



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL NO. 40 OF 2019

(Originally Kakamega High Court Civil Appeal No. 94 of 2018)

WEST KENYA SUGAR CO LIMITED.....APPELLANT

v

VINCENT AMBONYA MULUPI.....RESPONDENT

**(Being an Appeal from the judgment and decree of Hon. T.K. Kwambai, Resident Magistrate, Butali Law Courts in Butali SRMCC
No. 131 of 2016 delivered on 12/7/2018)**

JUDGMENT

1. In a judgment delivered on 12 July 2018, the learned Magistrate found West Kenya Sugar Co. Ltd liable to Vincent Ambonya Mulupi (Respondent) for breach of the duty of care/negligence in the workplace.
2. The Respondent was awarded general damages of Kshs 100,000/- (less 10% contributory negligence) and special damages of Kshs 6,000/-.
3. The Appellant being dissatisfied filed a Memorandum of Appeal before the High Court in Kakamega on 23 July 2018 contending that
 1. The Learned trial Magistrate erred in fact and law in arriving at a finding that the Appellant was 90% 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.
 2. The learned trial Magistrate erred in fact and law in arriving at a finding that the Appellant was 90% 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 liable for the accident and/or the Respondent's injuries when there was no evidence of a breach of duty of care and/or contract at all on the part of the Appellant.
 4. 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.
 5. The Learned trial Magistrate erred in fact and law in shifting the burden of proof to the Appellant contrary to the law.
 6. The Learned trial Magistrate failed to appreciate sufficiently or at all the evidence tendered in favour of the Respondent was contradictory and could not warrant judgment in his favour.
 7. The Learned trial Magistrate failed to appreciate sufficiently or at all the evidence tendered in favour of the Appellant controverted and rebutted the Respondent's evidence thus lowering the Respondent's probative evidentiary value.
 8. 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's breach of contract, statutory duty or negligence.
 9. The learned trial Magistrate erred in fact and law in finding that the Respondent had proved his case on a balance of probability.
 10. 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.

11. The learned trial Magistrate erred in fact and law in finding that the Respondent had proved his case on a balance of probability.
 12. The learned trial Magistrate erred in fact and law in failing to dismiss the Respondent's suit with costs to the Appellant.
 13. Without prejudice to the foregoing, the award of damages was inordinately excessive in the circumstances for soft tissue injuries.
4. On 25 October 2019, the High Court, citing lack of jurisdiction, transferred the Appeal to this Court.
 5. Pursuant to directions given by the Court on 4 November 2020, the Appellant filed its submissions on 27 November 2020 while the Respondent filed his submissions on 16 December 2020 (should have been filed/served before 11 December 2020).
 6. In its submissions, the Appellant abandoned the ground of appeal in respect of quantum.
 7. The grounds of appeal were also reduced to 5.

Role of this Court on the first appeal

8. The Court of Appeal in *Selle and Another v Associated Motor Boat Co. Ltd & Ors (1968) EA 123* stated on the role of Court on the first appeal thus

This Court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.

However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had 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 demeanour of a witness is inconsistent with the evidence in the case generally.

9. This Court will bear in mind the interdict on its role.

Employment/contractual relationship

10. The Respondent's case was that he was employed by the Appellant as a cane loader in 2013 and that his loader number was L1393. He gave the name of his supervisor at the time of the accident on 6 October 2013 as one Chiluyi and the tractor driver as Wycliffe. The Respondent also produced his pass (card).
11. To further buttress the assertion that he was an employee of the Appellant, the Respondent produced a copy of the sick-sheet he was issued by the Appellant after the accident to enable him to seek medical treatment
12. The Appellant's witness denied that it owned tractor registration number KAT 414Y ZE9167 or that one Wycliffe was assigned to drive the tractor. However, he stated that one Wycliffe Lucheli was assigned to KTCB 785H ZC 2582 and that on the material day he had been assigned to collect cane from a farmer called Charles Wekesa while another driver Wycliffe Shaka was assigned KAW 950B.
13. During cross-examination, the witness appeared to change and admitted that the Appellant had tractor KAT 414Y and that it was in service though he did not have the details as he had not carried to Court the logs for the tractor.
14. Under section 9 of the Employment Act, 2007, it is the duty of the employer to prepare a written contract and cause the employee to sign it.
15. The Respondent herein did not produce a contract but sought to rely on secondary employment records to prove a contractual relationship. He produced a gate-pass and a sick-sheet on the letterhead of the Appellant.
16. He also gave the name of his supervisor. The supervisor was not called to testify. The reason for the failure was also not disclosed.
17. It is also noteworthy that the Appellant did not call any witness who had custody of employment records.
18. In light of the secondary records produced before the trial Court and by virtue of section 10(7) of the Employment Act, 2007, this Court is satisfied that the Respondent proved to the requisite standard that he was an employee of the Appellant.

Injury on 6 October 2013

19. The Appellant contended that the Respondent was not on duty on the day he said he was involved in an accident and certain records were produced (weigh records) which did not capture the Respondent as having been present at work on the material day.
20. Ordinarily, employees do not keep records such as attendance records. It would therefore be the word of the employee as against the employer to prove if the employee was on duty.

21. The Appellant failed to produce the logs for the tractor the Respondent testified he was assigned to on the material day. No sufficient explanation was given. The supervisor and another loader the Respondent disclosed were on duty were not called (he testified the supervisor issued him with the sick-sheet). There was no explanation for the failure to call them as witnesses.

22. The Respondent produced a sick-sheet on the letterhead of the Appellant. It had an entry of an accident in the workplace on 6 October 2013 at 11.00 am.

23. The Court is satisfied that the Respondent proved on a balance of probability that he was at work on the material day and that he was involved in an accident while on duty.

Liability

24. Challenging the trial Court's finding on liability, the Appellant contended that the Respondent had not established a causal link between its negligence and the injuries sustained.

25. According to the Appellant, the Respondent did not adduce any evidence to demonstrate it was responsible or the proof of causation. It further submitted that the Respondent had not proved any of particulars of negligence pleaded.

26. The Respondent had in his witness statement attributed negligence to the Appellant on the ground that the wire rope he was using while applying pressure to the cane during the tying process snapped, broke and hit him on the chest.

27. However, the Respondent did not disclose what it was that the Appellant failed to do in terms of providing a safe system and work environment.

28. The trial Court in finding on liability alluded to the fact that the Appellant did not lead any evidence as to why the Plaintiff is to blame and or how he contributed to the said injury as pleaded and that the wire rope was the only available means to fasten the said canes he had no other choice.....

29. It appears that the trial Court shifted the burden to the Appellant. It was for the Respondent to discharge the legal burden before the evidentiary burden shifted.

30. The trial Court, therefore, fell into error.

31. In the view of the Court, the facts which were placed before the Court merited the parties herein moving under the Work Injury Benefits Act, where negligence is not a decisive or primary concern in the assessment of compensation.

Conclusion and Orders

32. The Court has concluded that the trial Court shifted the burden to the Appellant. The shifting was premature.

33. The order which commends itself to this Court is to partially allow the Appeal and set aside the findings on liability with the consequence that the award of general and special damages are vacated.

34. Each party to bear own costs of the trial and the Appeal.

Delivered through Microsoft teams, dated and signed in Kisumu on this 20th day of January 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Appellant Olendo, Orare & Samba LLP, Advocates

For Respondent Z.K. Yego Law Offices

Court Assistant Chrispo Aura