REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

APPEAL NO. 7 OF 2019

(Formerly Kiambu High Court Civil Appeal No. 8 of 2018)

Before Hon. Lady Justice Maureen Onyango

RIITHO FARMERS CO-OPERATIVE SOCIETY.....APPELLANT

VERSUS

SAMUEL MWANGI NDEGE.....RESPONDENT

(Being an appeal from the judgment of Hon. Magistrate L. M. Wachira (Mrs.) Senior Principal Magistrate, delivered on 13th November 2017 at the Senior Magistrate's Court at Gatundu Law Courts in SPMC No. 216 of 2013 – Samuel Mwangi Ndege v Riitho Farmers Co-operative Society)

JUDGMENT

On 13th December 2017, the Senior Principal Magistrate, L. M. Wachira (Mrs.) delivered a judgment whereby the Appellant was held 100% liable and the Respondent awarded general damages of Kshs.600,000.00 and special damages of Kshs.2,000.00. Aggrieved by this decision, the Appellant lodged the appeal herein at the High Court in Kiambu on 22nd January 2018 seeking the following orders-

1. That the appeal be allowed.

2. That this court be pleased to order the dismissal of the suit in its entirety.

3. Alternatively, to prayer 2 above, the court be pleased to review the award on liability and quantum of damages.

4. That the Court be pleased to assess downwards the quantum of damages awarded to the Respondent.

5. That the Respondent do pay the costs of this appeal and the costs in the lower court.

6. That such further relief as may appear just to the Court.

In the Memorandum of Appeal, the Appellant lists the following grounds of appeal –

a. That the Learned Magistrate erred in law and in fact in disregarding the evidence before the Court and finding the Appellant 100% liable.

b. That the Learned Magistrate erred in law in failing to find negligence had not been proved to the required standard as against the Appellant.

c. That the Learned Magistrate erred in law and fact in awarding general damages and special damages to the Respondent amounting to Kshs.602,000.00.

d. That the Learned Trial Magistrate erred in law and fact and misdirected herself in failing to consider the submissions by the Appellant together with the authorities relied on by the Appellant.

e. That the court failed to consider the totality of the evidence adduced and consequently arrived at an erroneous decision.

On 17th October 2018, Meoli J. sitting at the High Court in Kiambu directed that the matter be disposed of by way of written submissions. Consequently, the Appellant filed its submissions on 19th February 2019 while the Respondent filed his submissions on 12th April 2019. The appeal was thereafter transferred to this court for hearing and disposal.

Appellant's Submissions

The Appellant submits that the Respondent did not prove his case for an award of damages as required by section 107 of the Evidence Act. It submits that Dr. G. K. Mwaura relied on the treatment notes of Gatundu District Hospital to establish the Claimant's injuries. It is the Appellant's submissions that the Learned Trial Magistrate failed to appreciate the pleadings thus arriving at a wrong computation of the award. The Appellant urges this Court to allow the appeal. The appellant relies on the case of ***Ndungu Dennis vs. Ann Wangari Ndirangu & Another [2018] eKLR.***

The Respondent's Submissions

The Respondent submits that the Appeal lacks merit and ought to be dismissed with costs. He submits that there was uncontroverted evidence that he slipped and fell into a hole in the course of performing his duties hence the Appellant was liable for the injury for failing to issue a warning sign regarding the hole, and for failing to provide safety wear and a safe working environment which was contrary to Section 6(1) of the Occupation Safety and Health Act.

The Respondent urges this Court to uphold the trial court's award of Kshs.602,000.00 in damages because he proved that he had suffered 30% incapacity. He relied on the case of **Arrow Car Limited vs. Elijah Shamalla Bimomo and 2 Others [2004] eKLR**.

Analysis and Determination

In a first appeal like this one, the duty of the court is to review the evidence before the trial court and come up with its own evaluation of the evidence.

