West Kenya Sugar Company Limited v Werunga (Employment and Labour Relations Appeal E006 of 2022) [2023] KEELRC 973 (KLR) (20 April 2023) (Judgment)

Neutral citation: [2023] KEELRC 973 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA

EMPLOYMENT AND LABOUR RELATIONS APPEAL E006 OF 2022

JW KELI, J

APRIL 20, 2023

BETWEEN

WEST KENYA SUGAR COMPANY LIMITED ..... APPELLANT

AND

JACOB WANJA WERUNGA ..... RESPONDENT

(Appeal against the entire judgment and decree of Hon. B. Ochieng (CM) delivered on the 30th November 2018 in Kakamega CMCC NO. 195 OF 2015)

JUDGMENT

1. The Appellant being dissatisfied by the judgment and decree of Hon B Ochieng (CM) delivered on the November 30, 2018 in Kakamega CMCC No 195 of 2015 filed Memorandum of Appeal dated January 28, 2022 against the entire decision and seeking the following reliefs:-

    a. 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.

    b. Costs of the appeal and the primary suit be awarded to the appellant.

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

    a. The Learned Trial Magistrate erred in fact and law in arriving at a finding that the Appellant was 100% liable for the accident in the absence of any proof linking the Appellant to the 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.

b. The Learned Trial Magistrate erred in fact and law in arriving at a finding that the Appellant was 100% 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.

c. 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 or care and/or contract at all on the part of the Appellant.

d. 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.

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

f. 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.

g. 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.

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

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

j. 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 conclusion on the same.

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

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

m. The Learned Trial Magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstances that it represented an entirely erroneous estimate vis-a -vis the Respondent's claim.

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

Background to the appeal

3. The Respondent/Claimant sought before the trial magistrate court damages for injuries sustained at work for which the trial magistrate entered judgment against the appellant as follows:-

> 'Judgment is entered for the plaintiff against the defendant and I award him a total of Kes, 180,000/- as general damages on 100% proof of liability , Kshs 10,000 as special damages together with costs and interest. '(page 93)

Hearing

4. The court directed that the appeal be canvassed by way of written submissions. The Appellant's written submissions drawn by LG Menezes & Company Advocates were dated January 28, 2023 and received in court on the January 30, 2023. The Respondent's written submissions drawn by Abok Odhiambo & Company Advocates were dated February 13, 2023 and received in court on the February 14, 2023.

Determination

5. The principles which guide this court in an appeal from a trial by the magistrate court are now well settled. In *Selle And Another V Associated Motor Boat Company Ltd & Others*, [1968] EA 123, Sir Clement De Lestang, Vice President of the Court of Appeal for East Africa stated those principles as follows:-

> "An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this 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 this 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."

6. Further in *David Kahuruka Gitau & Another v Nancy Ann Wathithi Gatu & Another* Nyeri HCCA No 43 of 2013 the court opined:- 'Is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on pointe of law and facts and come up with its findings and conclusions."

Issues for determination

7. The Appellant in its submissions challenged the finding by the magistrate court of 100% liability. In the grounds of appeal the appellant further challenged quantum award of damages as being inordinately high and erroneous estimate via a vis the respondent's claim.

8. The respondent listed issues for determination as follows: -

    a. Whether there was proof of an employment relationship between the appellant and respondent at trial court

    b. Whether there was proof of negligence on the appellants part which resulted in the respondent's injuries

    c. Whether the respondent dispensed with the burden of proof in proving negligence on the appellant part

    d. Whether the court had regard to the appellant's evidence pleadings and submissions in its judgment

    e. Whether the trial court award of damages for the respondent's injuries was inordinately high.

9. The court, taking into consideration the grounds of appeal and the written submissions by both parties finds that the issues placed by the parties for determination in the appeal are with regard to the liability and quantum of damages and formulates the issues as follows:-

    a. Whether there was proof of an employment relationship between the appellant and respondent at trial court and of negligence against the appellant linked to the respondent's injuries

    b. If (a) positive, Whether the court had regard to the appellants evidence, pleadings and submission in its judgment

    c. Whether the trial court award of damages for the respondent's injuries were inordinately high.

