REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MACHAKOS

APPEAL NO. 15 OF 2020

(Formally Machakos HCCA No. 181 of 2015)

Before Hon. Lady Justice Maureen Onyango

KENYA BUILDERS AND CONCRETE COMPANY LIMITED.....APPELLANT

VERSUS

AARON KIMEU KIOKO.....RESPONDENT

(*Being an appeal from the judgement of Hon. M. K. Mwangi, Principal Magistrate*

delivered on 30th October, 2015 in the Chief Magistrate's Court at Machakos in

CMCC No. 272 of 2013 – Aaron Kimeu Kioko v Kenya Builders and

***Concrete Company Limited*)**

JUDGMENT

Introduction

1. The instant appeal is against the decision of Hon. M. K. Mwangi, Senior Principal Magistrate. It was initially filed at the High Court at Machakos and subsequently transferred to this Court for judgment following a determination that the Court has no jurisdiction as the appeal raises out of an employment relationship. The Appellant filed its record of appeal of 15th May 2018. Pursuant to the court's directions parties dispensed with the appeal by way of written submissions.

2. In its Memorandum of Appeal dated 19th November 2015, the Appellant challenges the impugned judgment on the following grounds:

i. The Learned Magistrate erred in finding that the Respondent had proved his case on a balance of probability and in apportioning liability in favour of the Respondent at 85:15

ii. The Learned Magistrate erred in law in arriving at a decision that was wholly against the weight of the evidence produced

iii. The Learned Magistrate failed to consider the evidence of the Appellant which demonstrated that the Respondent was not injured as alleged in his pleadings

iv. The Learned Magistrate erred in law in awarding the Plaintiff the sum of Kshs.300,000 as general damages and Kshs.3,000 as special damages less

15% apportionment

v. The Learned Magistrate misdirected himself on the evidence presented before him thereby reaching an erroneous decision wholly against the weight of the evidence before him.

3. Consequently, the Appellant seeks the following orders:

i. The appeal be allowed

ii. The judgment and order of the Chief Magistrate's Court against the Appellant delivered on 30th October 2015 be set aside

iii. The aforesaid judgment be substituted with an order dismissing the plaintiff's case

iv. The Appellant be awarded the costs of the original case and this appeal plus interest at court rates

Brief Facts of the Case

4. This appeal stems from a personal injury claim by the Respondent wherein he sued the Appellant for injuries he sustained in the course of his employment with the Appellant on 17th September 2011. The Respondent was instructed to push a roller machine on wet ground causing him to slide and the machine hit his chest. In his plaint his injuries were listed as bruises and a fracture of the sternum which injuries were confirmed by PW2, Dr. G. K. Mwaura who examined the Respondent.

5. After considering evidence presented by both parties, the trial court found the Appellant 85% liable for failing to provide a safe system of work and the requisite work implements to the detriment of the Respondent and awarded the Respondent damages of Kshs.300,000.

Appellant's Submissions

6. The Appellant narrates that the facts before the lower court as presented were that the Respondent was an employee at the Appellant's construction site in Nanyuki. On 17th September 2011, the Respondent alleges that he was injured at the Appellant's work site in Nanyuki. However he only went to hospital after one month and 10 days at Athi River and was granted 21 days' sick off. During cross-examination, it was discovered that he had another case namely Civil Suit No. 311 of 2013 pending before Mavoko Law Courts. The injury therein occurred during the *"sick leave"* period prescribed by the doctor at Athi River Community Hospital.

7. The Appellant's witness, DW1 testified that in the event of an accident at the Appellant's premises, there was an established procedure for treatment. The same is reported to the foreman then to the first aider if the injury is minor and if it is major, the employee is sent to Nanyuki Cottage Hospital for treatment. Therefore, in addition to not following set procedure, the Respondent's act of going to a hospital in Athi River more than 20 miles from Nanyuki about one and a half months later led the Appellant to conclude that his claim was fraudulent. The Appellant contended that its evidence was overwhelming hence the trial court should have found in its favour and dismissed the Respondent's case which action it now prays for from this court.

Respondent's Submissions

8. After briefly rehashing the facts of his claim the Respondent submitted on liability and quantum. With regard to liability, he reiterated his testimony before the trial court. That he was lawfully operating a roller machine when he slid and sustained injuries to his chest from being hit by the roller. It was DW1's case that he was not injured as his name did not appear in the injury register. However, DW1 failed to produce the said register in court which register was in their possession. The same could have aided the court in proving whether or not the Respondent was injured.

9. On the contention raised by the Appellant on the Respondent having sought treatment in Nanyuki yet the case was filed in Mavoko the Respondent replied that the Appellant admitted jurisdiction and did not raise a preliminary objection challenging it. He asserted that he had proved his case on a balance of probabilities by discharging the burden of proof required of him as stipulated in the case of ***Nandwa v Kenya Kazi Limited (1988) KLR 488*** where the court held as follows:

> *"In an action for negligence, the burden is always on the Plaintiff to prove that the accident was caused by the negligence of the Defendant. However, if in the course of trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the Plaintiff's favour unless the Defendant provides some answer to displace the inference"*

10. The Respondent urged this court to dismiss the appeal on the issue of liability. He cited the case of ***Peters v Sunday Post Limited (1958) EA 424*** in which the Court of Appeal observed thus:

> *"It is a strong thing for the appellate court to defer from the finding of a question of fact, of a judge who tried the case and who had the advantage of seeing witnesses. An appellate court has indeed the jurisdiction to review the evidence to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction that should be exercised with caution; it is not enough that the appellate court itself might come to a different conclusion."*

11. In relation to quantum it is the Respondent's position that his injuries being bruises on the anterior and left aspects of the case and a fracture of the sternum were confirmed by the testimony of a medical practitioner, Dr. G. K Mwaura who testified as PW2 and produced a medical report to that effect. He described the Respondent's injuries as severe skeletal injuries that caused him grievous bodily harm. Due to this severity, the trial court justifiably awarded the Respondent damages of Kshs.300,000 which award is similar to that set by the court in ***Justine Byahuwa Alima v Kenya Bus Services HCCA No. 3465 of 1982*** for similar injuries. The Respondent concluded that the appeal lacks merit in its entirety and should be dismissed with costs.

