



**Prime Mills Limited v Bogonka (Appeal 28 of 2018)
[2023] KEELRC 2424 (KLR) (3 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2424 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL 28 OF 2018
DKN MARETE, J
OCTOBER 3, 2023**

BETWEEN

PRIME MILLS LIMITED CLAIMANT

AND

OGETO ERICK BOGONKA RESPONDENT

JUDGMENT

1. This matter came to court vide a Memorandum of Appeal dated April 14, 2017. It raises the following as the basis of the suite;
 1. That the Learned Magistrate erred in law and in fact in finding the defendant 100% liable which was against the weight of evidence from both the plaintiff and the defendant's witness.
 2. That the Learned Magistrate erred in law and in fact in failing to find that the plaintiff was at fault or substantially liable for the accident as he was in control of the object.
 3. That the learned Magistrate erred in law and in fact in failing to dismiss the suit as no direct evidence was adduced to establish liability.
 4. That the learned Magistrate erred in law and in fact in failing to find that the defendant had not breached any duty of care.
 5. That the Learned Magistrate erred in law and in fact in failing to find that the defendant had supplied all protective gears necessary for this matter.
 6. That the Learned Magistrate erred in law and in fact in failing to find that the plaintiff did not take adequate steps to ensure his own safety while at work.
 7. That the Learned Magistrate erred in law and in fact by making awards on general damages that was excessive regards being to decide cases.



8. That the Learned Magistrate erred in law and in fact in failing to follow and be bound by the principle of state decisis.
2. She prays thus;
 - a. The appeal be allowed and the plaintiff's case be dismissed with costs.
 - b. That in the alternative to (a) above the judgment on liability be varied and apportioned substantially in favour of the defendant
 - c. That the award on General damages be reduced.
 3. The Respondent in his written submissions dated March 30, 2023 rubbishes the appeal and prays that it be dismissed.
 4. The Appellant submits as follows;
 7. This being a first appeal, this Honourable Court is not bound by the Trial Court's finding on fact but is required to re-examine afresh all the evidence. For this proposition, we rely upon the decision in *James IthaleAkothe v Abdiwele Ali Abdi & another* [2020] eKLR where it was held at page 6 as follows:

This being the first appeal, it is my duty to re-examine a fresh the evidence and material tendered before the Lower Court and draw my own conclusions, but I have to be slow in overturning the decision of the trial Court, bearing in mind that I did not have the opportunity of seeing or hearing witnesses who testified so as to assess their credibility (see *Selle v Associated Motor Boat Company Limited* [1968] EA 123).
 5. The Appellant in her written submission dated March 14, 2023 further posits a case on burden of proof to disapprove the Respondent's case. The is as follows;
 10. The burden of proof of liability in a civil case always rests on the plaintiff/claimant even if the case proceeds as an undefended cause. Section 107 and 109 of the *Evidence Act*, chapter 80 of the Laws of Kenya is clear on the foregoing position by stipulating as follows:

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.

109 The burden of proof in a suit 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 lies on any particular person.
 6. Further;
 14. The summary of the Respondent's allegation of negligence is that he was in the lawful course of employment within the Appellant's premises when the Appellant provided him with unsafe system of work when the furnace he was working on exploded and hot objects hit him and as a result he sustained serious injuries. The Respondent was mandated by long established principles to prove this allegation failure to which his case fails. To hold otherwise would be to sacrifice the Appellant's fundamental right to fair hearing and presumption of innocence while exhorting an unjudicial bias that a plaintiff in a road accident claim is always right regardless of the evidence or lack of it.