    Issue 1 Whether there was proof of an employment relationship between the appellant and respondent at trial court and of negligence against the appellant linked to the respondent's injuries

10. The court finds that proof of employer employee relationship was primal to finding on liability. It is thus the first issue for the court to dispense with in the instant appeal.

Appellants submissions

11. The appellant submits there was no proof the respondent was their employee or that there was a contract of employment at time of the alleged accident between the parties. That DW1 pointed out that if the respondent had been on duty on the material date his name would have been in the casual payment listing and loader weighment details produced as Dexhibit 2 and 3 respectively failing which it meant the respondent did not report to work nor was he employed, that the said tractor KTCB 495J did not leave the company premises on the material date. That the casual payment listing(Dexh2) was equivalent of muster roll and evidence the respondent was not in employment on material date as was ably dealt with by Justice Emukule(Rtd) in the case of *Timsales Limited v Noel Agina Okello* (2014)e KLR in paragraphs 26 -28 to wit: -'26. I do not agree that the contents of the muster roll or accident register cannot be taken as conclusive proof of the fact of employment, and these are my reasons. Firstly a muster roll by definition is a record of daily attendance by employees in a farm or factory. It is like a clocking register. If an employee claims that he was at work on a particular day, but failed to clock-in his name at the particular time of reporting to work, he must show by other evidence that he was actually present on the particular day, and give reasons why he failed to have his name entered in the muster roll. This is particularly so where an employee is engaged on a daily or casual basis, the terms of whose engagement provide for his payment at the end of each day, and even if such an employee may not have an identification document his name must at least appear in the muster roll. There is no evidence that the Respondent received any wages for the time (if any) worked.

    27. Secondly, a muster roll and an Accident Register are management tools. They are prepared and maintained by management through designated officers at levels established by respective industries. There is no evidence of basis for any suggestion that because they are prepared and kept by management, they are manipulated by such management employees either to protect themselves or to protect their employer from liability to pay wages or claims arising from industrial accidents.

    28. When therefore a name of a litigant who claims to have been a casual or even permanent employee, who is required to have his name entered in the Muster Roll, or an Accident Register (in the event of an accident), does not appear in either the Muster Roll or Accident Register, the degree of proof of probability of having worked, or having had an accident on a particular day becomes much higher."

12. That Dexh1 was the uncontroverted evidence of record of ownership of the tractor KTCB 495 J which revealed that the owner as at 18/9/2013 was Tarus Reuben and not the appellant and Dexh4 was a record of all tractors of the appellant and tractor KTCB 495 J was not listed. The appellant relied on the decision of the High Court in *Alfred Kioko Muteti v Timothy Miheso & another* (2015)e KLR where the court held, ' we agree that the best way to prove ownership would be to produce to court a document from the Registrar of motor vehicles showing who the registered owner is.."

Respondent's submissions

13. That the respondent produced gate pass as evidence of employment hence the letter of employment could not arise as the appellant never issued contract letters to menial job holders. That DW1 admitted PW1 was in employment as a casual worker. That Pexh 1 was his gate pass issued by the appellant . That PW1 testified on the March 18, 2013 the tractor he was assigned to load was unable to ascend the hill and reversed and eventually overturned causing injuries which he was treated, Pexh2 was treatment notes, Pexh3(a)medical report of Dr Adai and receipt marked Pexh3b and demand notice(page 77). That the supervisor visited the scene after he was called. That the gate pass was proof of employment as held by the trial court and relied on the hold of Riech J in *Mumias Sugar Ltd v Silas Okhuya Indakwa*(2021)e KLR. In the said decision the court held that even if the employment contract was not produced the gate pass entitled the respondent to be in the premises at material time of the accident as the gate pass had period stated. That DW1 working as transport superintendent admitted the respondent worked for the appellant as a casual worker. That it can be deduced from DW1 testimony that he dispatched several tractors, that the tractors used to ferry sugar cane at the appellant's factory and were directly under the appellant's control and so the defence of not being registered owner was not available. That the driver and the tractor were under the appellant as they dispatched the tractors.

