REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MACHAKOS

APPEAL NO. 4 OF 2020

(Formally Machakos HCCA No. 244 of 2013)

Before Hon. Lady Justice Maureen Onyango

SBI INTERNATIONAL (K) LIMITED.....APPELLANT

VERSUS

FREDRICK MATHEKA KASILU.....RESPONDENT

(Being an appeal from the judgement of Hon. L. Simiyu, Senior Resident Magistrate

in Machakos CMCC No. 823 of 2012 delivered on 28th November 2017) –

***Fredrick Matheka Kasilu v SBI International (K) Limited*)**

JUDGMENT

Introduction

1. The instant appeal is against the judgment of Hon. L. Simiyu, Senior Resident Magistrate at Machakos delivered on 28th November 2013. It was initially filed at the High Court at Machakos and subsequently transferred to this Court for determination. The Appellant filed its record of appeal on 13th December 2017. Pursuant to the Court's directions parties dispensed with the appeal by way of written submissions.

2. In its Memorandum of Appeal dated 8th December 2013, the Appellant challenges the impugned judgment on the following grounds:

   i. The Learned Magistrate's decision in finding the Appellant 100% liable and awarding damages to the Respondent was contrary to the law and against the weight of evidence led.

   ii. The Learned Magistrate erred in law in finding and determining that an accident occurred when in fact no evidence was produced to that effect.

   iii. The Learned Magistrate erred in law and fact in shifting the burden of proof to the Appellant when the Respondent had not proved the necessary facts to the required standard.

   iv. The Learned Magistrate erred in law and in fact in failing to consider and rule on the evidence of the defendant to the effect that the plaintiff's claim as a workman was misconceived.

   v. The Kshs.80,000 awarded to the Respondent as general damages by the Learned Magistrate was manifestly excessive in the circumstances of the case to make an erroneous estimate of the damages to which the Respondent is entitled.

   vi. The Learned Magistrate erred in law in issuing an unreasoned judgment.

3. Consequently, the Appellant seeks the following orders:

   i. The appeal be allowed

ii. The judgment on liability, damages and the resultant decree be vacated and replaced with an order that the Respondent's suit is dismissed for failure of proof

iii. Costs of the appeal be borne by the Respondent

Brief Facts of the Case

4. This appeal stems from a personal injury claim by the Respondent for which he sued the Appellant for negligence and failure to provide a safe system of work, hence causing him to sustain injuries while in the course of his employment with the Appellant on 6th August 2011. The Respondent's case was that he was instructed to load stones onto a lorry which function was ordinarily performed by a crane. A stone fell from the said lorry and injured him due to the lorry's faulty door. The Respondent also faulted the Appellant for failing to provide protective gear such as boots, a helmet and overall that would have prevented or significantly lessened his injuries.

5. After considering evidence presented by both parties, the Trial Court found the Appellant 100% liable and awarded the Respondent damages of Kshs.80,000.

Appellant's Submissions

6. The Appellant contends that the Trial Court erred in law and in fact in reaching the conclusion that it was 100% liable to the Respondent yet the Respondent did not prove his case on a balance of probabilities as required by law. It is submitted that he who alleges the existence of a fact must prove as per section 107 of the Evidence Act as reiterated in the case ***Nderitu v Ropkoi & Another (2004) eKLR.***

7. It is the Appellant's case that there was no evidence to support the finding of the Trial Court that the Appellant was 100% liable for his alleged accident. To this end the Appellant urged the Court in its appellate capacity to re-consider evidence, evaluate and draw its own conclusions afresh as was stated in the celebrated case of ***Selle v Associated Motor Boat Company Limited (1968) EA 123.*** The Appellant continues that the Respondent testified in cross-examination that he was employed by SBI (K) Ltd having been picked together with others by a supervisor known as Kasembe who took them to the site. He was not issued with a work identity card nor payslips. The Respondent did not call any of his colleagues as witnesses to corroborate his assertion that he was employed by the Appellant.

8. The Appellant submitted that no evidence was tendered to establish the ownership of the lorry from which the stone fell injuring the Respondent; other than the averment that the name *"SBI International"* was embossed on it. The Appellant opines that the foregoing is not sufficient proof of an employment relationship between itself and the Respondent. That DW1, HOSBON ONSEMBE OMONGA, the Appellant's salary accountant testified that the Respondent worked for a sub-contractor. He relied on a stone – pitching sub-contract between the Appellant and Dapeka Construction Company dated 10th May 2011 whose terms were that it was the subcontractor's obligations to:

i. insure all its equipment and works and provide compensation required to rectify any loss or injury occurring;

ii. at its own expense provide all material and equipment necessary or required for the safe and efficient performance of the works save for the stone and cement which shall be supplied by the contractor

iii. bear sole responsibility over all matters affecting the labour employed on the works

9. The Appellant faults the Trial Court for disregarding the aforementioned sub-contracting agreement particularly on its role to provide for labourers. As a result the Appellant did not have a list of the labourers who were on duty on 6th August 2011. The same was in possession of the sub-contractor.

10. With respect to the injury the Appellant's position is that mere existence of an injury and the fact that the Respondent was given medical attention at Athi River Community Hospital did not mean that the injury occurred at the Appellant's premises. It contended that the trial magistrate erred by not explaining the basis upon which he found that the Respondent had proved his case on a balance of probability. The Appellant averred that its accident handling and reporting mechanism would have been followed if indeed the Respondent was injured on 6th August 2011. Since a report was not made to them and the Respondent did not seek treatment from the Appellant's clinic as per standard procedure then it is apparent that the alleged injury did not occur at the Appellant's premises.

11. It is the Appellant's submission that the Trial Court erred by shifting the burden of proof to itself when the Respondent had not proved the necessary facts to the required standard. The Respondent's assertions that he was employed by the Appellant and injured while in its employ were expressly denied by DW1 in his testimony. The evidential burden then shifted upon the Respondent to prove that he was so employed and on duty on 6th August 2011 in accordance with Sections 107, 108 and 109 of the Evidence Act. The Appellant cited the case of ***Nandi Tea Estates Ltd v Eunice Jackson Were (2006) eKLR*** where Ibrahim J. (as he then was) stated thus:

"I am of the view that the Learned Magistrates erred by not explaining the basis upon which they found the Plaintiff had proved her case on a balance of probability. What evidence led him to decide that the Plaintiff was injured while on duty, I see none. I find that the Learned Magistrate shifted the burden of proof to the defendant. The law is clear on our adversarial system that he who alleges must prove his case. The standard here is on its "balance of probability." On the question of having been on duty and that she was injured at her place of work, there was no iota of evidence to fit the balance of probability in the Plaintiff's favour"

12. To this end, the Appellant submits that the Court erred in shifting the burden of proof to the Appellant by finding that the employer has an upper hand in terms of providing the evidence of employment and that it is common practice that the employer keeps all records of their employees whether casual or permanent. The Appellant maintains that it was the duty of the subcontractor to hire casual workers or labourers

and that they had no records in their possession such as payroll or the master roll of all workers. Further, the Respondent's claim as a workman was misconceived and improperly founded since he failed to adduce evidence demonstrating employment. The duty of care owed by an employer flows from the existence of the employment relationship as was held in the cases of ***Boniface Muthama Karitu v Carton Manufacturers Limited Civil Appeal No. 670 of 2003*** and ***Otieno Nolwonyo v Mumias Sugar Company Limited (2014) eKLR.***

13. On the question of quantum of damages it was submitted that the Trial Court ought to have assigned a percentage of liability to the Respondent on contribution considering that the work he was performing was manual labour for which no exceptional skill was required in accordance with the finding in ***Mumias Sugar Company v Samson Murinda Kakamega HCCA No. 58 of 2020 (unreported)***. The Appellant proposed an award of Kshs.50,000 at 50% contribution.

