REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MACHAKOS

APPEAL NO. 6 OF 2021

(Formally Machakos HCCA No. 26 of 2018)

Before Hon. Lady Justice Maureen Onyango

APEX STEEL LIMITED.................................... APPELLANT

VERSUS

ONESMUS MUTUKU KOMU........................ RESPONDENT

(*Being an appeal against the judgement and decree of Hon. J. A. Agonda, Senior Resident Magistrate delivered*

***on 16th February 2018 at Mavoko in PMCC No. 50 of 2015 – Onesmus Mutuku Komu v Apex Steel Limited*)**

JUDGMENT

1. Apex Steel Limited, the Appellant herein filed an appeal against the Judgment and Decree of the Senior Resident Magistrate at Mavoko PMCC No. 50 of 2015 delivered on 16th February, 2018. In the Judgment the Learned Trial Magistrate found the Appellant 100% liable and awarded the Respondent general damages in the sum Kshs.100,000/- together with costs and interest thereon at Court rates as against the Appellant.

2. The Appellant being dissatisfied with the Judgment of the Trial Magistrate seeks to set it aside on the following grounds as raised in its Memorandum of Appeal:

> *(i) The Learned Trial Magistrate erred in law and fact by totally ignoring the evidence placed before her which clearly demonstrated that no accident occurred on 18th October, 2013 involving the Respondent and thereby arrived at an erroneous conclusion.*
>
> *(ii) The Learned Magistrate erred in law and fact by totally ignoring the evidence placed before her, including the Appellant's Wage Roll and a Manual Attendance Register, all which clearly demonstrated that the Respondent reported to work at 8:30 am and left work at 2.46 pm without reporting any accident and thereby arrived at an erroneous conclusion.*
>
> *(iii) The Learned Magistrate erred in law and fact by totally ignoring the evidence placed before her, including the Appellant's Accident Register, which clearly demonstrated that the Respondent was never injured on 18th October, 2013 while in the course of employment or at all.*
>
> *(iv) The Learned Magistrate showed extreme prejudice by totally ignoring the testimony of the Appellant's witnesses which clearly demonstrated that the Respondent's claim is fraudulent, thereby arriving at an erroneous conclusion.*
>
> *(v) The Learned Magistrate misapprehended the medical evidence in material respects and thus arrived at an extremely high award of damages.*
>
> *(vi) The Learned Magistrate showed extreme prejudice by totally ignoring the Appellant's Counsel's submissions on the issue of law and evidence and thereby arrived at an erroneous conclusion.*

3. The Appellant seeks the following orders: -

(a) That the Appellant's appeal be allowed.

(b) That the Judgment of the Trial Court be set aside and the Order allowing the Respondent's suit be set aside with an Order dismissing the said suit with costs to the Appellant.

Brief facts of the case

4. The Respondent in his Plaint filed on 20th January, 2015 contended that he was employed by the Appellant. On or about 18th October, 2013, while in the course of his lawful duties, he was involved in an accident and as a result sustained a blunt injury to his chest.

5. The Respondent attributed the occurrence of the accident to negligence, breach of contract and breach of statutory duty on the part of the Appellant.

6. In its defence, the Appellant denied the allegations made in the plaint and in particular that the Respondent was its employee as at the date of the alleged accident or that any accident occurred on 18th October, 2013 involving the Respondent within its premises.

7. The Appellant further argued that if any accident occurred (which it denied) then the same was solely caused by the Respondent's negligence and duly particularized the same.

8. The Trial Magistrate upon considering the evidence on record and submissions by the parties found the Appellant 100% liable for the injuries sustained by the Respondent and awarded him Kshs.100,000/- as general damages. The Claim for special damages of Kshs.4,500/- was however dismissed for want of proof. The Respondent was awarded costs of the suit together with interest at court rates.

9. The parties agreed to dispose of the appeal by way of written submissions and each party filed its respective submissions.

