REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL NO. 1 OF 2019

(Before Hon. Justice Mathews N. Nduma)

KASSIM ONYANGO MUMBO.....APPELLANT

VERSUS

MUMIAS SUGAR COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. The Appellant filed the Appeal against the judgment of M.I.G Monanga, Principal Magistrate, Kakamega in Kakamega CMCC No. 15 of 2010 delivered on 25th March 2013.

2. The trial magistrate dismissed the suit filed by the Appellant. The grounds of Appeal are as follows:

(i) The learned trial magistrate erred in law and fact in dismissing the Appellant's suit against the weight of evidence on record and contrary to the Appellant's evidence.

(ii) The learned trial magistrate erred in law and fact in failing to find that the respondent did not provide the Appellant a safe working environment.

(iii) The learned trial magistrate erred in law and fact in awarding the appellant general damages that were extremely low in view of the injuries sustained by the appellant.

3. Both parties filed written submissions on 22nd October 2018 and 8th November 2018 respectively.

4. The court shall be guided in determining the Appeal by the case of ***Selle and another vs Associated Motor Boat Company Limited and another (1968) EA 123*** it being a first Appeal. The decision in Selle's case was explained in the ***Nairobi HCCC Appeal No. 213 of 2006, Oluoch Erick Gogo vs Universal Corporation Limited (2015) eKLR*** as follows:

> *"My duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore make an allowance in that respect. In addition, this court will normally as an appellate court, not normally interfere with a lower court's judgment on a finding of fact unless the same is founded on wrong principles of fact and or law. The Court of Appeal in Selle's case stated:*
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> > *"A court of appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion".*

5. In the judgment of the trial court, the learned magistrate in dismissing the Appellant's suit made the following finding of fact:

> *"I have considered filed submissions. I have considered the following issues:*
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> *(a) Whether the plaintiff was an employee of the defendant.*
>
> *(b) Whether he was on duty on the date of the accident.*
>
> *(c) Whether it was the Agent or defendant to blame for the accident……..I found it difficult in the circumstances to find*

even in the absence of counter evidence from the defendant, that he has proved he was on duty on the material date of the accident. This is because of lack of any document to confirm the plaintiff was on duty on that date ie. 29th December 2009.

If the contract covered the date of injury, it would be acceptable but even the medical document P3b does not refer to an injury of 29th October 2012 so as to support the allegations in the plaint".

6. The cause of action was set out in paragraphs 3, 4 and 5 of the plaint that may be summed as follows:

7. At all material times, the plaintiff was an employee of the defendant as general labourer in the Cogen Power Plant Supply. That on or about 29th December 2009, while the plaintiff was in ordinary cause of his employment, in their boiler section, a grinder firing machine started abruptly and without warning causing the riddling hoppers to injure the plaintiff's finger and therefore causing him severe bodily injuries for which the plaintiff holds the defendant responsible. The injury was described as traumatic amputation of the terminal pulp of the right middle finger.

8. The defendant denied these allegations in its statement of defence pleading in the alternative that if the accident occurred, which was denied, then the same was due to sole and/or contributory negligence of the plaintiff and the plaintiff was put to strict proof thereof.

9. Before the trial, the Appellant served on the respondent notice to produce under order XII Rule 8 dated 3rd November 2010, a document described as *"Prescription chit for the plaintiff from Mumias Sugar Company Limited Medial Centre for 8th January 2010"*.

From the record of appeal at page 45, PW1 the Appellant testified under oath as follows, inter alia:" *"On 29th December 2009 I was working at Mumias Sugar Company. I was a casual labourer. I have a document to show. A gate pass and a contract form dated. I worked from 5th October 2009 to 8th October 2010. I wish to produce the temporary gate pass exhibit P1 (a) and the contract of employment form as exhibit P1(b) respectively. I was working in the Cogen Power Plant. It is within Mumias Sugar. I was at work on 29th December 2009. I came at 2 p.m. I worked till 5 p.m. I was involved in accident. I was in the grinder firing section. I was greasing ridding hopers. It is a machine that revolves. It was off as we did maintenance. Someone in the control room suddenly switched it on….."*

11. The Appellant proceeded to produce copy of a medical report by the company doctor. The original according to him was retained by the company doctor. The Appellant had served the respondent a notice to produce the original medical report which was in the possession of the respondent. The respondent's objection to have the copy produced was dismissed by the trial court and the report was admitted as exhibit P2(a) (b) and (c). The medical report exhibit P2 (b) was dated 8th January 2010. The Appellant explained that it is only the doctor who could explain why he dated it the 8th January 2010 since the Appellant was attended to on 29th December 2009 the date he was injured. The Appellant was closely cross examined by M/S Aron for the respondent. The Appellant insisted that he was injured while working for the respondent on 29th December 2009 and that he was allocated duty at Cogen Power Plant by a supervisor of the respondent company.

The respondent did not call any witness to controvert the aforesaid evidence. The oral and documentary evidence adduced by the appellant was therefore not controverted at all.

The issues for determination is whether the learned trial magistrate erred in law and fact, by rejecting the aforesaid uncontroverted evidence by the Appellant and found that the Appellant did not prove on a balance of probabilities that on 29th December 2009, he was injured in the course of duty whilst working for the respondent and/or in the premises of the respondent and suffered injuries for which he sought general and special damages.

14. The learned trial magistrate did not place any weight at all on the oral testimony adduced by the Appellant. Instead, the trial magistrate only focused on the documentary evidence exhibits P1 and P1(b) and P2(b) to question the credibility of the testimony by the Appellant whilst referring to the medical report P2(b) the trial magistrate stated:

"*However, it does not state whether the injury was that of 29th December 2009"*

15. A careful perusal of the medical report titled:

"*Mumias Sugar Company Limited*

From: Factory Cogen Project

To: Medical Centre

Name: Kassim Mumbo

Company. MSC. Staff.

