REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CIVIL APPEAL NO. 60 OF 2020

[Formally Kajiado High Court Civil Appeal no. 16 of 2019]

SIMION NYAMWEYA ABINCHA..APPELLANT

-VERSUS-

K. G. PATEL & SONS LIMITED...1ST RESPONDENT

RABDIYA CONSTRUCTIONS LIMITED...2ND RESPONDENT

JUDGMENT

Introduction

1. The appellant herein was a plaintiff in Civil Suit number 535 of 2015, before the Principal Magistrate's Court, Kajiado. The Respondent was the defendant therein. The said suit was commenced by way of a plaint dated 31st July 2015. The plaint was later amended on the 28th October 2015 and filed on the 14th December 2015. In his pleadings, the Appellant contended that he was at the material time an employee of the Respondent and that in the course of his employment, he suffered a workplace injury. The appellant sought for general and special damages upon basis of the alleged injuries.

2. Upon being served with summons to enter appearance, the Respondent did enter appearance and file a statement of defence on the 21st April 2019. The matter consequently got destined for hearing *inter partes* on merits as there was a joinder of issues.

3. On the 6th April 2017, the matter came up for hearing before the learned Chief Magistrate, S. M. Shitubi, when the Appellant testified and closed his case. The Respondents decided to close theirs without calling any evidence.

4. At the hearing the Appellant moved the trial Court to adopt his witness statement as evidence. The Court did adopt the same as such. Then he briefly testified orally apparently touching on areas that needed clarification.

5. The Appellant stated that at all material times he was employed by the Respondent company, as a general worker. That on 8th June 2015 he sustained injuries while in the course of employment. This happened when a piece of building material fell from the 5th floor hitting him on the head, as he was collecting timber. He stated that this occasioned him serious injuries.

6. The Asian who was supervising the timber workers advised that he be given first aid. On the 9th June 2015, he was treated at Kisaju Medical Clinic. He produced treatment notes before the trial Court as his exhibit No. 3. Later on, on the 16th June 2015, he visited a doctor who prepared a medical report for him. This report was his exhibit No. 2.

7. The Respondent had not given them any documents of employment at the time the accident occurred. However, every morning their names could be recorded on a register. The Appellant blamed the Respondents for the injuries. The Respondent did not give them protective gear like a helmet. It did not engage any protective measures like using nets. He stated that they were not taken through any training on how to work at a construction site safely.

8. Under cross examination by the Respondents' counsel, the Appellant testified that he was only 3 (three) months old in the employment of the Respondent when the accident occurred. Then he was working at a construction site. He had been assigned to pick timber at the 1st floor, while construction works were on at the 5th floor, when an object hit him, resultantly he lost consciousness.

9. The Appellant stated that he went to hospital Kisaju Medical clinic on the same day, however when he was shown the treatment notes he stated that he visited the clinic, a day after the incident, on the 9th, when his situation got worse. The injury confined him out of work for one week. Notwithstanding the fact that the Respondent knew that he had been injured at work, it refused to grant him an off.

10. The learned trial Magistrate rendered herself on the matter through her Judgment dated 6th July 2017, but delivered on the 3rd August 2017. In the judgment, the learned trial Magistrate found that indeed the Appellant was an employee of the Respondent at the material time as his evidence on this was not contradicted.

11. However, on what the trial Magistrate stated as her issues for determination, i.e. if the Appellant was injured, was he injured in the course of working for the Defendant? The Hon. Magistrate did not find in favour of the Appellant. She held that the Appellant had failed to give an explanation as to the exact date when he sustained the injury. The Appellant case was dismissed with costs on account of this failure.

12. Were she to find in favour of the Appellant on his case, she would have awarded him Kshs. 130,000 as general damages for the soft tissue injuries, and Kshs. 3,450 for the proven medical expenses.

<u>The Appeal</u>

13. Aggrieved with the learned trial Magistrate's Judgment, the Appellant filed the appeal herein, putting forth three principal grounds, thus;

> (i) That the learned trial Magistrate erred in law and in fact in taking into account irrelevant issues and arriving at a wrong conclusion.
>
> (ii) That the learned trial magistrate erred in law and in fact in canvassing issues not before the Court arriving at a wrong conclusion.
>
> (iii) That the learned trial Magistrate erred in law and in fact in dismissing the Appellant's claim on account of a legal technicality.

<u>The Appellant's submissions</u>

14. The Appellant in his written submissions, appreciating that this is a first Appellate Court over the matter, submits that a first appeal such as the instant one is by way of a retrial. He buttresses the submission by citing the holding in ***Selle & another =vs= Associated Motor Boat Co. Limited & others [1968] E.A. 123***.

> ***"I accept counsel for the respondent's proposition that this Court is not bound necessarily to accept the findings of fact by the court below. An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must consider 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 Judges findings if it appears either that he has clearly failed on some point to take into account particular circumstances or probabilities material to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."***

15. Counsel submitted that the learned trial Magistrate was right to the extent that she held that the Appellant did prove his case on a balance or probability that he was an employee of the Respondent at the material time as a casual worker, and that there was sufficient evidence that he had been injured. He however finds fault on her holding that the Appellant did not prove that he was injured at the Respondents' place of work.

16. It was submitted that to the requisite standard, the Appellant did prove that he was injured at the Respondent's premises. The standard of prove being on a balance of probabilities. He urges this Court to look at this issue of prove with the lens provided by the holding in ***Timsales Limited =vs= Harun Thuo Ndungu [2010] eKLR***, thus;

> ***"In determining whether the Respondent discharged that duty (of proving his case), it must be borne in mind that the Respondent's duty was to prove his claim against the Appellant, and the Appellant to disapprove its liability against the Respondent, not on the basis of proof beyond reasonable doubt but rather on the balance of probability."***

17. It was further submitted that the learned trial Magistrate erred in law, when she invoked a wrong standard of prove to the prejudice of the Claimant's case. To demonstrate that this happened, counsel singled out a statement in the Judgment which he holds suggests that the Hon. Magistrate applied a beyond reasonable doubt standard, viz;

> ***"In as much as the defence did not call evidence on this, the cross examination by counsel casts doubt on the Plaintiff's evidence in respect of this. Probably further evidence to prove that it was in fact at his place of work was required."***

18. Had she applied the correct standard of proof, she would have easily found that the Appellant had established that he was injured at his place of work. The Claimant moved Court to adopt his witness statement as part of his evidence in chief. The Court did adopt it as such. The statement is clear as to when the incident occurred, the 8th June 2015. Too that immediately the accident occurred he was first attended at the place of the occurrence. That upon the 1st aid he later went to Kisaju Medical Clinic.

19. Counsel further submitted that the Appellant stated in his evidence under cross-examination that he went to the Clinic the following day on the 9th June 2015.

20. That in any event, the Respondent did not place any evidence before Court to controvert the Appellant's evidence on this. According to counsel, it is trite law that where a party fails to call evidence to disapprove an allegation, the said allegation shall remain uncontroverted. To fortify this submission, he placed reliance in the case of ***Kimatu Mbuvi =vs= Benson Ngali [2012] eKLR*** where Justice Lenaola (as he then was) held:

> ***"Liability cannot be challenged where a party calls no evidence to rebut the allegations of negligence and hardly challenges the circumstances of the accident in question."***

21. The Appellant's counsel contended that the learned trial Magistrate only took into account, the evidence of the Appellant under cross examination. She neglected pleadings, evidence under examination in chief, re-examination and submissions. This caused her to arrive at a wrong finding.

22. It was contended that, having found that the Appellant was an employee of the Respondent, then she would have directed herself that at the juncture at which the employee proved the employee-employer relationship, it became duty upon the employer (Respondent), to tender documents to disabuse the allegation that the Appellant was not injured at the place of work.

As regards this duty, counsel placed reliance on the provisions of section 10 (1) of the Employment Act, and the holding in ***Chengo Kitsao Chengo =vs= Umoja Rubber Products Limited [2016] eKLR***, as;

> ***"The obligation to produce employment records to dispose verbal allegations by an employee in any legal proceedings before the Court is vested by section 10 (7) of the Employment Act."***

23. The Respondent was in the circumstances of the matter under an obligation to tender as evidence, the master roll and injury register. The importance of these documents was underscored in Justice D. Musinga's decision in ***Kebirigo Tea Factory =vs= Tarid Raini [2008] eKLR***, where he stated;

> ***"The Appellant did not produce the master roll…………. That would have been a very appropriate document to prove that the Respondent was not in the Appellant's employment on the material day. There was no indication as to why the same was not produced. Section 107 (1) of the Evidence Act states as follows:***
>
> ***"whoever desires any Court to give Judgment as to legal right or liability dependent on the existence of facts he asserts, must prove that those facts exist."***
>
> ***DW1 was the one who was keeping the Appellant's master roll …… In light of the above analysis of the evidence that was adduced before the trial Court, I am inclined to agree with the learned trial Magistrate that the Respondent proved this case on a balance of probabilities."***

The Respondent did not discharge this obligation.

24. Regarding an employer's duty to have a safe working environment for his or her employees, counsel relied on the decision of ***Wilson & Cycle Coal Co. =vs= English [1938] Ac 579***. In the circumstances of this matter, the Respondent did not discharge the duty.

25. The Appellant has made lengthy submissions on quantum, I note that it is not one of the grounds of appeal that the learned trial Magistrate erred in law or fact in arriving at the figure of Kshs. 130,000 and Kshs. 3,450 as the general and special damages respectively, that she would have awarded had the Appellant succeeded on the issue of liability. Consequently, I will not consider the submissions.

The Respondent's submissions

26. Counsel for the Respondent submitted that in exercising its jurisdiction as a first Appellate Court, the Court should not lose sight of the fact that it did not see or hear any of the witnesses. He finds comfort in the decision of the Court of Appeal in the case of ***Prudential Assurance Company of Kenya Limited =vs= Sukhwinder Sigh Jutley & Another [2007] eKLR***, where the Court stated;

> ***"As a first Appellate Court, it is our duty to treat the evidence and material tendered before the superior Court to a fresh and exhaustive scrutiny and draw our own conclusions bearing in mind that we have not seen or heard the witnesses and giving due allowance for this – Selle =vs= Associated Motor Bost Company Limited [1968] E.A. 123."***

27. It was submitted that on matters fact the only witness called was the Appellant. As a consequence, therefore, the only evidence that was, for the court to guide it arrive at a decision was his. Section 107 (1) of the Evidence Act placed a duty on the Appellant to prove his case. Section 109 of the Evidence Act was also relied on as it provides that;

> ***"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."***

28. Further reliance was put on the decision in **P.J** ***Dave Flowers Limited =vs= David Simiyu Wamalwa [2018] eKLR***.

29. That by evidence, the Appellant was under duty to prove that the incident did indeed take place in the workplace and that he was injured as a result. Unfortunately, the evidence of the Appellant was muddled up with a host of contradictions.

30. On what counsel sees as contractions, he submitted that the Appellant alleged that the stones fell from the 5th floor and hit him, making him lose consciousness, that at the same time he states that he was looking down when the debris hit him. Further that he stated that he lost consciousness yet he was able to hear the supervisor give directions that first aid be performed on him. That it is highly impossible that the Appellant would hear the supervisor give the directions, yet he was unconscious at the time.

31. That the Appellant contradicted himself on the date when the incident occurred. He stated that he was injured on the 8th June 2015 and that he went to hospital the same day. However, looking at the treatment notes, it will emerge that he went to hospital on 9th. When he was shown the report, he stated that he went to hospital a day after the incident, when his situation got worse.

32. That there were notable differences in the doctor's report and the treatment notes. The treatment notes state that he had suffered a superficial wound that was bleeding profusely while the medical report states that he suffered a deep cut on the scalp.

33. In his conclusion counsel stated that, in view of the circumstances, the learned Magistrate was right to find that liability was not established.

34. It was his submissions that under section 21 of the Work Injury Benefits Act, the Appellant was under duty to present evidence that he made a report to the Respondent of his injury. He, in buttressing this, cites a holding in ***Kakuzi Limited =vs= Lucy Wanjiri Kiguro [2011] eKLR***, where the Court held;

> ***"Where a worker is injured and they fail to immediately report to their supervisor and produce treatment notes initially from the Clinic, they should not be given any award nor should the employer be liable."***

The Appellant did not give or present any evidence that he reported his injury to the employer.

35. On the standard of proof, counsel submitted that the learned trial Magistrate applied the correct standard, that of a balance of probabilities when she stated in the Judgment that;

> ***"Without a convincing explanation as to exactly what date the injury occurred it is difficult to prove this. Indeed, if a stone was lodged in his body Kisaju medical report should have noted."***

That a balance of probabilities meant that one outcome was more probable than another – ***John Kanyangu Njoga =vs= Daniel Kimani Maingi [2000] eKLR.***

36. That the Appellant did not discharge his burden of proof. He too failed to establish negligence on the Respondent's part. The trial Magistrate's decision was therefore right.

37. Counsel has submitted on quantum, as I have hereinabove stated, there is no appeal or cross appeal on the figures that the learned trial Magistrate stated in her Judgment as what she would have awarded had the Appellant established liability. I cannot therefore consider the submissions.

Analysis and determination

38. From the onset let me appreciate the scope, ambit and power of a first Appellate Court while deciding first appeals. The jurisdiction of first Appellate Court while hearing an appeal is wide like that of a trial Court. It is open to the Appellant to assess all facts of fact and or of law in the first appeal. It is duty upon the first Appellate Court to consider and appreciate the entire evidence, and may come to a different conclusion away from that of the trial Court. The Judgment of a first Appellate Court must be in texture one that reflects its conscious application of mind and record findings supported by reasons on all issues along with the contentions put forth and pressed by the parties. If the first Appellate Court has reversed the findings of fact, it must come into close quarters with the reasoning assigned by the trial Court and then assign its own reasons for arriving at a different finding.

39. In the case of ***Prudential Assurance Company of Kenya Limited =vs= Sukhwinder Singh Jutley and Another [2007] eKLR*** on the role of a first Appellate Court, the Court of Appeal stated;

> ***"As a first Appellate Court, it is our duty to treat the evidence and material tendered before the superior Court to a fresh and exhaustive scrutiny and draw our own conclusions bearing in mind that we have not seen or heard the witnesses and giving due allowance for this – Selle =vs= Associated Company Limited [1968] E.A. 123."***

In dealing with this Appeal, I will give due consideration to a foregoing premise.

40. In this Appeal, there is no contestation on the learned trial Magistrate's finding that the Appellant was an employee of the Respondent at the material time. At the centre of it however, is her finding that the Appellant did not establish to the requisite standard, that he was injured at the workplace.

41. Counsel for the Appellant stated the learned trial Magistrate erred in so finding. According to him, the Appellant had placed ample evidence before her to demonstrate the contrary. He further stated that this evidence regarding the fact that the incident occurred at the workplace remained uncontroverted as the Respondent did not bring forth any evidence to challenge it. He sought fortification in the holding in, ***Kimatu Mbuvi =vs= Benson Ngale (2012) eKLR***, where Justice Isaac Lenaola (as he then was) held;

"Liability cannot be challenged where a party calls no evidence to rebut the allegation of negligence and hardly challenge the circumstances of the accident.

In ***CMC Aviation Limited =vs= Cruise Air Limited [1978] E.A., 103***, Madan J. stated;

> ***"Pleadings contain averments of those concerned until they are proved or disapproved, or there is admission of them or any of them by the parties they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence."***

42. As a basis for her finding that the Appellant did not prove that he was injured at the work place, the learned trial Magistrate stated;

> ***"………………… it is not clear whether he went to hospital for he has testified about 8/6/2015 the date of the accident and 9/6/2015 the date of recorded at Kisaju Medical Clinic in the treatment notes which also indicated that the injuries were fresh and he was bleeding profusely. In such as much as the defence did not lack evidence on this, the cross examination by counsel casts doubt on the plaintiff's evidence in this respect."***
>
> (Emphasis mine).

43. In this statement, it is clear that the learned trial Magistrate did not consider that since the Respondent offered no evidence, the circumstances of the incident as was explained by the Appellant, and liability out of the incident was not assailed at all.

44. As regards the issue as to whether or not the Appellant was an employee of the Respondent, the learned trial Magistrate found in favour of the Appellant on an account that the Respondent did not contradict his evidence, she stated;

> ***"The defendant did not call any witnesses. I have considered the evidence and submissions, the first issue for determination is if the Plaintiff was an employee of the Defendant. He said that there were no employment documents. He used to record names. The Defendant did not contradict this."***

45. It is not difficult to discern that she appreciated the principle as enunciated by Justice Lenaola (as he then was) in the fore-mentioned case of Kimatu Mbuvi, but in the next issue applied a contrary view. Consistency was lacking here. Consistency in-Judgment, in approaches and application of principles is imperative, it inspires public confidence in the Judicial System.

46. The statement by the learned trial Magistrate hereinabove put forth suggests that the account of events as was given by the Appellant was not clear. I find the statement, being a product of the learned trial Magistrate's failure to consider the evidence and material that was placed before her wholesomely. The pleadings, the witness statement (turned evidence in chief) and the documents.

47. I have carefully considered the plaint, the witness statement, the oral testimony by the Appellant, I see no account of events that is not unclear. The incident occurred on the 8th June 2015, the Appellant was first attended to at the scene at the instruction of the supervisor, and later he visited Kisaju Medical Clinic on the 9th June 2015. I have not lost sight of the fact that under cross-examination, he first said that he went to hospital on same date of the incident, but clarified by saying that he went to the hospital the following day when his situation became worse. The learned trial Magistrate did not capture the clarification and give a reason why she was not agreeing with it, if she wasn't.

48. The medical report dated 16th June 2015 that was produced in evidence by consent was very clear under the item History of injuries sustained and treatment, where the doctor stated,

> ***"He was injured in his place of work at K.G. Patel and Sons on the 8th June 2015 while on duty and sustained the following injuries."***

I get it that this medical report was done 8 days after the incident. The facts of the incident would have been clear in the minds of the Appellant.

49. In her Judgment, the learned trial Magistrate states that it was the evidence of the Appellant that debris fell on his head and that in fact one lodged in his body. Then in the concluding paragraph of her Judgment she stated; *"if indeed a stone was lodged in his body kisaju Medical should have noted."* I have considered the Appellant's evidence, in chief, under cross-examination and in re-examination, I find nowhere, where the Appellant stated that a stone was lodged in his body. This therefore is a matter that, the learned trial Magistrate took into account, influenced her decision, yet it was not canvassed by the parties. Put in another way yet it did not flow from the evidence and material placed before her. The learned trial Magistrate was in error here.

50. The learned trial Magistrate further held that it was not clear whether he went to hospital for he testified that the accident occurred on 8th June 2015, while 9th June 2015, was the date recorded on the Kisaju Medical Clinic treatment notes which also indicated that the injuries were fresh and he was bleeding. I have keenly looked at the treatment notes – (Exh. 3) from Kisaju Medical Clinic, there is nothing therein to the effect indicating that the 9th of June 2015, was the date when the injury was sustained. The fact that the injuries were fresh and the

Appellant bleeding profusely, looked in the context of the entire evidence that was placed before her, is in agreement with the Appellant's evidence that he went to the clinic when his situation got worse.

51. It is surprising that the treatment notes (Exh. 3) do not at all have a content indicating that when the Appellant visited the clinic, his injuries were fresh. I have found it totally difficult to understand where the learned trial Magistrate picked this from.

52. Further, it is worth noting that the issue of the fresh look of the injury (which I have said does not appear to be flowing from the treatment notes) and the profuse bleeding did not come up in the evidence before her, either, in chief or under cross-examination.

53. In an adversarial system like is ours, the record should be in a manner that reflects it, and or an appreciation of its being.

54. In the upshot, I agree with the Appellant that the learned trial Magistrate took into account matters that were not canvassed in evidence by the parties to the prejudice of the Appellant. She too failed to take into account relevant matters, occasioning her arriving at wrong findings.

55. I am convinced that the Appellant did prove his case to the requisite standard before the learned trial Magistrate, and there was no need for calling of further evidence as she suggested.

56. As to whether the Appellant was injured at the work place or not, the premises that the learned trial Magistrate took into account as have been brought forth herein before, are premises that were irrelevant and largely not canvassed on, by the parties. The Appellant testified that the employer was aware of the accident. It was imperative that an injury register or any other convincing evidence be tendered by the Respondent to controvert this. This the Respondent did not do. The evidence of the Appellant on this issue remained uncontroverted therefore.

57. The learned trial Magistrate concluded that had the Appellant established the liability aspect of his case, she would have awarded him general and special damages of Kshs. 130,000 and Kshs. 3,450 respectively. Those figures are not challenged in any of those grounds forming part of the Appeal herein. Further, an Appellant Court can disturb an award of damages by a trial Court only if certain conditions are demonstrated to be in existence. This is what the Court of Appeal had in mind in the holding in the **case of Butt =vs= Khan (1981) KLR 349, thus;**

> ***"An Appellate Court will not disturb an award of damages unless it is so inordinately high or less as to present an entirely erroneous estimate. It must be shown the Judge proceeded on wrong principles, or he misapprehended the evidence in some material respect and so arrived at a figure ……."***

58. The parties have submitted on these proposed figures on quantum. The Respondents suggesting that the same should be reduced to Kshs. 26,000 upon basis of the Judgment in ***DWA Estate Limited =vs= Niko Mulaki Katambuka [2015] eKLR***, while the Appellant urges an award of Kshs. 250,000, putting reliance on the decisions in ***Channan Agricultural Contractors Limited =vs= Fred Barasa mutayi [2013] eKLR***.

59. I am not convinced that there are grounds, or the conditions necessary on, which this Honourable Court can disturb the figures, present.

60. By reason of the premises hereinabove, I allow the Appellant's Appeal and enter Judgment for him as follows:

a) The learned trial Magistrate's Judgment on liability is quashed and set aside and in place thereof, this Court's Judgment on a 100% liability basis made against the Respondents jointly and severally.

b) Judgment on quantum in the sum of Kshs. 130,000 general damages, and Kshs. 3,450 special damages is entered in favour of the Appellant against the Respondents.

c) Costs of this Appeal, and those for the lower Court suit, shall be in favour of the Appellant.

d) Interest on the award on quantum shall be at court rates from the date this judgement till full payment.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF NOVEMBER, 2021

OCHARO KEBIRA

JUDGE

Delivered in presence of;

Mr. Ngige for the Appellant.

Mbeche for the Respondent.