Ogada v Fargo Courier (Appeal E113 of 2023)
[2023] KEELRC 3135 (KLR) (3 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 3135 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E113 OF 2023

NJ ABUODHA, J

NOVEMBER 3, 2023

BETWEEN

NICHOLAS OKOTH OGADA ..... APPELLANT

AND

FARGO COURIER ..... RESPONDENT

(Being an appeal from the judgment, orders and decree of Hon. D.A Ocharo (SRM) in Chief Magistrate's Court at Milimani CMCC No. 2548 of 2014 delivered on 5th September, 2017)

JUDGMENT

1. Through the Memorandum of Appeal dated 2nd October, 2017 the Appellant appeals against the Judgment of Honourable D.A Ocharo (SRM delivered on 5th September, 2017 in Milimani CMCC No. 2548 of 2014.

2. The Appeal was based on the grounds that:

    i. The Learned Magistrate erred both in law and fact by apportioning liability between the appellant and the respondent in equal shares yet there was no evidence led to show that the appellant was contributory [sic] negligent.

    ii. The Learned Magistrate misdirected himself in assuming facts not in evidence and in particular that the appellant was in a rush and or hasty which caused him to slip yet there was no evidence leading to that effect and as a result erred in his analysis of the evidence placed before him thus came to the wrong conclusion on contributory negligence.

    iii. The Learned Magistrate erred both in law and fact in failing to appreciate the law as well as the duty of care it imposed on the respondent to provide a safe system of work thereby arriving to a wrong conclusion altogether.

iv. The Learned Magistrate erred both in law and fact in imposing an impossible duty on the appellant on how to go about his work which duty was not imposed by law.

v. That the trial magistrate erred in law and in fact by not entering judgment on liability at 100% as a against the defendant as proved and submitted.

3. The Appellant in its submissions dated 28th November, 2022, collapsed the grounds of appeal into two. Namely: whether the learned magistrate erred in law and fact in apportioning liability at 50%:50% and not 100% as against the respondent. Second whether the appellant was entitled to the orders sought.

4. On the first issue, counsel submitted that as to whether the appellant's injuries were occasioned entirely by the negligence or failure by the respondent to provide a safe system of work or whether the appellant contributed to his injuries was considered in the case of *Tridev Construction v Charles W. Kasambeli* [2015] in which the Court stated that the common law duty of care of an employer was not to merely provide a safe system of work but to ensure that employees complied with that system of work. Counsel further relied on the case of *Simba Posho Mills Ltd v Fred Machira Onguti*. Counsel further submitted that no evidence was tendered by the respondent before the trial court to prove that the appellant contributed to the occurrence of the accident. Counsel stated that the respondent did not lay any evidence that it exercised its statutory duty of care and ensured that there was adequate safety apparel at the premises and further that the respondent never tendered any evidence to show the appellant was contributory to the negligence in the way he went about his duties while at the respondent's premises. The respondent never produced any evidence to show the appellant was furnished with directions and never followed. In support of the foregoing submission, counsel relied on the case of *Peter Benard Makau v Prime Steel Limited* [2018]

5. The respondent on its part submitted that it was incumbent on the appellant to prove that which he asserted. The evidence as captured by the trial court was that the appellant was a motorcycle rider employed by the respondent and that he alleged that he slipped in the respondent's warehouse when he went to collect a letter. He fell and fractured his left leg. The appellant, however in his evidence in chief never led any evidence on how the accident occurred but in cross-examination stated that he relied on documents produced by the defendant where how the accident occurred. The respondent submitted that the appellant did not prove his case against the respondent on a balance of probabilities thus leaving the trial court to infer from the circumstances that both parties were to blame.

6. It is the duty of this Court as a first appellate to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the Appeal. This was well stated in the case of *Selle & another v Associated Motor Boat Co. Ltd & others* thus.

> " An appeal to this court from a trial by the High Court is by way of 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.....or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

7. In determining the Appeal herein, this Court shall similarly seek to reanalyze the evidence tendered before the Trial Court vis-à-vis the court's conclusion and disposition.