7. The Appellant further seeks to rely on authority of *David Ogo Alwar v Mary Atieno Adwera & another* [2021] eKLR, where it was held as follows;

It is noteworthy that the burden of proof always lie with he who alleges and therefore in this case, the burden of proof lay with the appellant/plaintiff to proof any of the acts of negligence attributed to the respondents/defendants. One can only prove that another is liable by adducing evidence to that effect or unless the defendant admits liability or the pleaded acts of negligence. The fact of an accident having occurred is not in itself proof of liability (Emphasis added)

8. The Appellant again seeks to rely on the authority of *Alfred Kioko Muteli v Timothy Mibeso & Another* [2015] eKLR where it was observed as follows;

...the burden of proving that the 1st defendant was liable in negligence for the occurrence of the accident still pay on the plaintiff. Pleadings are not evidence and it is not enough to plead particulars of negligence and make no attempt in one's testimony in court to demonstrate by way of evidence how the accident occurred and how the 1st defendant was to blame for the said accident. It is trite law that he who alleges must prove and that burden does not shift to the adverse party even if the case proceeds by way of formal proof and or undefended. (Emphasis added)

9. The gist the Appellant case is that the Respondent had failed to proof his case at the lower court and therefore a finding in his favour is erroneous. Again, if this was not the case, the learned magistrate erred in the award of an exorbitant quantum not befitting of the circumstances and nature of injuries and again not in tandem with the authorities provided in evidence and in support of the defence.

10. The Respondent case is a justification of the findings of the learned magistrate in her findings in favour of the Respondent. It is his case that his matter was ably proven in the lower court and therefore the favourable outcome.

11. Here, he seeks to rely on the authority of section 109 of the *Evidence Act* on burden of proof of particular facts and also the authority of *Bigot Flowers (K) Limited v Isaac Nyamainyeria Omabene* [2020] eKLR where it was observed as follows;

“Where then an employee is injured simply because the employer has not taken such reasonable measures to provide the necessary safety devises, gear or protective clothing, it is sufficient and in general, satisfactory to say that the employer has not fulfilled its duty”

12. He concludes by citing the authority of *Faith Mutindi Kasyoka v Safepark Limited* [2019] eKLR in buttressing his case;

“In the present matter, the Respondent did not adduce evidence demonstrating the Appellant had been issued proper protective gear suitable to her role. It was not sufficient to offer the Appellant ear muffs. The measures adopted by the Respondent did not match the common law duty to take all reasonable steps to ensure the employee's safety.”

13. The Appellant totally fails in meeting this uphill tasks of disapproving the Respondent's case. All the way to the lower court, the Respondent has established an overwhelming case of negligence on the part of Appellant. This was proven and logicalised in the lower court and hence the findings of the learned magistrate.



14. I am unable to in any way fault the learned magistrate findings on the outcome or even award of damages. This was in tandem and agreement with the evidence adduced before court which the Appellant has been unable to supplant. I therefore inclined to dismiss the appeal with costs to the Respondent.
15. Overall, the submission and reliance on the principle of preponderance of evidence adduced in paragraph 21 of the Appellant's case in reality and fact favour the Respondent and not the Appellant as is sought. So is the submission on the burden of proof lies upon the appellant to show that they indeed provided the protective equipment for the work as required.
16. We are guided by The Evidence Act Cap 80 Laws of Kenya at Section 109 that provides:
 109. Proof of particular facts.

The burden of proof as to any particulars 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.
20. Conclusively, the Respondent submits that the court should uphold the trial court's finding on liability and quantum. The appellant breached its duty of care to the respondent by failing to provide a safe system of work. It failed to provide the respondent with sufficient protective working gear. We also urge the Honourable court not to interfere with the assessment of quantum of damages as the same were fair in the circumstances. We pray that the court dismisses the appellant's appeal with costs to the respondent.
21. I agree.
22. And truly, this court as no justification for interfering with the well laid out decision of the lower court.
23. I am therefore inclined to dismiss the appeal with costs to the Respondent.

DELIVERED, DATED AND SIGNED THIS 3RD DAY OF OCTOBER 2023.

D. K. NJAGI MARETE

JUDGE

Appearances

- 1. Mr. Otieno instructed by KinyanjuiNjuguna& Co. Advocates for the Appellant.**
- 2. M/s Wambui instructed by MainaRogoi& Co. Advocates for the Respondent.**