I have considered the Appellant's record of appeal, the evidence adduced in the trial court and submissions by the parties, and find that the following are the issues for determination before this Court-

a. Whether the evidence on record and submissions support the findings and determination of the trial court.

b. Whether the orders sought by the Appellant should be granted.

The trial court held as follows-

> "The Plaintiff told court that he was injured while on duty and he was allowed off to go to hospital and he went to Gatundu District Hospital on the same date. This is supported by the treatment record produced in court and showing that he had actually been treated at Gatundu Level 4 hospital on the 19/06/2013 with history of a fall."

The Appellant in its submissions, argued that the trial court erred in failing to take into consideration the evidence of its witness that the Respondent's basis for leaving work was because he was unwell. The respondent's testimony was that after the fall, he told the manager that he had sustained an injury and proceeded to Gatundu Hospital for treatment. He produced the Hospital's General Outpatient Record dated 20th June 2013 to back his testimony.

The trial court also relied on the testimony of PW2 whose report had assessed the Respondent's permanent degree of functional incapacity at an overall percentage of 30%.

In finding the Appellant 100% liable, the trial court was of the following view-

> "Secondly, the Plaintiff told court that the area was sloppy. The defendant ought to have provided the Plaintiff with gumboots for better grip to lessen the likelihood of slipping and falling. The Defendant failed to do this and again, must be held culpable. I will thus find the Defendant was to blame for the injuries suffered by the Plaintiff and hold them 100% liable."

In its defence filed on 31st October 2013, the Appellant denied the occurrence of the accident and contended that it took all preventive measures to protect its employees by providing a safe working environment and protective clothing. It however did not state the specifics of how this was done.

According to the record, the respondent (plaintiff in the original suit) testified that on 19th June 2013, he fell due to water on the ground and hurt his back. That he informed the Manager, Mr. Karanja and he was treated on 20th and 28th June 2013 and again on 1st August 2013. That he was later referred to Kenyatta National Hospital for further treatment.

Under cross examination the claimant testified that he went to hospital the same day he was injured and again on 21st September 2013. That he was also treated on 24th January 2013 for back and abdomen problems. He agreed with counsel for the appellant that the treatment notes

from Gatundu Hospital show he complained about back pain after carrying heavy load.

The record further reflects that PW2 DR. GEORGE KUNGU MWAURA testified that he compiled his medical report relying on the history, physical examination, treatment cards from Gatundu Hospital and Kenyatta National Hospital as well as MRI of the spine report. PW2 further testified that the injury of PW2 could have been caused by any other factor and that in the treatment notes of 24th June 2013, PW1 had stated that the had been having pain for two weeks.

DW1 STEPHEN KARANJA testified PW1 (the respondent in this appeal) was an employee of the appellant and was at work on 19th June 2013. That the respondent reported to him that he was not feeling well and took the afternoon off and never reported back the following day or thereafter. He testified that there was no report of an accident on that day.

Under cross examination DW1 testified that the respondent called him at night to report that he was at Gatundu Hospital.

In the judgment it is stated that –

> "The plaintiff's testimony is that he was working for the defendant as a casual. On the particular date, the plaintiff told court that he was carrying a sack of coffee berries. He told court that the ground was a bit sloppy and there was a hole and he slipped and fell into the hole. He told court that he sustained injuries to the lower back and when x-rays were done, it showed that he suffered disc and nerve compression. The plaintiff told court that he reported the incident to the manager and he was allowed to go for treatment at Gatundu Level 4 Hospital. The plaintiff blamed the defendant for not providing a safe environment and system of work. He also states that he was not provided with protective gear.
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> . . .
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> The Defendant called one witness who confirmed that indeed the plaintiff was an employee of the defendant and that the witness had received a report of the date of the alleged injury but the report was that the plaintiff was unwell and wanted to go see a doctor. According to the witness there was no report of an injury at work. He told court that he allowed the plaintiff off duty to go to hospital for being unwell and the plaintiff never ever reported back to work form that day. The court is to determine both liability and quantum."

There is no evidence of sloppy ground or that the respondent (PW1) fell into a hole, slipped and fell as stated in the judgment.