Appellant's Submissions

10. The Appellant submitted that the Trial Court failed to exercise its discretion properly thus giving this court the requisite jurisdiction to disturb the Trial Court's decision. To buttress this argument the Appellant relied on the case of **Mbogo & Another v Shah (1968) EA 93** *where it was held that Courts will not interfere with the exercise of jurisdiction by an inferior court unless it is satisfied that its discretion is clearly wrong.*

11. The Appellant in its submissions has pointed out instances where it believes the Trial Court failed to exercise its discretion judiciously and fairly. It argues that the Trial Court failed to consider the evidence of its witnesses DW1 and DW2 as well as exhibits produced including the accident register on account that the witness producing it was not its author and therefore arrived at a wrong determination.

12. It is further submitted that the Trial Court failed to consider the contents of the attendance register (produced as Defence Exhibit 1) that clearly indicated that the Respondent was on duty as from 8.30 am and left at 14.46 hours, that there was no entry made on the injury column on any injuries and/or accident(s) recorded on that day as the Respondent wrote "*NO*" on the said column a clear indication that the alleged accident did not take place.

13. The Appellant maintained that the Trial Court failed to consider the evidence of DW1, Leonard Musyoki who testified that the Respondent's name did not appear in the Accident Register produced as Defence Exhibit 2 and that all injured employees were referred to Athi River Medical and not Shalom Hospital as contended by the Respondent. Based on the foregoing, the Appellant argued that the Respondent did not sustain any injuries at its premises on the material date.

14. The Appellant maintained that the Trial Court left out entirely the account of its witnesses DW1 and DW2 as well as the Respondent's account during cross examination. It further maintained that no evidence was tendered to support the Respondent's contention that he was injured in the course of his duties with the Appellant.

15. The Appellant contended that the Respondent failed to discharge the burden of proof during the trial of this matter and that as a result the Trial Magistrate erred in law and fact in finding the Appellant 100% liable.

16. The Appellant urged this Court to find that the Respondent was never injured as alleged and urged this Court to find in its favour and allow the appeal as prayed.

Respondent's Submissions

17. The Respondent on the other hand urged this Court to perform its duty of being an appellate court judiciously and as guided by the case of **Abok James Odera t/a A.J Odera and Associates v John Patrick Machira t/a Machira & Co. Advocates (2013) eKLR** as cited in the case of **Dorcas Wangithi Nderi v Samuel Kiburu Mwaura & Another (2015) eKLR** *where it was held that on a first appeal courts should reconsider the evidence, evaluate and draw its own conclusions despite the fact it has never seen or heard the witnesses in the case.*

18. The Respondent further submitted that from the evidence on record and his oral evidence, he was injured while in the lawful course of his assigned duties at the Appellant's premises as a result of the Appellant's failure to provide him with a safe working environment and protective gear.

19. The Respondent argued that the Appellant failed to call 2 key witnesses being the company nurse, to confirm whether or not the

Respondent had been injured while on duty and the safety and health officer, to confirm whether or not he was issued with protective gear to fully support its case.

20. He further argued that in the absence of these two key witnesses the evidence as adduced by the Appellant was treated as hearsay evidence and was therefore not admissible as rightfully pointed out by the Trial Magistrate.

21. The Respondent argued that the decision of the Trial Court is sound and that it is clear from the Judgment that the Trial Magistrate considered the evidence adduced and submissions made by all the parties before arriving at the final determination. It is on this basis that the Respondent maintained that this Court should not interfere with the Judgment delivered on 16th February 2018. For emphasis the Respondent relied on the case of **Naftali Ruthi Kinyua v Patrick Thuita Gachure and Another (2015) eKLR** where the Court adopted the ruling in **Mbogo & Another v Shah (1968) EA** *that a court will not interfere with the exercise of the discretion of an inferior court unless it is satisfied that the decision is wrong as the court misdirected itself.*

22. In conclusion the Respondent submitted that the instant Appeal has no merit and urged this Court to dismiss the same with costs to the Respondent.

Analysis and Determination

23. I have considered the grounds of appeal and the record of appeal. I have further considered the parties' submissions. The issues for determination are –

> (i) Whether the Trial Court erred in law and fact in finding the Respondent was injured while in the course of employment at the Appellant's premises;
>
> (ii) Whether the orders sought by the Appellant should be granted.

24. Being a first appeal, this Court has a singular duty to re-evaluate the entire case and come up with its own findings as enumerated in the case of **Selle v Assorted Motor Boat Company 1968 EA Company 1968 EA 123-126**. 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 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 demeanour of a witness is inconsistent with the evidence in the case generally."*

Whether the Learned Magistrate erred in law and fact in finding that the Respondent was injured while in the course of employment

25. The Respondent's evidence is that on 18th October 2013 he was loading metal tools and when it was released it hit him on the chest. That first aid was administered after which he was referred to Athi River Shalom where he was treated and discharged. He produced medical summary and patient's card as "PEX 1(a)" and "1(b)". He also produced sick off sheet "PEX 2".

26. During cross examination the Respondent stated that he reported to work at 8.30 am and left at 14.46 pm. He was shown the injury register which indicated that he did not get injured on the material date. He stated that he was not aware that the company was listing injuries sustained by employees. He stated he was given sick off from 22nd October 2013. He further testified that the Appellant refers its employees to Athi River Medical Services but he was taken to Athi River Shalom Hospital.

27. DW1 Leonard Musyoki, the Appellant's Supervisor stated in his witness statement which he adopted that his duties included maintaining the Attendance Register and the Accident Register. That he also administered First Aid to injured employees and organised for their transfer to the nearest hospital in the event of serious injury.

28. He testified that at the Appellant's gate there is a machine for clocking in with the thumb. That employees in addition sign an attendance register. That when leaving work, they sign out in the register and also clock out in the clocking machine. That it is the records from the clocking machine and the attendance register that are used to pay the employees' wages. That the attendance register has an injury column where an employee enters *"Yes"* for injury and "*No"* for no injury.

29. DW1 testified that on 18th October 2013, the Respondent reported to work at 8.30 am and clocked out at 18.46 pm. That in the attendance register the Respondent entered *"NO"* against his name and signed that he was not injured on that day.

30. DW1 further testifies that an employee who is injured reports, he administers first aid then refers the employee to Athi River Medical of the injury is serious. That the Appellant does not refer any employee to Shalom Hospital. That the name date and time of injury is recorded in the accident register.

31. DW1 testified that the Respondent's name did not appear in the Accident Register for 18th October 2013. He further testified that an employee who is injured is rushed to hospital and does not clock out.

32. DW1 testified that the Respondent's sick off sheets were for 22nd October 2013 and not on the date he alleges to have been injured on 18th October 2013. In support of his case DW1 produced the Attendance Register, the Accident Register and Wage Sheets. The wage sheet

reflects that the Respondent reported to work at 08.30 and out at 14.46. His name does not appear in the Accident/Injury Register. On the attendance register for 18th October 2013, the Respondent signed *"NO"* against his name on the register under the column "*Injury Yes/No*" and appended his signature.

33. The sick off sheet has alterations on the dates. There are no original treatment records. What was produced is a medical summary prepared on 8th November 2013. It states at the bottom. "*For review after sick off*" yet it is dated on the date the sick off of two weeks was supposed to lapse.

34. From the foregoing, I would agree with the Appellant that the Learned Trial Magistrate did not address the evidence before her including the Appellant's Wage Roll and Manual Attendance Register which clearly demonstrated that the Respondent was not injured on 18th October 2013. She also ignored the evidence by both the Respondent and DW1 that the Appellant did not refer its injured employees for treatment at Athi River Shalom Hospital but to Athi River Medical Services. She further ignored the evidence that the Respondent was not treated on the date of alleged injury being 18th October 2013 as the evidence produced by the Respondent show that he was treated and given sick off on 22nd October 2013.

35. The evidence in the medical report is not material as it was issued about five months after the accident. The medical report in any case states "*healing is complete"* meaning that at the time the Respondent was reviewed by the Doctor, there was not material evidence of the injury.

36. From the foregoing, I find merit in the appeal, and accordingly make the following orders: -

(i) The appeal is allowed

(ii) The judgment of the Trial Court is set aide and substituted with an order dismissing the Respondent's suit with costs both in the lower Court and in the appeal.

DATED, SIGNED AND DELIVERED AT MACHAKOS ON THIS 26TH DAY OF NOVEMBER 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