



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MACHAKOS
APPEAL NO. 13 OF 2020

(Formally Machakos HCCA No. 166 of 2017)

Before Hon. Lady Justice Maureen Onyango

GEORGE KYALO KILUNDA.....APPELLANT

VERSUS

DONJAWES LIMITED.....RESPONDENT

(Being an appeal from the judgement of Hon. Y. A. Shikanda, Senior Resident Magistrate in Machakos CMCC No. 259 of 2014 delivered on 30th November 2017)

JUDGMENT

Introduction

1. The instant appeal is against the decision of Hon. Y. A. Shikanda, Senior Resident Magistrate delivered on 30th November 2017. It was initially filed at the High Court at Machakos and subsequently transferred to this Court for judgment. The Appellant filed his record of appeal of 21st November 2019. Pursuant to the court's directions parties dispensed with the appeal by way of written submissions.

2. In his Memorandum of Appeal dated 14th November 2017, the Appellant challenges the impugned judgment on the following grounds:

- i. The Learned Magistrate erred in law and in fact by deciding the case without considering all the evidence on record.
- ii. The Learned Magistrate erred in law and fact by holding that the doctor had copied information from a previous report regarding injuries suffered by the Appellant.
- iii. The Learned Magistrate erred in law and in fact by holding that medical evidence adduced by the Appellant amounted to mere hearsay.
- iv. The Learned Magistrate erred in law and fact by challenging the medical evidence before the court without any evidence to the contrary.
- v. The Learned Magistrate erred in law by dismissing the suit without determining the real issues in dispute.
- vi. The Learned Magistrate erred in law and fact in failing to consider the plaintiff's submissions and authorities in making a finding on quantum.

3. Consequently, the Appellant prays that the judgment of the lower court delivered on 30th November 2017 be set aside and assessment be done based on evidence before the court and the prevailing range of comparable awards.

Brief Facts of the Case

4. This appeal stems from a personal injury claim by the Appellant wherein he sued the Respondent for injuries he sustained in the course of his employment on 30th January 2014. The Appellant's case was that he was pushing some metals into a machine when one suddenly pressed

his left hand causing him to sustain a fracture on his index finger. In his plaint his injuries were listed as a fracture of his left index finger at the 1st metacarpal bone.

5. The Respondent entered appearance, filed a defence consisting of general denials and did not participate in the case thereafter. The hearing proceeded undefended. After considering evidence and submissions presented by the Appellant, the trial court held that the Appellant had failed to prove his case against the Respondent on a balance of probabilities and dismissed the suit with costs to the Respondent.

6. The appeal was canvassed by way of written submissions. Only the Appellant's submissions filed on 3rd March 2020 are on record.

Appellant's Submissions

7. The Appellant submits that he instituted his case before the trial court vide a plaint dated 19th March 2014 seeking general and special damages for injuries he sustained in an industrial accident which occurred on 30th January 2014 at the Respondent's premises. The matter proceeded for trial and based on the evidence on record, the trial court entered judgment on liability at 100% against the Respondent. However, on quantum, the Magistrate found that the Appellant had failed to prove his case against the Respondent and dismissed the suit.

8. The Appellant summarised the issues for determination into one question being whether the Trial Magistrate erred in law and in fact when he ruled that the medical evidence adduced by the Appellant amounted to hearsay. He submitted that during trial, he adopted his witness statement which stipulated that he sustained a fracture on the index finger of his left hand while pushing metals into a machine. The Appellant produced a treatment card from Athi River Medical Services, a medical report by Dr. Ndeti dated 31st August 2016 and a demand letter.

9. After trial, the court dismissed the Appellant's claim for the reason that he failed to produce initial treatment notes. Further, the court stated that the medical report he produced as an exhibit and prepared by Dr. Ndeti was mere hearsay as he relied on a medical report by Dr. P. M Kariuki which was not produced in court. The Appellant argued that the trial court erred as Dr. Ndeti took his history and relied on his previous medical report by Dr. P.M. Kariuki which report formed part of his evidence as listed in his bundle of documents. Moreover, the trial court failed to consider that Dr. P.M Kariuki was deceased, which information was relayed to court on 21st July 2016 and is captured in the court's proceedings.