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 finding of the Learned Magistrate was at variance with the evidence;

ii. Whether the Learned Magistrate erred in law and in fact for finding the Appellant 85% liable for the Respondent's injury.

iii. Whether the Trial Court erred in awarding damages that were not commensurate to injuries sustained

iv. Whether the Appellant is entitled to orders sought

14. It is the Appellant's submissions that the evidence before the Court was that on the alleged date of injury the Respondent was on sick leave arising from an earlier injury, that the suit in respect of the first injury was at the time of hearing of the instant suit pending before the Chief Magistrates Court at Mavoko under CMCC No. 311 of 2013.

15. Although the issue of the case pending in Mavoko CMCC No. 311 of 2013 was never pleaded, during cross examination the Respondent admitted that he was injured twice in August and in September. He further admitted that he had field another case in respect of the other injury in Athi River.

16. From the material on record, it is evident that the Respondent alleges to have been injured twice; first on 31st August 2011. He was treated at Athi River Community Hospital on 2nd September 2011 and given two weeks sick off. According to the treatment records, the Respondent sustained an injury on the left elbow joint after being hit by a compressor (roller) machine at his place of work which slipped. He was registered Under IP. No. 818/2011. The discharge summary was issued by F. M. Juma

17. The second injury which is the subject of the instant appeal is alleged to have occurred on 17th September 2011 at the Respondent's work place in Nanyuki. The Respondent was again allegedly treated at Athi River Community Hospital on 27th October 2021 under I.P No. 653/2011. The discharge summary form is signed by DR. JUMA E. M. The Respondent was granted two weeks sick off.

18. According to the discharge summary form, the Respondent was hit by a roller machine while working as a road construction worker and suffered hairline fracture at the inferior aspect of the sternum. He was treated and given strict bed rest for one month.

19. In his testimony in Court, the Respondent stated that he was at work opening a boiler milking area when the Site Manager directed him to press a wire road (sic) before the meter could dry off. That as he opened the machine, it slid on the wet surface and (the) steaming gear turned and hit him on the chest.

20. In the witness statement, the Respondent states that he was operating a roller machine when it slid and hit him on the chest.

21. There are several issues that do not add up. If the Respondent was treated at the same Hospital on 2nd September and again on 27th October 2011, why does he have two different Hospital numbers that is 818/2011 for 2nd September injury and 653/2011 for 27th October injury?

22. Why does the injury on 2nd September have No. 818/2011 and a later injury of 27th October 2011 have No. 653/2011? Why are these inpatient numbers when the Claimant was never admitted? And why a discharge summary when there was no admission?

23. The two discharge summary forms also look markedly different. The one dated 2nd September 2011 has the name of the Hospital, the address, title *"Discharge Summary"* and the following particulars Name, Age, IP No., Date of Admission, Date of Discharge, Attending Doctor, Diagnosis, Clinical Summary, Investigation Done, Management, Discharge/Referral prescription, Clinical Appointment Date, Doctor's Signature and Date.

24. In the report dated 27th October 2011, the letter head has the name of the Hospital, the address and telephone numbers, name of patients, IPM, date of admission, age of patients, bed no., date of discharge, date of next visit, summary, doctor's names, signature and date.

25. The first discharge summary dated 2nd September 2011 has the name Dr. Juma with no signature while the second dated 27th October 2011 has the name of Dr. Juma E. M with a signature. Why did he file two separate suits, one in Mavoko and the other in Machakos against the same employer for injuries sustained allegedly 17 days apart?

26. I have further noted that the medical report does not make any reference to a review of the treatment notes and x-rays. There is no mention of the other injury in the medical report dated 15th February 2013 yet at the time of review the Claimant had the medical report from the other Doctor dated 12th March 2012. How did either Doctor miss the other injury?

27. All these are facts that in my view raise doubt as to whether the Respondent suffered any injury on both or either 31st August 2011 and 17th September 2011.

28. In the judgment, there is no mention of the earlier injury or the other suit filed by the Respondent. It is my view that this is crucial evidence that had the Learned Magistrate addressed in the judgment, would have raised sufficient doubt as to the authenticity of the averments of injury by the Respondent.

29. It is for these reasons that I agree with the Counsel for the Appellant that the Learned Magistrate erred in law in arriving at a decision against the weight of the evidence produced and that the Respondent failed to prove his case on a balance of probabilities.

Conclusion

30. From the totality of evidence, pleadings and legal arguments advanced by the parties, I find that the appeal has merit. I accordingly make orders as follows–

(i) The appeal is allowed.

(ii) The judgment and order of the Chief Magistrate's Court against the Appellant delivered on 30th October 2015 be and is hereby set aside

(iii) The aforesaid judgment be and is hereby substituted with an order dismissing the plaintiff's case.

31. There shall be no orders as to costs.

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