

    b. Quantum

    c. Special damages

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 or heard the witnesses and should make allowance for that fact. See Selle & Another v Associated Motor Boat Co. Ltd & Others (1948)EA123. In the instance appeal, the impugned ruling is on matters of law so the court will re-evaluate the law and authorities relied on in determining the preliminary objection by the trial court.

13. The appellant relied on the said authority in court is also guided by authority in Selle & Another v Associated Motor Boat Co. Ltd & Others (1948)EA123 and in David Kahuruka Gitau and another v Nancy Ann Wathithi Gitau and another No. 43 of 2013 where the court opined as follows:- ' it is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with findings and conclusion.''' The court finds that the decision mirrors the old decision in Selle and another (supra) and upholds both decisions to apply in the instant appeal.

14. Liability

Appellants submission

15. That liability is a tort of negligence and the burden was on the plaintiff to proof on balance of probabilities as per section 107 and 109 of the *evidence act* to wit: 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 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.

16. The Appellant submits that the respondent did not produce evidence that at all material times he was in casual employment with the appellant, that respondent alleged to have had accident on 2nd May

2014 but visited the clinic on the 10th may 2012 8 days from the alleged accident without justification to the trial court of the delay. That the medical report issued at Kabras Action Group Clinic was on the basis of mere allegation that the respondent's injury was at the appellants premises without ascertaining the correctness of the information. That the respondent did not call eye witness to corroborate his averments and that was fatal to his case and to buttress this submissions relied on the decision of Justice Mohammed Ibrahim as he then was in Eldoret HCCA NO. 103 OF 2022 Kenital (K) Limited v Charles Mutua Mulo &Others (UR) cited in his decision in Eldoret HCC No. 102 of 2015 Sally Kibii v Dr. Francis Ogaro where he held:- ; 'in all adversarial systems like ours a party undermines his case drastically by not calling or failing to call witness. The plaintiff simply did not adduce any evidence before the trial court on liability. They could have called eye witness and/or the investigating officer. Proof of negligence was material in this case and the burden was on the plaintiff."

17. The Appellant submits that the respondent did not prove the particulars of negligence by the appellant as outlined in his plaint. That the respondent was expected to wear protective gear to avoid unnecessary accidents which he did not testify he had. That the Respondent voluntarily assumed the risks for not being careful n and for not wearing protective gear t to mitigate risks. And thus was estopped by doctrine of volenti non fit injuria form claiming damages form the appellant. That there was no evidence produced to prove the appellant did not provide safe working conditions. The respondent did not bring co workers to court to corroborate his testimony. To buttress their appeal case the appellants further relied on decision of court of appeal to extent that the employer's duty is limited to reasonable duty of care and skill and mere employer employee relations was not tantamount to liability in Japheth Natse Ifedha v Collindale Security Company Limited(2014)e KLR.

18. The Appellant further relied on section 13(1)(a) and (c) of the *Occupational Safety and Health Act* No. 15 of 2007 13.(1) Every employee shall, while at the workplace— (a) ensure his own safety and health and that of other persons who may be affected by his acts or omissions at the workplace; (c) at all times wear or use any protective equipment or clothing provided by the employer for the purpose of preventing risks to his safety and health;

19. Further the Appellant in submitting that the appellant was not liable for the injuries sustained by the respondent and relied on the decision in Mwanyule v said T/A Jomvu Total Service Station (2004) 1 KLR 47 where the court emphasized that the employer owes no absolute duty to the employee and the only duty is that of reasonable care against risk of injury caused by events reasonably foreseeable or which would be prevented by taking reasonable precaution. The appellant further to challenge the finding on liability relied on decision of court in P.J Dave Flowers LTD v David Simiyu Wamalwa(2018)e KLR where in allowing appeal the court held in part, The particulars of the hazards and elements of breach of duty care must be clearly pleaded and evidence adduced to prove them. The plaintiff/respondent might have suffered harm but there is lack of nexus between the injuries and breach of employment contract with appellant company.

20. Secondly, taking into account the totality of the evidence it was unsafe for the trial magistrate to hold that the appellant was liable for acts of negligence or breach of duty to provide safe environment without credible and cogent evidence on the part of the respondent, thirdly, the evidence on causation and blameworthy falls below the legal threshold, fourthly, the exercise of discretions to apportion liability at a ratio of 80%; 20% by the learned trial magistrate is anchored on sinking sand and incapable of being ascertained from the evidence on record. Consequently, I agree with the learned counsel for the appellant that this appeal ought to be allowed on the basis of liability.