Decision

14. The court had to determine sub-issues being whether the respondent was a casual worker on material date of accident, whether the respondent was injured in course of duty and whether the tractor was under the control of the appellant. On the employment the respondent relied on a gate pass whose detail was pass number L 409 Jacob Werunga, cane loader on contract, West Kenya Sugar Co Ltd (Pexh1 copy). Pexh2 (original)was a booklet stamped Mtingongo dispensary Malava dated August 8, 13 which stated injuries to be backache and hand angle dislocation. The respondent appeared to have been put on massage and antibiotics. Pexb3a(copy)was medical report of Dr Andai who relied on the said Pexhb2 on history of the injuries. The court noted the doctor did not refer to hand angle dislocation. The opinion was moderate soft tissue injuries and had fully recovered. There was a receipt of Kshs 5000 for the report. PExhb4a (copy) was the demand letter which indicated accident was on 18th September 2013 with handwritten alteration of date at heading only to read August 8, 13. The body of the letter date of September 18, 2013 remained.

15. The appellant produced casual payment listing for August 8, 2013 listed alphabetically as evidence the claimant was not on duty on alleged material date of the accident(23-30), sample time and pay card (31), letter by the medical practitioner and dentist board stating Dr Andai was not licensed to practice(page 32), Transporter's list for August 8, 2013 as prove the said tractor KTCB 495J was not dispatched on the material date(pages 33-39) and loaders weighment details (41-47).

16. During cross-examination the respondent stated the gate pass was seized by the defendant. That he was a loader since 2002. That the accident was reported at Misiko area and he had not produced the police abstract, that he was in the transport sector and the supervisor deals with incidents when they happen. That he paid the doctor Kshs 3,500 and the receipt did not have revenue stamp. That it was at 1pm

when the accident happened, the tractor lost climbing power. That they were three in the tractor, the driver and another loader. That his name must have been in the register. They were paid vide mpesa per tonne. The accident was along siroi road and that the driver was a reliever. The clinic where he was treated was the defendant's clinic.

17. DW1 testified he had been in the transport department for 10 years with the appellant. On cross examination DW1 told the court there was contradiction on date of accident. That the loaders clock in. That the printouts produced were from the transport department and the persons who printed the same was not indicated. On August 8, 2013 several tractors were dispatched to Visori area and he had not availed a driver as witness. That the accident had not occurred. He had not reported to the police. Investigation was ongoing. After accident they rush patients to hospital and record the accidents in the register and he had not produced the same. DW1 stated the tractor did not belong to the appellant.

18. The magistrate trial court on liability found DW1 conceded all copies of documents produced purporting to be from the appellant lacked the requisite company seal and did not have names of persons who prepared them nor were they certified and the consequently found the said documents were of no probative value to rebut the prove of employment of gate pass held by the respondent as prove of employer employee relationship and treatment notes (Pexh 2) confirming the accident happened.

19. Upon evaluation of the evidence this court at appeal observed that the respondent was not consistent on the material date of accident as follows:- the statement of claim paragraph 5 referred to accident on September 18, 2013(page 4),the plaintiff's witness statement stated date of accident as September 18, 2013, (page 7)demand letter dated September 17, 2013(page 10) indicated date of accident as September 18, 2013 , the medical report indicated date of accident as September 18, 2013(page 11) and referred to medical treatment notes at Mtingingo dispensary which indicate date of September 18, 2013(page 14). During evidence in chief the respondent stated the accident was on 5th august 2013 contrary to his witness statement. DW1 brought up the contradiction on date of accident during cross-examination and produced record from the Registrar (Dexb1) to prove the said KTCB 495J was not their motor vehicle as at September 18, 2013. The learned magistrate in the judgment at page 87 stated the claim arose from accident of September 18, 2013. The court holds that the learned trial magistrate erred on issue by determination that the claimant was injured on September 18, 2013 contrary to his evidence in chief. The court perused the original exhibits produced and marked by court at trial. Pexh2 was a green booklet with stamp of Mtingongo Dispensary dated August 8, 13 and so did the medical report. The demand letter had hand correction of date from September 18, 2013 to August 8, 2013 on title but in the body remained September 18, 2013. The court noted the treatment note in the record at page 14 was different from the original Pexb2 in terms of the injury details. That the injuries under original Pexb2 were different from those in the medical report (page)11. The original claimant's exhibits in the lower court file had different dates of accident from the certified copies, which appear to have been availed to court as they are also in the original file and the injuries were also not matching. The court smelled a rat from the foregoing and found that in view of the inconsistency on material date of the accident and even the injuries considered together with the pleadings and oral evidence in court there was no prove of the alleged date of accident. The gate pass did not indicate the period it covered; indeed, it indicated contract yet no contract was produced. The decision by Riech J in Mumias Case (supra)was thus not applicable for in that case the claimant's gate pass had specific date placing him at the premises of the employer on the material date. The claimant's evdience was not corroborated by independent witness. Even the doctor who prepared the medial report was not licenced (page 32). The respondent's evidence did not pass muster to pass burden of proof to the appellant as per *evidence Act* to wit: '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." The court finds that the evidence of defence that the appellant did not own the said tractor on September 18, 2013 (dexh1) was relevant in view of pleadings alleging accident September 18, 2013. The claimant was bound by his pleadings.