Respondent's Submissions

14. The Respondent in its submissions condensed issues for determination into two; namely whether the Magistrate erred in law in finding that the Respondent was an employee of the Appellant, and whether the Trial Court erred in law in finding that the Respondent was injured while in the course of employment with the Appellant.

15. It was submitted that the Respondent testified that he was a casual employee of the Appellant allocated duties of carrying stones within the Appellant's site when he was injured. He explained that he was not issued with a work identity card hence he could not produce one. Moreover, the subcontractor agreement alluded to by the Appellant was not produced in evidence during trial as reflected in the Trial Court's proceedings.

16. The Respondent associated himself with the finding by the trial magistrate that the subcontractor was not named or enjoined to the suit. The Appellant's statement of defence only consisted of mere denials and the Appellant did not produce any evidence demonstrating that the plaintiff's name was not in the payroll or master roll which documents are usually exclusively in the Appellant's custody and control. That the said documents should have been presented to Court for perusal. The Respondent cited the Court of Appeal case of ***C. P. C Industrial Products (K) Limited v Samuel Kirwa Kosgei [2005] eKLR*** in support.

17. In relation to quantum it is the Respondent's case that no concrete grounds have been advanced to support the Appellant's assertion that the Kshs.80,000 award was excessive. That this ground of appeal should therefore fail. The Respondent concluded that the appeal lacks merit and should be dismissed with costs.

Analysis and Determination

18. 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 v Assorted Motor Boat Company (supra)*** guiding Appellate Courts such as this one in the determination of such appeals. In the said case 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 if it appears either that he has 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 demeanor of a witness is inconsistent with the evidence in the case generally."*

19. 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 employment relationship was correctly inferred between the parties;

ii. Whether the Learned Magistrate erred in law and in fact for finding the Appellant wholly 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.

20. Regarding the first issue, I agree with the Appellant that it is trite law that he who alleges must prove. From the Court record, the Respondent testified that he was employed by the Appellant as a casual labourer. He was not issued with an identity card and was paid in cash in intervals of 2 weeks to 1 month. He attributes his accident to instructions from his supervisor to speed up the work of arranging stones. The Respondent also stated that he was not issued with protective gear such as a helmet, boots and overalls. He was injured on the thumb, toe, head and chest. PW2, a registered medical practitioner confirmed the Appellant's injuries and produced a medical report marked as P.Ex 3 to that effect. The Defence witness on the other hand (DW 1) stated that he is an accountant dealing with the payroll of employees. He claimed that the Respondent worked for a subcontractor. However, he stated that the documents proving the same were not *"filed in good time*". The Respondent's claim that the aforementioned contract was not produced in evidence holds true. In accordance with the rules of evidence, it cannot be introduced at the appellate stage.

21. The Appellant vehemently avers that it was not the right party to bear liability in this case. The subcontractor by the name of Dapeka Construction Company was supposed to handle all labour matters with respect to the casuals. However, from the Appellant's conduct in having sufficient notice of the case, defending it and not taking up judicial recourse available to it to absolve itself of liability; the Court is baffled as to how exactly the Appellant expects liability to be assigned another party which was not enjoined in these proceedings. No

mention is made of the existence of a third party in the defence. A casual worker is not expected to know the inner workings of business entities such as the relationship between SBI International and Dapeka. From the record it is evident that the Appellant did not bother to file an application challenging its wrongful joinder nor did it attempt to enjoin Dapeka with whom it had a working relationship in the proceedings as a co-defendant or third party for liability to be attributed fully or apportioned to it. This fact was correctly cited by the Trial Court. Sections 108, 109 and 112 of the Evidence Act provide as follows:

> **108. Incidence of burden**
>
> **The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were**
>
> **given on either side.**
>
> **109. Proof of particular fact**
>
> **The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.**
>
> **112. Proof of special knowledge in civil proceedings**
>
> **In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.**

22. In accordance with the above provisions, the Appellant was the party that stood to suffer loss by bearing liability if the same was not proved. The relationship between itself and Dapeka was a matter of special knowledge privy to the Appellant. Moreover, the Appellant contradicts itself by laying down the procedure to be followed in the event that a worker is injured in its premises. It states that a report is made to the site supervisors, the injury is confirmed in writing by all who witness it; first aid is administered and its accountant, DW1 is personally informed and fills a form with the particulars of the injured person which form is sent to the Appellant's insurer and the local labour ministry office under the workmen's compensation claim for further action. If indeed this entire process was the responsibility of the subcontractor who bears all employee records, why did the Appellant not state so in its defence or enjoin the sub-contractor?