The Respondent's submissions

21. The Respondent submits that he blamed the injury on the appellant who allowed him to work in a dangerous environment and failed to warn him of impeding danger and a metallic object cut him on the left toe. That it was the duty of the employer to take all reasonable precaution of the safety of the employees and not to expose the, to risk of injury by making place of work safe., that the plaintiff produced gate pass as evidence of employment and sick sheet bearing the appellant name which the appellant issued on the 2nd may 2014 and a further sick sheet issued on 11th April 2014 when he went back for review(page 13 and 16 of the record). That the said clinic was within the respondent premises for attending employees with medical needs as admitted by the appellant in the investigating report dated 14th July 2017 (page 54 of the record) that if the respondent was not an employee of the appellant he would not have been treated in their clinic. That the plaintiff produced medical report of Dr. Lamba which confirmed the injuries the plaintiff sustained.

22. That the Appellant filed defence but did not call witnesses to produce their evidence or rebut the respondents CASE. that in the case of Netah Njoki Kamau & Another V Eliud Mburu Mwaniki (2011)e KLR where the court held that ;- It follows that the respondent's defence remained mere allegation. There has, indeed been many decided cases in this vein. On such case is, North End Tradign Company Limited (Carrying on the Business Under the Registered Name of) Kenya Refuse Handlers Limited Vs. City Council Of Nairobi (2019) eKLR thus:-

    18. In Edward Muriga Through Stanley Muriga Vs. Nathaniel D. Schulter Civil Appeal No.23 of 1997, it was held that where a defendant does not adduce evidence the plaintiff's evidence is to be believed, as allegations by the defence is not evidence.

    19. In the case of Motex Knitwear Limited Vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No.834 of 2002, Lesiit, J. citing the case of Autar Singh Bahra And Another Vs. Raju Govindji, HCCC No.548 of 1998 appreciated that:-

> 'Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.'" Similarly, the Court of Appeal in the case Edward Mariga Through Stanley Mobisa Mariga Vs. Nathaniel David Shulter & Another [1979] eKLR said:-
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> "The respondents filed a defence in which they denied the appellant's claim and averred that the accident was caused by the appellant's own negligence in that he suddenly ran across the road and in the process was hit by the motor vehicle. The respondents did not give evidence and so the only explanation as to how the accident happened was the version put forward by the appellant and his brother."

23. The Respondent submits that the said court further held that the defence was not available for consideration have not been proved by evidence and stated – '10. The trial court erred to have considered the respondent's defence when it indeed remained unproved. The respondent's defence was not available for consideration having not been proved by evidence. This is made further clear in the case Cmc Aviation Ltd Vs. Crusair Ltd (no.1) (1987) KLR 103 as follows:-

> " The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually

given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents."

Decision

24. The court agreed with the holding of the Court of Appeal that the defence though filed the appellant having not attended court to produce the evidence the same could not be considered as was held in the case of Edward Mariga through Stanley Mobisa Mariga Vs. Nathaniel David Shulter & Another [1979] eKLR said:-

> " The respondents filed a defence in which they denied the appellant's claim and averred that the accident was caused by the appellant's own negligence in that he suddenly ran across the road and in the process was hit by the motor vehicle. The respondents did not give evidence and so the only explanation as to how the accident happened was the version put forward by the appellant and his brother." And in In the case of Motex Knitwear Limited Vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No.834 of 2002, Lesiit, J. citing the case of Autar Singh Bahra And Another Vs. Raju Govindji, Hccc No.548 of 1998 appreciated that:-
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> 'Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail." All decisions cited in Netah Njoki Kamau & Another V Eliud Mburu Mwaniki (2011)e KLR.

25. The court then addressed itself to the burden of proof in a matter where there is no defence . The court applied the provisions of the *Evidence Act* : 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". Section 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". Consequently even without defence the plaintiff had burden to prove existence of facts of his case and the liability of the defendant for his injuries.

26. Taking the foregoing into account the court noted that the trial learned magistrate at page 113 of the record addressed liability as follows:- ' on liability the evidence adduced in the form of a medical report the plaintiff sustained suffered soft tissue injury on the left le. The defendant is held 100% liable."