On the issue of lability, the Trial Magistrate held that –

> "The defence argument is that the report given to the supervisor was that the plaintiff was unwell and not that he was injured. However, no document was availed to actually demonstrate that the plaintiff had reported that he was unwell and not that he was injured. The defendant under the law is obligated to maintain a record of injuries and of sick sheet relating to employees as part of record keeping and therefore ought to be bowing to the court the document said off duty forms showing that indeed the plaintiff was unwell and not injured. This is lacking and therefore the allegation that the plaintiff was unwell remains the word of the defence witness against that of the plaintiff. On a balance of probabilities therefore, 1 will find that indeed the plaintiff was injured while on the course of duty with the defendant."

Again, no evidence was adduced about records. In any event the appellant denied that there was any injury and thus it could not have had records of injury. Secondly DW1 testified that the respondent did not report back to work after that date. The appellant would therefore not have had any sick sheet as the same is only obtained from the employee after he has been seen by the doctor.

Further, the finding of the Trial Magistrate that DW1 "*did not state that there was no hole on the pathway of the plaintiff*" is not supported by the evidence on record.

Again the finding that the appellant ought to have provided the respondent with gumboots for better grip to lessen the likelihood of slipping and falling is not supported by the evidence. No evidence was adduced to the effect that gumboots would stop a person from falling into a hole and getting injured.

Further, the Trial Magistrate observed that *"… therefore the allegation that the plaintiff was unwell remains the word of the defence witness against that of the plaintiff. On the balance of probabilities therefore, I will find that indeed the plaintiff was injured while on the course of duty with the defendant."*

This was a misapplication of the law. As submitted by the appellant, the elementary principle of law is that "*he who alleges, must prove*". The principle is firmly embedded in Section 107 of the Evidence Act, Cap 80 of the Laws of Kenya which stipulates that: -

> **107. Burden of Proof**
>
> **1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**
>
> **2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**

I agree with the appellant that the respondent did not discharge the burden of proof on a balance of probabilities.

On the issue whether the respondent was injured in the course of duty, the Trial Magistrate failed to take into account the evidence of the claimant during cross examination to the effect that he had been treated for similar injury as those alleged prior to the date of the accident. The treatment notes from Gatundu Hospital show that on 24th January 2013, long before the alleged injury on 21st September 2013, the respondent had been treated for abdominal pain and lower back pains. Further on 24th June 2013, the medical history reads that "*patient reported with lower back pain for 2/52 after carrying heavy loads on the back*."

> "FINDINGS
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> MRI of L. S. Spine reveals normal alignment of vertebral bodies with mild straightening of vertebral column.
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> No evidence of spondylolisthesis.
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> Reduced signal intensity of L5-.S1 disc is seen in T2W image suggestive of disc desiccation with diffuse posterior disc bulge causing flattening of thecal sac anteriorly and contacting with bilateral exiting nerves.
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> Rest of vertebral bodies and disc height and signal intensity is within normal limits.
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> The conus medullaris is at LI level.
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> Screening of thoracic spine does not reveal any significant abnormality.
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> The visualized spinal cord bulk and signal intensity is normal.
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> Structures of posterior elements are normal.
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> Pre and paravertebral soft tissues shadows are unremarkable.
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> Impression:
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> Disc desiccation L5-S1 with diffuse disc bulge causing flattening of thecal sac anteriorly and contacting with bilateral exiting nerves.
>
> Spinal canal measurements along with cord bulk and signal intensity is within normal limits.
>
> Screening of thoracic spine does not reveal any significant abnormality."

From the foregoing, I find that there was no evidence that the respondent sustained injury after he slipped and fell in a hole at the place of work. I further find that the Trial Magistrate took into account matters that were not adduced in evidence and further misdirected herself on matters of law thus arriving at a wrong finding.

The appeal is accordingly allowed. The finding of the Trial Magistrate is set aside and substituted by an order dismissing the suit in its entirety.

Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF APRIL 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court of 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