



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

APPEAL NO. 25 OF 2019

(Originally Kakamega High Court Civil Appeal No. 45 of 2018)

WEST KENYA SUGAR CO LTDAPPELLANT

V

BENARD NYABELA MEYI.....RESPONDENT

**(An Appeal from the Judgment and decree of Hon. E. W. Muleka, Senior Resident Magistrate, Butali Law Courts in Butali SRMCC
CC No. 53 of 2014 delivered on the 5th March 2018)**

JUDGMENT

1. Benard Nyabela Meyi (Respondent) sued West Kenya Sugar Co Ltd (the Appellant) before the Magistrates Court alleging breach of duty of care and breach of contract leading to an accident and injuries in the workplace.
2. After a hearing, the trial Court delivered judgment on 5 March 2018 in which it found the Appellant liable to the extent of 70%.
3. The Respondent was awarded general damages of Kshs 86,000/- (after factoring contributory negligence on the part of the Respondent).
4. The Appellant was dissatisfied and on 5 April 2018 it filed a Memorandum of Appeal before the High Court, Kakamega contending that
 1. The Learned trial Magistrate erred in fact and law in treating the evidence and submissions before him superficially and consequently coming to a wrong conclusion on the same.
 2. The Learned trial Magistrate erred in fact and law in ignoring the principles applicable in awarding quantum of damages and the relevant authorities on quantum cited in the written submissions presented and filed by the Appellant.
 3. The Learned trial Magistrate erred in fact and law in finding that the Respondent had proved his case on a balance of probability.
 4. The Learned trial Magistrate erred in fact and law in failing to dismiss the Respondent's suit with costs to the Appellant.
 5. The Learned trial Magistrate erred in fact and law in ignoring the pleadings and submissions for the defence.
 6. The Learned trial Magistrate erred in fact and law in failing 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.
 7. Without prejudice to the foregoing, the award of damages in the circumstances was excessive.
5. On 25 October 2019, the High Court, citing lack of jurisdiction transferred the Appeal to this Court for hearing and determination.
6. When the parties appeared before this Court for directions on 4 November 2020, the parties were directed to file and exchange submissions.
7. The Appellant filed its submissions on 27 November 2020 while the Respondent filed his submissions on 15 December 2020.

8. The Court has considered the record and the submissions.

Role of this Court on the first Appeal

9. The role of a first appellate Court was discussed in *Kamau v Mungai* (2006) 1 KLR 150 where it was held that this being a first appeal, it was the duty of the Court... To re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard the witnesses and hence making due allowance for that.

Proof on a balance of probability

Employment relationship

10. The Respondent testified that he had a contract with the Appellant as a casual labourer and he named one Ainea Lukuyi as having been his supervisor.

11. To support the contention that he was in a contractual relationship with the Appellant, the Respondent produced a copy of a Temporary Daily-Rated Employment (exhibit 2b). The document indicated that the contract would run from 1 July 2011 to 2 October 2011.

12. The Appellant's first witness, a supervisor disowned the contract produced by the Respondent as being fake. In his testimony, the witness stated that the Human Resource Manager was one Michael Michumo and not Mutemi, who had signed the Respondent's contract.

13. The witness also testified that in 2011, the Appellant had computerised its attendance systems (biometric).

14. He further testified that the Respondent was in employment from 2005 to 2006 and not in 2011 when the alleged accident happened.

15. The evidence tendered before the trial Court on whether there existed an employment relationship between the parties when the alleged accident occurred on 8 September 2011 was inconsistent.

16. The Employment Act, 2007 contemplates both oral and written contracts of employment. It is the responsibility of an employer to keep and maintain employment records.

17. The records are not limited to contracts but include pay records and attendance registers.

18. It would have been easier for the Appellant to produce the attendance registers (biometric) and pay records for September 2011 to discredit the Respondent's evidence that he was in a contractual relationship with it in 2011 instead of asserting that the documents produced were fake.

19. The Human Resource Manager who was said to have been in office at the material time was listed as a witness but he was not called. There was no explanation of why he was not called. The person named by the Respondent as having been his supervisor was also not called to testify.

20. In consideration of the foregoing and the provision of section 10(7) of the Employment Act, 2007, the Court finds that the Respondent had proved on a balance of probability that he was an employee of the Appellant at the material time.

Was there an accident on 8 September 2011?

21. In support of the plea that he was involved in an accident on the material day in the workplace, the Respondent narrated that while carrying some metal to the store with a colleague, the colleague slipped and fell and the metal hit him on the leg.

22. The Respondent indicated that he went to a clinic the next day where he got treatment. A copy of hospital booklet from the clinic was produced to demonstrate that the Respondent received treatment on 9 September 2011.

23. The Respondent called an employee of the clinic as his first witness. The witness confirmed that the Respondent had attended the clinic on 9 September 2011.

24. But under cross-examination, the witness confirmed that the outpatient number reflected in the Respondent's medical booklet did not correspond with the details in the extract of the outpatient register. The name of the entry did not match with that of the Respondent.

25. The Respondent did not disclose the name of the colleague with whom they were ferrying metals to the stores.

26. The said colleague was not called to corroborate the Respondent's testimony.

27. In the view of this Court, such corroboration was necessary considering the inconsistencies in the medical records produced.

28. In light of the inconsistencies in the medical records and failure to call any other corroborative evidence, the Court finds that the Respondent did not discharge the burden of proving that he was involved in an accident in the workplace on 8 September 2011.

29. The trial Court, therefore, fell into error of both fact and law in relying on the medical records to find that the Respondent was involved in an accident in the workplace on the material day.

Liability

30. The Court has concluded that the Respondent did not prove to the required standard that he was involved in an accident in the workplace on 8 September 2011.

31. With such a finding, the question of liability falls by the wayside.

Conclusion and Orders

32. From the foregoing, the Court finds that the trial Court was in error in finding the Appellant liable for an accident which was not proved to have happened.

33. The Court allows the Appeal and substitutes the judgment delivered on 5 March 2018 with an order dismissing the Plaintiff which was filed on 7 March 2014.

34. Each party to bear their own costs.

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

Radido Stephen, MCI Arb

Judge

Appearances

For Appellant Ogejo, Olendo & Co. Advocates

For Respondent Nyamwega Osoro & Co. Advocates

Court Assistant Chrispo Aura