10. It is the Appellant's case that evidence need not be in the form of documents only but may also take the form of oral or object evidence. He cites the case of *Carolyn Indasi Mwonyonyo v Kenya Bus Service Ltd (2012)*

eKLR in which the Court held as follows:

"The Black Law Dictionary defines the term evidence as:

Any species of proof, or productive matter, legally presented at the trial of an issue by the act of the parties and through the medium of witnesses, records, documents, exhibits, concrete object etc for the purpose of inducing belief in the minds of the court or jury as to their contention

.....

It is clear from the above definition that evidence can be by way of oral, documents or objects. I do find that the trial court erroneously dismissed the Appellant's suit for no apparent reasons. The trial court's suspicions on the injuries sustained by the Appellant blinded its objectivity and corrupted its mind.....

The oral evidence was sufficient to find in favour of the Appellant. There is no written rule that injuries suffered by a victim of a road traffic accident must be formed by documentary evidence by way of treatment notes"

11. In light of the foregoing, the Appellant opines that he proved his case on a balance of probabilities by way of oral evidence of the injuries he sustained as well as the medical report produced hence the trial court's judgment ought to be set aside.

Analysis and Determination

12. This being a first appeal, it behoves this Court to consider the case in its entirety on matters of both fact and law; notwithstanding that the court does not have a similar opportunity to the court of first instance to engage in intricacies such as the demeanour and delivery of the witnesses. The court is guided by principles set in the case of *Selle & Another v. Associated Motor Boat Co. Ltd & Others [1968] EA 123* in which it was held that:

"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 appear earlier that he has clearly failed on some part 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."

13. From a consideration of the parties' pleadings, submissions, the court record and the applicable law, the issues arising for determination are as follows:

- i. Whether the Appellant established an employment relationship between himself and the Respondent.
- ii. Whether the trial court erred in holding that the medical report produced by the Appellant amounted to hearsay evidence leading to dismissal of the claim
- iii. Whether the Appellant is entitled to orders sought

14. Regarding the first issue, it is trite law that he who alleges must prove. This claim proceeded undefended. However, the Appellant still bore the burden of proof which he ought to have discharged in order to succeed in his claim. It is imperative to first establish an employment relationship before an employer's liability for a workplace injury can be inferred. From the court record, it is clear that the Appellant did not adduce evidence of the same. He did not produce any documentation, such as a job card, payslip or other evidence of payment; or any evidence in corroboration of his claim. To this end, I do not agree with the trial court's finding that the Appellant was an employee of the Respondent and on duty at the material day and time; and that the Respondent was liable for his injury.

15. Secondly, the court is inclined to agree with the Trial Magistrate that the matter of medical documents was rather convoluted. The court record shows that a Mrs Mukiri addressed the court thus on 21st July 2016:

“I am not ready to proceed. The reason is that I wish to substitute the medical report within 7 days. The doctor who filed the initial medical report has since passed away. We wish to file a second medical report”

16. From the above pronouncement it is evident that the Appellant's Counsel intended that the initial report be abandoned or expunged from the court record and with good reason. To my mind, the second medical report ought to have been an independent assessment of the Appellant's injuries to establish a nexus between the same and the alleged industrial accident and to assist the court in making an accurate assessment on quantum. Moreover, in the circumstances it would have eased the conundrum of the age-old evidentiary rule, being production of a document by its maker. By the Appellant's own admission, Dr. Ndeti relied on the former report which fact backs up the trial court's finding on hearsay. A “maim” injury is an impairment. Dr. Ndeti termed the Appellant's injury as such but concluded that he was fully recovered. He did not assign any percentage of temporary or permanent incapacity. Moreover, the treatment notes presented by the Appellant are from Athi River Medical Services yet in his testimony he states that he was treated at Mutonguni Hospital, Athi River. These contradictions cannot be overlooked.

17. This court observes that this case was handled in a casual and rather lackadaisical manner; probably because it was undefended. Caution and more attention should have been exercised as the burden of proof to be discharged by the Appellant remained the same if not a little higher for his claim to succeed in the absence of the Respondent's evidence in rebuttal. The trial court stated that the plaintiff filed submissions which were a little “mixed up”. Indeed, the Appellant therein is referred to as “deceased” on two occasions which could be attributed to poor draftsmanship. However, in as much as mistakes of counsel should not be visited upon a litigant and that justice should be administered without undue regard to technicalities; the aforesaid matters of evidence are weighty and go to the root of the matter.

Conclusion

18. From the totality of evidence, pleadings and legal arguments advanced by the Appellant, I find that this appeal lacks merit and is accordingly dismissed with costs.

19. I order accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 8TH DAY OF OCTOBER 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE