



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**APPEAL NO.19 OF 2018**

**[formerly Nakuru High Court Appeal No.101 of 2016]**

**STEPHEN MWANGI KIMUYU ..... APPELLANT**

**VERSUS**

**BIASHARA MASTERS SAWMILL ..... RESPONDENT**

[being an appeal from the judgement and decree of Hon. Wendy K Michemi Chief Magistrate at Molo delivered on 30<sup>th</sup> August, 2016 in Molo CMCC No.208 of 2012]

**JUDGEMENT**

This appeal arises from the judgement and decree in Molo CMCC No.208 of 2012 delivered on 30<sup>th</sup> August, 2016 and which followed a claim by the appellant that on 8<sup>th</sup> March, 2012 while on duty with the respondent as an employee while welding a metal bar a piece of metal got into his right eye causing injury and which arose out of negligence and breach of statutory duty by the respondent. the trial court heard the parties and in judgement made a finding that there was no liability and dismissed the claims with costs.

the appellant dissatisfied filed the appeal on 9 grounds which can be summarised that the trial court erred in law and in fact on the grounds that there was no defence made to the claims made, making a finding that the claims made were mere allegations instead of what was proved, injury sustained and that the injury occurred while in employment; failing to consider the report of the injury made to the respondent whereas the alleged injury book was not produced by the respondent to prove so; and there was no evaluation of the matter before court and the judgement should be reviewed, set aside and an award made.

The appellant submitted that on 8<sup>th</sup> March, 2012 while at work with the respondent he was injured to his right eye, he suffered injury, damage and loss due to the negligence and breach of statutory duty of the respondent. he was attended to by Dr Obed who also testified to support his case, Edwin Chomba Maheso the clinical officer, Njoro who attended to him immediately after the accident. The respondent on the other had called Nichodemus Shakaba and testified that he had been the supervisor of the appellant and that no injury was reported but failed to produce the injury book but later changed to state that he had an extract of the same but failed to produce it.

The appellant also submitted that the trial court erred in going into his character instead of addressing the facts before it that he had had 4 other accidents which in a span of 5 months raising an eyebrow. This judgement of the matter based on character led to a wrong finding as there was no defence.

The appellant in submissions relied on the case of **IEBC & another versus Stephen Mutinda Mule & 3 others [2014] eKLR; Boniface Muthama Kavita versus Carton Manufacturers Limited Civil Appeal No.670 of 2003.**

The respondent submitted that the appellant failed to prove his case on a balance of probabilities as held in **Mumende versus Nyali Golf & Country Club (1991) KLR.** The appellant's evidence that he was at work welding some metal as when he was injured to his right eye and blamed the respondent who had not provide him with welding glasses but in cross-examination he confirmed he had been given eye shield meaning the respondent had taken reasonable care and attention to prevent an accident. The appellant was in control of the metal he was welding and thus had a duty of care to himself but he went ahead to work on a rusted metal causing injury to himself and cannot blame the respondent. There is nothing to connote negligence on the part of the respondent as held in **Statpack Industries versus James Mbithi Munyao HCCA No.152 of 2003.**

The respondent also submitted that the findings by the trial court were based on the evidence, the law and proper assessment and should be confirmed and the appeal dismissed.

This being a first appeal, it is mandatory for this court to consider the evidence at the trial and evaluate it afresh before making own conclusions irrespective of the determinations made by the trial court subject, of course to the understanding that this court has no advantage

of hearing or seeing the witnesses. See **Kiruga versus Kiruga & another [1988] KLR**.

Was the appellant injured while at work? Was it caused by the negligence and or breach of a statutory duty of the respondent?

Before the trial court the appellant pleaded that on 8<sup>th</sup> March, 2012 while on duty he got injured while at work. His right eye was injured by a metal he was welding. He blamed the respondent for being negligent and in breach of statutory duty.

In defence the respondent filed a defence on 8<sup>th</sup> November, 2012 and denied the claims and blamed the appellant for being negligent while at work and causing self-injury.

On 17<sup>th</sup> September, 2014 the respondent amended the defence and on the grounds that on 15<sup>th</sup> May, 2012 there was no accident reported involving the appellant and the allegations of negligence and breach of statutory duty were denied on the basis there was no proof of the same.

In the analysis of the judgement of the trial court it is not clarified why the respondent filed an amended defence whereas there had been no amended plaint.

The accident to the appellant had occurred on 8<sup>th</sup> March, 2012 as confirmed by the records submitted from Huruma Dispensary, Njoro and the Evidence of the appellant and his witness Edwin Chomba Miheso. The respondent's witness Nichodemus Shakaba testified that there was no injury reported on 8<sup>th</sup> March, 2012 but the appellant was on duty on this day and allocated welding duties. He however did not produce any work records.

The evidence of injury while at work was thus not challenged in any material way.

With regard to alleged negligence on the part of the respondent, when a party pleads negligence he has to prove the casual link between the injury and the duty of care placed upon the employer in negligence thus where an employee is undertaking manual work as is the case hereof, he is to take reasonable care of his own safety as the employer is not expected to babysit or supervise such manual tasks that need no supervision as held in **Amalgamated Saw Mills versus David K. Kariuki [2016] eKLR**.

In this case the appellant blamed the respondent for not providing him with protective gear while at work. That he had no welding glasses. Upon cross-examination, the appellant testified that;

*The accident occurred at around 9.30am in the morning. I reported the accident to someone, I cannot remember his real names, and however his nickname was 'Buda'. The same manager gave me permission to seek treatment. I went back to work at around 12.00 noon. Huruma Mobile clinic is next to Njoro Health Centre. I was given eye shield. I used it. The metal which causes my injury had a lot of rust. I reported the accident to the personnel manager. ...*

In re-examination, the appellant testified that;

*If I had welding glasses, I could not have been injured.*

From this evidence, it is apparent that the eye shield/welding glasses were issued after the accident.

Liability is due. the failure to issue the appellant, the employee with protective gear while at work while welding metal and the failure to keep a record of the same was in breach of a statutory duty of care. There is no reasonable defence for such omission(s).

The trial court in analysing the evidence noted that the appellant had other claims made against the respondent. the details of the other claims is not stated. What was before the trial court related to the alleged injury to the appellant on the 8<sup>th</sup> of March, 2012 and where the trial court found and established there were other matters related and creating a conflict as to the motive of the appellant there great causing should have been applied with the details to contradistinguish the matter(s) before the court for a perspective of what kind of 'character' the appellant is with regard to all the claims filed.

Without such analysis, to apply the same as a blanket to assess there was no evidence is contrary to fair administration of justice.

There was employment between the parties, and during the pendency of such employment the appellant got injured to his right eye and he produced evidence and called witnesses to support his claims. the respondent on the other hand failed to file any work records to challenge the claims made.

The court having analysed the evidence afresh finds the trial court erred in dismissing the claims. as correctly assessed, had the claims been addressed on the merits, the authorities relied upon, an award of ksh.50,000 in general damages should have issued with special damages at ksh.5,000 which is hereby confirmed.

**Accordingly, the judgement of the trial court in Molo CMCC No.208 of 2012 is hereby set aside and the appellant awarded ksh.50,000 in general damages; ksh.5,000 in special damages; and each party shall bear own costs of the lower court and the instant appeal.**

**Delivered at Nakuru this 6<sup>th</sup> day of February, 2020.**

**M. MBARU**

**JUDGE**

In the presence of: .....