23. The Court is guided by decision in ***C. P. C Industrial Products (K) Limited v Samuel Kirwa Kosgei [2005] eKLR*** whereby the Court faced with a similar set of circumstances observed as follows:

> *"In that event, strictly speaking, Messrs. Copan Agencies Limited were not an independent contractor. The common law position on the liability of a principal for the negligence of an independent contractor as stated in the book by Salmond on Torts 19th Edition, page 544 paragraph 184 does not apply to our present case. The work was neither assigned nor supervised by Copan Agencies Limited. The Appellant was primarily liable in negligence as the one who assigned and supervised the work. The agreement between Copan Agencies Limited and the Appellant that was produced in Court has a number of clauses. Clause 4 (d) states –*
>
> *"4(d) That the CONTRACTOR will be legally responsible for all his workers welfare including salary payments, mandatory insurances, uniforms, protective apparatus, transport, meals etc". Clause 6(e) of the agreement states – "46(e) That the CONTRACTOR will meet the COMPANY safety requirements by making sure that his employees are provided with uniforms and protective apparatus e.g. glasses, helmets, respirators, gloves, etc as provided in the safety contract manual".*
>
> *Nowhere in the agreement is it stated that the contractor will assign work or supervise the employees. The evidence on record is that the work of loading drums was carried out in the premises of the Appellant, assigned by employees of the Appellant and also supervised by an employee of the Appellant. There is no evidence that the Respondent was aware of the terms of the agreement between the Appellant and Copan Agencies Limited. Be that as it may, since the Appellant was assigning and supervising the work he cannot escape from liability. They should not have allowed a worker who did not have protective clothing to engage in the work."*

24. Secondly, on the issue of the Appellant's liability for the Respondent's injury, in light of the foregoing I find that the same was sufficiently proved. The Appellant admittedly failed to abide by its statutory obligation to provide a safe system of work as well as protective gear to the Respondent consequently compromising his safety. To my mind, a helmet, overalls and safety boots would have prevented the fall or substantially alleviated its effect. The Appellant also did not debunk the Respondent's averments that the work he was doing was normally undertaken by a crane. The Appellant's inaction was in contravention of Section 101(1) of the Occupation, Safety and Health Act, 2007 which provides as follows–

> **Every employer shall provide and maintain for the use of employees in any workplace where employees are employed in any process involving exposure to wet or to any injurious or offensive substance, adequate, effective and suitable protective clothing and appliances, including, where necessary, suitable gloves, footwear, goggles and head coverings.**

25. Lastly, the Appellant is of the opinion that damages of Kshs.80,000 was exorbitant for soft tissue injuries. In considering this issue, the Court is guided by the case of **Butt v Khan (1981) KLR 349** which set the following tenets:

> *"An Appellate Court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."*

26. As stated by the Trial Court, the authority cited by the Respondent bore an award of Kshs.400,000 which case was very different from the present case while the Appellant's authorities ranged from Kshs.50,000 – 70,000 for similar injuries. Compared to these an award of Kshs.80,000 cannot be termed as manifestly excessive. In fact, the Trial Court was guided on quantum by the cases cited by the Appellant itself. It is reasonable and within an acceptable range with a slight variation attributed to inflation as correctly stipulated by the Trial Court. I see no reason to interfere with the same.

Conclusion

27. From the totality of evidence, pleadings and legal arguments advanced by the parties, it is safe to conclude that the appeal lacks merit and should be dismissed with costs.

28. It is so ordered.

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