8. The only quarrel the appellant appear to have with the lower court's judgment is the apportionment of liability at 50% against each party. From the evidence, the claimant's account of events is as follows:

> " On 27th November, 2012 I went to pick letters as usual. While within the warehouse, I slid on a slippery floor in which some oil had splilt and which I did not see. I fell. When I attempted to stand I realised my left leg could not stand. I was assisted by colleagues to get outside. Mr. Kabiru (Senior Human Resource Manager) and Mr. Kavera ordered that I be taken to Guru Nanak for treatment. My left leg was X-rayed at Guru Nanak. I was told that I had sustained a fracture. A plate was put. No document was used from Guru Nanak. I never went to the labour office. The latter from labour office was brought to my attention by Mr. Kabura Senior Human Resource Manager. It was already filled. He even brought me the workmen compensation claim form. The medical documents filed by the defendant explain how I was injured. They however have a wrong date".

9. On the evidence, the trial magistrate rendered himself as follows on the issue of liability:

> " At common law the employer is under obligation to provide a safe working environment. He owes the employee a duty of care. The trial Magistrate relied as well on the case of *Tridev Construction v Charles Kasambeli* cited above by the appellant. He went further to state that in my view the defendant breached the duty of care by allowing a slippery substance to spill on the floor of a warehouse which the plaintiff frequented while in performance of his day to day activities of sorting out mail for delivery...on the other hand however, it is unfathomable to imagine how the plaintiff would not see oil split on the floor. He did not state that the lighting in the warehouse where he was sorting out letters and where he slipped and fell was poor. The only conclusion then which one arrives at is that the plaintiff was rush and hasty which is why he didn't notice the spilt oil or if he noticed it he never took any step so as to avoid sliding or slipping and falling. He was too negligent.

10. From the record, the respondent called only one witness. That is Dr. Moses Kinuthia who examined the claimant over his injury and complied a report. The respondent never called any witness from the respondent premises where the accident took place. One would have expected the respondent to call either Mr. Kabiru (senior human resource manager) and the general manager Mr. Kavera who took the appellant to hospital. No reason was given why they were not called. It is there not easy to understand on what basis the trial Magistrate came to the conclusion that the appellant was in hurry and negligent.

11. Section 6 of Occupational Safety and Health provides:

> Duties of occupiers
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> (1) Every occupier shall ensure the safety, health and welfare at work of all persons working in his workplace.
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> (2) Without prejudice to the generality of an occupier's duty under subsection (1), the duty of the occupier includes—
>
> (a) the provision and maintenance of plant and systems and procedures of work that are safe and without risks to health;

(b) arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;

(c) the provision of such information, instruction, training and supervision as is necessary to ensure the safety and health at work of every person employed;

12. Section 13 on the other hand provides:

Duties of employee

(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;

(b) co-operate with his employer or any other person in the discharge of any duty or requirement imposed on the employer or that other person by this Act or any regulation made hereunder;

(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;

(d) comply with the safety and health procedures, requirements and instructions given by a person having authority over him for his own or any other person's safety;

13. A reading of the above two sections of the *Occupational Safety and Health Act*, places a first obligation to provide a safe working place and system of work on the employer. The employee is thereafter required to ensure his own safety and health and that of other persons who may be affected by his acts or omissions at the workplace and further observe and co-operate with his employer or any other person in the discharge of any duty or requirement imposed on the employer or that other person by the Act or any regulation made hereunder. An employee is further at all times required to wear or use any protective equipment or clothing provided by the employer for the purpose of preventing risks to his safety and health and to comply with the safety and health procedures, requirements and instructions given by a person having authority over him for his own or any other person's safety.

14. As observed above, the respondent never called any witness to testify as to what arrangements it had in place in line with the provisions of section 6 of *OCSH Act* above. It was incumbent on the respondent to demonstrate the presence of these measures and arrangements and in what way the appellant failed to adhere to them hence the injury, before the blame for contributory negligence could be apportioned to him. To this extent, the learned trial Magistrate erred in law and fact by apportioning liability as against the appellant at 50%.

15. In conclusion the Court hereby allows the Appeal and substitutes the order of the trial Court apportioning liability at 50% with an order of 100% liability as against the respondent.

16. The other findings and orders of the trial Court are hereby upheld.

17. The appellant shall further have costs of the appeal.

18. It is so ordered.

DATED AT NAIROBI THIS 3RD DAY OF NOVEMBER, 2023

DELIVERED VIRTUALLY THIS 3RD DAY OF NOVEMBER, 2023

ABUODHA JORUM NELSON

JUDGE