



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CIVIL APPEAL NO 13 OF 2018

SAMUEL MULA MBINDU.....APPELLANT

VS

STEEL MAKERS LIMITED.....RESPONDENT

(Appeal from the judgment of Hon L.K Gatheru, RM dated 24th August 2018 delivered by Hon. D.M Ndungi, SRM on 19th September 2018

in (Mariakani SRMCC No 301 of 2016)

JUDGMENT

1. This is an appeal from the judgment of **Hon. L.K Gatheru, RM** dated 24th August 2018 and delivered by **Hon. D.M Ndungi, SRM** on 19th September 2018.
2. The Appellant filed a plaint in the lower court on 19th July 2016, seeking special and general damages for an injury he claimed to have sustained on 3rd July 2014, while working for the Respondent as a casual labourer.
3. The Appellant testified before the trial court that on the date of the accident, he had been instructed by his supervisor to offload hot metals from the cutting machine to the floor. In the process, one of the metals burnt his right hand.
4. The Appellant blamed the Respondent for failing to provide protective gear and to properly supervise his work.
5. The Respondent's defence before the lower court was that the Appellant was not injured at work on 3rd July 2014 as claimed. In sum, the Respondent termed the Appellant's claim fictitious.
6. The trial court heard the parties and dismissed the Appellant's claim on the ground that the Appellant had failed to prove injury at work.
7. Being aggrieved, the Appellant filed the present appeal challenging the entire judgment of the trial court.
8. In his Memorandum of Appeal as contained in the Record of Appeal dated 25th April 2019, the Appellant raises the following grounds:
 - a. That the learned Magistrate erred in both law and fact by failing to find that the Respondent was liable for an accident which occurred on 3rd July 2016;
 - b. That the learned Magistrate erred in both law and fact in failing to appreciate that the Respondent had deliberately withheld primary evidence from the court;
 - c. That the learned Magistrate erred in both law and fact by failing to find that there were glaring contradictions in the Respondent's pleadings, witness statement and testimony;
 - d. That the learned Magistrate erred in both law and fact by failing to consider and analyse the Appellant's evidence on liability and quantum as required in law;
 - e. That the learned Magistrate erred in both law and fact by failing to consider the Appellant's written submissions;

- f. That the learned Magistrate erred in both law and fact by finding that the Appellant was not injured at work by virtue of the treatment notes and totally failing to consider the witness statement filed in court;
- g. That the learned Magistrate erred in both law and fact by finding that the Appellant was not injured at work by virtue of the treatment notes and relying on hearsay evidence on the part of the Respondent;
- h. That the learned Magistrate erred in both law and fact by finding that there was an agreement between the parties on production of documents during pre-trial;
- i. That the learned Magistrate erred in both law and fact by considering a defence not pleaded nor proved by the Respondent in its defence;
- j. That the learned Magistrate erred in both law and fact by failing to find that the Appellant was injured at work yet the Respondent withheld critical evidence from the court;
- k. That the learned Magistrate erred in both law and fact by failing to attribute negligence on the part of the Respondent;
- l. That the learned Magistrate erred in both law and fact by failing to find that the Appellant had proved his case on liability;
- m. That the learned Magistrate erred in both law and fact by failing to find that the burden in negligence had shifted to the Respondent;
- n. That the learned Magistrate erred in both law and fact by finding that the Appellant required corroboration of his evidence to prove his case;
- o. That the learned Magistrate erred in both law and fact by finding that the Appellant did not prove his case because he failed to produce treatment notes;
- p. That the learned Magistrate erred in both law and fact by showing open bias to the evidence of the Appellant by considering other cases and applying the test of beyond reasonable doubt as opposed to the test of balance of probability;
- q. That the learned Magistrate erred in both law and fact by awarding the Appellant general damages which were excessively low in the circumstances of the case.

9. This is a first appeal and it therefore falls on me to re-consider and re-evaluate, the evidence on record and draw my own conclusions, bearing in mind that I had no chance of seeing the witnesses (see *Association for the Physically Disabled of Kenya v KUDHEIHA Workers [2018] eKLR* and *Abok James Odera T/A Odera & Associates v John Patrick Machira T/A Machira & Co Advocates [2013] eKLR*).

10. The Appellant raises seventeen (17) grounds of appeal which in my view fall under the two (2) broad categories of liability and quantum of damages.

11. In his judgment, the learned Trial Magistrate found and held that the Appellant had failed to prove that he had actually suffered an accident while at work.

12. In support of his case, the Appellant had filed treatment notes from Mazeras Dispensary in addition to a post-accident medical report by Dr. Ajoni Adede.

13. The question as to the probative value of the treatment notes which were filed but not produced was canvassed before the trial court. In his judgment, the learned Trial Magistrate considered case law on this issue. He cited several cases notably, *Timsales Limited v Elijah Macharia [2012] eKLR* where it was held that failure to produce treatment notes was not fatal to an injury claim.

14. The trial court also cited *Timsales Limited v Harun Thuo Ndungu [2011] eKLR* where it was held that the answer to the question whether failure to produce treatment notes is fatal will vary from case to case. The learned Magistrate further considered the decision in *Bigot Flowers (K) Ltd v David Were [2016] eKLR* where it was held that to require a party to call the maker of treatment notes who the party may not even know, would amount to denial of justice.

15. Finally, the learned trial Magistrate rendered himself as follows:

“In this case, the plaintiff’s evidence would suffice as he was cross examined and further produced the medical report only for two reasons: One, that his oral evidence doesn’t tally with that of the doctor. As the defendant counsel observed, Doctor Ajoni Adede stated that the patient was attended at Mazeras Dispensary and hence relied on such treatment notes. The plaintiff was however categorical in his evidence in chief and cross examination that he attended treatment at Rabai Health Demonstration Centre where he paid Kes. 500/-. This throws his case into confusion since the treatment notes relied upon fail to support that position. Second, the plaintiff’s failure to produce the treatment notes was not explained in any respect at all. This is despite the express directions by the court at the pretrial stage that the maker of the treatment notes shall have to be called for the same to be relied in evidence. In my humble opinion, the plaintiff abdicated on his duty to prove his injury and wants to win his case through weighty submissions. He ought to have followed the pretrial direction agreed upon by the parties unless reasonable explanation was given.”

16. A reading of the foregoing citation reveals that the learned Trial Magistrate did not base his decision on the Appellant's failure to produce the treatment notes or to avail corroborative evidence. Rather, the decision was based on the apparent contradiction with regard to the medical facility where the Appellant was first treated.

17. In the written submissions filed on behalf of the Appellant on 23rd October 2019, a rather serious allegation was made against the trial court to the effect that by making reference to 'Rabai Health Demonstration Centre' the learned Magistrate came up with testimony to dismiss the Claimant's case.

18. Looking at the Appellant's testimony before the trial court, he refers to 'Rabai' and 'Rabai Health Centre' as the medical facility where he was treated.

19. Whether it was 'Rabai' or 'Rabai Health Centre' or even 'Rabai Health Demonstration Centre' this was not the name of the facility stated in the treatment notes relied on by the Appellant. Moreover, there was no explanation as to why the Appellant chose to depart from the pre-trial agreement that the treatment notes would be formally produced.

20. Given the rather strong position taken by the Respondent that the Appellant's claim was fictitious, the Appellant ought to have gone all out to prove his claim. The name and identity of the medical facility where he was treated was a crucial point and in the absence of any credible explanation on the apparent discrepancy, the trial Magistrate could not have ruled any other way.

21. This Court therefore agrees with the learned Trial Magistrate that the Appellant failed to prove that he was injured at work on 3rd July 2014.

22. On the issue of quantum of damages that would have been payable to the Appellant had he succeeded in establishing liability, the learned Trial Magistrate returned a figure of Kshs. 130,00 in damages for pain and suffering and Ksh. 2,000 for special damages.

23. Assessment of damages is an exercise of judicial discretion which can only be interfered with when it is shown that the trial court failed to direct itself properly in law and fact (see *Printing Industries Limited & another v Bank of Baroda [2017] eKLR*). With this in mind, I would agree with the hypothetical award made by the trial court.

24. In the ultimate, I find this appeal to be without merit and proceed to dismiss it with costs to the Respondent.

25. It is so ordered.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 5TH DAY MARCH 2020

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JUDGE

Appearance:

Miss Osino for the Appellant

Mrs. Maithya for the Respondent