Complaint of:

Finger injured

Time 0.45 pm Date 8th January 2010".

16. The medical officer upon examining the Appellant made the following notes inter alia:

> *"……was treated here for injured finger. Was injured on R mid-finger on 29th December 2009. The finger still has……".*

17. Clearly, in dismissing this medical report solely on the basis that it was dated 8th January 2010, the learned trial magistrate grossly misdirected himself on facts presented before her in that the report clearly referred to the medical history of the Appellant that his finger was injured on 29th December 2009 but the report was dated and signed by the medical officer on 8th January 2010, which facts are clearly discernible on the face of the medical report bearing the letter head of the respondent company.

18. It is pertinent to repeat, that the respondent did not call any witness to controvert the clear and cogent oral and documentary testimony by the Appellant regarding the place and date of the injury on his finger. The evidence by the Appellant clearly placed the blame on the respondent. The Appellant was greasing the machine at the work place of the respondent when the machine was suddenly started and therefore put in dangerous motion from a source far from where the Appellant was.

19. Clearly, the Appellant had no control at all of the events that caused his injury. The claimant clearly proved on a balance of probabilities that the injury to his finger was as a result of negligence by another employee of the respondent and the respondent was 100% liable for the injury that ensued due to its negligence and/or breach of contractual and statutory duty owed by the respondent to the Appellant.

This court has reached the inevitable conclusion and finding that the Appellant had proved his case on a balance of probabilities that the respondent was liable for the injury suffered by the Appellant in the course of his duty at the respondent's premises. The learned trial magistrate clearly misapprehended the unchallenged evidence adduced by the Appellant and reached the wrong conclusion. I therefore find and hold the respondent wholly liable for the accident and injury occasioned to the appellant. I allow this appeal, set aside the order of the trial magistrate dismissing the appellant's suit with costs and substitute with judgment for the appellant on liability at 100%.

22. On quantum, the trial magistrate assessed the quantum that would have fairly compensated the Appellant had the trial court found in the appellant's favour on the issue of liability.

23. The trial court stated as follows:

> *"If the claim had succeeded then I could also have considered quantum proposals. In my view a reasonable award would have been Kshs. 100,000.00 as general damages. I would also have found that the claim for special damages of Kshs. 4,000 was proved".*

24The Appellant has submitted that the hypothetical award by the trial magistrate was inordinately low. The Appellant referred the court to:

> (a) ***Kennedy Mutunda Nzoka vs Basco Product (Kenya) limited (2013) eKLR*** where Nduma J. on 30th August 2013 awarded the Appellant Kshs. 210,000 as general damages for permanent disability of 2% to his
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> That the Appellant herein suffered a permanent physical disability of 10% to his right middle finger. That the authority was decided in 2013, 5 years ago. The Appellant urged the court to follow:
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> (b) ***Oluoch Eric Gogo vs Universal Corporation Limited (2015) in the High Court of Kenya at Nairobi, Civil Appeal No. 263 of 2006,*** where Aburili J. on 7th May 2015 awarded the Appellant Kshs. 200,000 as general damages for a crush to his left thumb. The Appellant urged the court to award the Appellant Kshs. 300,000 as general damages for the injuries suffered.

26The respondent on the other hand relies on the decision in ***C.B General Contractors Limited vs Cornel Odhiambo Odeyo (2018) eKLR*** in which Njoki Mwangi J. considered an award of general damage in the sum of Kshs. 200,000 to be on the higher side. The respondent submitted that the cases of ***Munga Nzaka Munya vs Manji Govid and Company and Timsels Limited vs Pemia Ochieng Omondi (2011) eKLR*** are relevant to this case. In Timsels Limited case (supra) Wendoh J. awarded Kshs. 60,000 in general damages. The respondent submits that these cases are similar to the present case.

27I have considered the facts of this case, vis a vis the principles of awarding damages set out in ***Kemfro Atica Limited T/A Meru Express and Another vs A.M Lubi and another (No. 2) (1983) KLR 30*** in which the Court of Appeal held:

> *"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either that the judge, in assessing damages,*
>
> *(a) Took into account an irrelevant factor, or*
>
> *(b) Left out of account a relevant one, or that, short of this*
>
> *(c) The amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage".*

2. In the present case, it is the court's considered view that the trial magistrate did not refer to any relevant authorities in arriving at the

hypothetical award of Kshs. 100,000 in general damages.

29I find the cases of ***Kennedy Mutinda Nzoka and Oluoch Eric Gogo (supra)*** relevant and similar to the present case and therefore a good guide in assessing general damages reasonably due to the Appellant. The Appellants in these cases had similar injuries. Considering the passage of time, I award the Appellant general damages in the sum of Kshs. 250,000. I also award the Appellant Kshs. 4,000 in special damages.

30In the end, I enter judgment for the appellant against the respondent on liability at 100%, general damages Kshs. 250,000, special damages Kshs. 4,000, interest on general damages from date of judgment in the lower court and interest on special damages from date of filing suit. I also award costs of the suit in the trial court and of this appeal to the appellant.

Judgment Dated, Signed and delivered at Nairobi this 30th day of April, 2020

Mathews N. Nduma

Judge

ORDER

In view of the declaration of measures restricting court of operations due the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this judgment has been delivered to the parties online with their consent. 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 18 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.

Mathews N. Nduma

Judge

Appearances

Abok Odhiambo and Company for Appellant

M/S O. Madialo and Company Advocates for the Respondent

Chrispo – Court Clerk