20. The court having found no proof of liability on basis:- for lack of proof of date of the alleged accident with pleadings by claimant stating September 18, 2013, the oral testimony August 5, 2013(page 77) and original documents which is the primary evidence stating August 8, 2013 , and submissions by the claimant stating material date of accident was August 8, 2013 contrary to his pleadings and evidence placed before court. The learned magistrate also stated in the judgment injuries arose from accident on September 18, 2013 (87). The court found there was lack of evidence of the respondent having been on duty on the alleged date of the accident as the gate pass did not have dates and the testimony was not corroborated. There was no proof of the alleged injuries as the medical treatments note stated right knee dislocation(page 14) and medical report indicated blunt injury to the chest, blunt injury to left hand and left knee. The court found that the entire alleged injuries were cooked up and did not simply add up hence not proved on balance of probabilities. The court found proof that the alleged tractor KTCB 495J did not belong to the appellant as at September 18, 2013 the pleaded date of accident. The claimant did not prove the existence of facts of having been on duty , date of accident and the injuries which he relied on for the court to have found the appellant liable as per burden of proof as stated under section 107 of the *Evidence Act* to wit:- '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'. The court holds that the inconsistences on the date of accident in pleadings and documents relied on, the inconsistences on injuries alleged to have been suffered and the lack of proof of being at place of work would have led any reasonable jury to find there was no proof of liability against the appellant. The court applying the reasonableness test holds that the burden of proof on balance of probabilities of liability against the appellant for the alleged injuries by the respondent was not discharged.

21. In the upshot, the court finds and determines that the learned magistrate erred in law and fact in finding there was proof112211 of negligence and attributing 100% liability of the alleged injuries on the appellant and awarding damages. In view of the finding that there was no proof of liability then the court finds there can be no award of damages hence no need to consider the 2nd issue on quantum.

Conclusion and disposition

22. The appeal is allowed and judgment dated November 30, 2018 of Hon B Ochieng (CM) delivered in Kakamega CMCC No 195 of 2015 on the November 30, 2018 is hereby set aside and substituted with judgment that the suit Kakamega CMCC No 195 of 2015 dated May 13, 2015 is dismissed with costs to the defendant. Costs of the appeal to the appellant.

23. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA ON THE 20TH APRIL 2023.

JEMIMAH KELI,

JUDGE.

Obiter Dictum on the record of appeal

The court was disturbed by the state of affairs of the existence of copies of claimant's exhibits filed on 15th May 2015 together with the claim which were materially different from the original (primary) exhibits. The

original exhibits were produced at the oral hearing by the claimant on 11th October 2017 and duly marked as the claimant's exhibits . The copies placed in the record of appeal were not marked as exhibits by the trial court. The trial court appears to have relied on the said copies and not the primary documents produced in court. The judgment was based on unproduced evidence while the produced evidence was duly marked and in the lower court file.

JEMIMAH KELI,

JUDGE

In the presence of

Court Assistant: Lucy

Appellant : Otieno Njoga

Respondent:- Absent