27. The said medical report indicated that the respondent was injured on 2nd may 2014 and the date of examination was 10th may 2014, in the report it was recorded that, ' the patient slipped and hit his left leg on the conveyer belt and sustained a cut wound on his left big toe. Patient was taken to Kabras action group clinic where he was treated and discharged."(page 11-12 of the record).

28. The court looked into the clinic sick sheet of 11th April 2015 and noted that it indicated that the patient had a painful fresh cut wound on the right leg (page 13 of the record) The court finds that there was no nexus between the clinic medical record of 11th April 2015 and the alleged injury of 2nd may 2014 which was of the left toe in any case. The medical report of 10th may 2014 indicated that the patient had been injured on 2nd may 2014 and was treated at the clinic that time.

29. The plaintiff produced gate pass as part of evidence at trial court. The said gate pass was dated 1st april 2015 while his injury happened on 2nd may 2014. The plaintiff stated in his witness statement that he was on duty on 2nd may 2014 as a casual worker(page 16 of the record). The gate pass produced was for 1st April 2015. The court finds there was no evidence before the trial court that as a casual worker the plaintiff he was on duty on the alleged date of the accident of 2nd may 2014. The proof of employer employee relationship between the parties was primal to finding of liability in work injury claim. The court finds there was no proof of existence of employer employee relationship between the respondent and the appellant on the alleged date of accident of 2nd may 2014. This was a critical issue considering the plaintiff told the court he was a casual worker.

30. The court agreed with the decision in Eldoret HCC No. 102 of 2015 Sally Kibii v Dr. Francis Ogaro where he held:- ; 'in all adversarial systems like ours a party undermines his case drastically by not calling or failing to call witness. The plaintiff simply did not adduce any evidence before the trial court on liability. They could have called eye witness and/or the investigating officer. Proof of negligence was material in this case and the burden was on the plaintiff." The court also agreed that it would be unsafe for the trial magistrate to hold that the appellant was liable for acts of negligence or breach of duty to provide safe environment without credible and cogent evidence on the part of the respondent as held in P.J Dave Flowers LTD v David Simiyu Wamalwa(2018)e KLR.

31. The court finds with material gaps in the evidence of the plaintiff being lack of proof of having been a casual worker with the respondent on the alleged date of accident of 2nd may 2014 having produced a gate pass for 1st april 2015 only , the Kabras medical clinic indicating he was treated for a fresh cut wound on the right leg on the 11th April 2015 , the medical report having stated he was examined on the 10th may 2014 the court find no nexus between the treatment at the clinic on 11th April 2015 and the alleged injury of 2nd May 2014 almost a year later. The court finds that the treatment at the clinic on 11th May 2015 was not a review as submitted by respondent but a fresh injury. There was no sick sheet produced for 11th April 2014. The court found that under the plaintiff's list of documents there was only one sick sheet from Kabras action group clinic of 11th April 2015 and not two sick sheets as submitted by the respondent. Indeed there was no sick sheet for treatment on the 2nd May 2014 as submitted by the respondent(page 9 of the record). The court finds that the learned magistrate court erred in law and fact in failing to review the evidence before the court before making decision on liability and for relying on the medical report of Dr. Lamba to the exclusion of the sick sheet and the gate pass number hence arriving at wrong conclusion on liability.

32. Consequently, the court finds that there was no proof of the liability of the appellant for the alleged injury as required under section 109 of the *Evidence Act* to wit:- 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."

33. Consequently, the court having found there was no proof of liability against the appellant by the respondent and the court having found there was no evidence of engagement as casual worker of the respondent by the appellant on the alleged date of the accident/injury which was a primal issue in the relationship between the parties being employer employee, the court sets aside the finding on liability and the entire judgment of the trial court.

Conclusion and disposition

34. The court holds that there was no proof on balance of probability that the appellant was liable for the alleged injuries by the respondent. The court allows the appeal and sets aside the entire judgment and

decree of Honourable H. Wandera Senior Principal Magistrate Delivered on the 26th October 2021 in Kakamega CMCC No. 66 of 2017 and its place dismisses the claim dated 20th February 2022 with no order as to costs. The monies held as security for decree to be released immediately to the appellant.

35. Costs of the appeal awarded to the Appellant.

36. It is so ordered.

DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 2ND MARCH 2023.

J. W. KELI,

JUDGE.

In The Presence Of:-

Court Assistant : Brenda Wesonga

For Appellant : Otieno Njoga

For Respondent:- Shibanda