REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CIVIL APPEAL NO 6 OF 2018

KESI JINDWA KARUKU.................................APPELLANT

VERSUS

STEEL MAKERS LTD...................................RESPONDENT

(Appeal from the judgment of Hon .L.K. Gatheru, RM dated 29th May 2018

in

Mariakani SRMCC No 307 of 2016)

JUDGMENT

1. On 29th May 2018, ***Hon. L.K Gatheru, RM*** delivered judgment in ***Mariakani SRMCC No 307 of 2016*** dismissing the Appellant's case in its entirety.

2. Being dissatisfied with the decision by the trial court, the Appellant filed the present appeal.

3. In his case before the trial court, the Appellant stated that on 18th December 2015, while working with the Respondent, he was removing hot metals from a conveyor belt using tongs when one of the hot metals missed the normal belt hitting him on the right leg and causing a burn.

4. The Appellant blamed the Respondent for failing to supply him with safety boots.

5. On its part, the Respondent states that the Claimant's claim was all along fictitious.

6. In his Memorandum of Appeal dated 27th June 2018, the Appellant raises the following grounds of appeal:

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 18th June 2015;

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 consider and analyse the Appellant's evidence on liability and quantum as required in law;

d) That the learned Magistrate erred in both law and fact by failing to consider the Appellant's written submissions;

e) 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;

f) That the learned Magistrate erred in both law and fact by considering a defence not pleaded nor proved by the Respondent in its defence;

g) 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 evidence from the court;

h) That the learned Magistrate erred in both law and fact by failing to attribute negligence on the part of the Respondent;

i) That the learned Magistrate erred in both law and fact by failing to find that the Appellant had proved his case on liability;

j) That the learned Magistrate erred in both law and fact by failing to find that the burden of proof in negligence had shifted to the Respondent;

k) That the learned Magistrate erred in both law and fact by finding that the Appellant required corroboration of his evidence to prove his case;

l) 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;

m) That the learned Magistrate erred in both law and fact by showing open bias to the evidence of the Appellant;

n) 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.

7. This is a first appeal and I am therefore guided by the well settled principles on the duty of a first appellate court. These principles were reiterated by the Court of Appeal in ***Wambaira & 17 others v Kiogora & 2 others [2004] eKLR*** as follows:

> "***This being a first appeal, we are not bound by the findings of fact by the superior court and we are under a duty to re-evaluate the evidence and reach our own conclusions – see <u>Selle v Associated</u> <u>Motor Boat</u> <u>Company Ltd</u> (1968) E.A. 123 and <u>Williamson Diamonds</u> <u>Ltd v Brown</u> [1970] E.A .1. We should however be slow to differ with the trial Judge and the caution is always appropriate as O'Connor P states in Peters v Sunday Post Ltd [1958] EA at p. 429: -***
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>> ***It is a strong thing for an appellate court to differ from the finding on a question of fact of a Judge who tried the case and who had the advantage of seeing and hearing the witness."***

8. The Appellant raises fourteen (14) grounds of appeal, many of them similar in substance. In my estimation, these grounds fall under the two broad categories of liability and quantum of damages.

9. In his judgment, the learned Trial Magistrate faulted both the Appellant and the Respondent for failure to formally produce documents they sought to rely on; for the Appellant, it was the treatment notes and for the Respondent it was the casual's and injuries registers.

10.In the final analysis however, the trial Magistrate put the responsibility of proving the claim squarely on the Appellant.

11.In his judgment, he states:

> "***What the plaintiff does not explain at all is his failure to produce the treatment notes to the court. What should the court interpret of it bearing in mind that the defendant claims the claim is fictitious? In Simba Commodities Ltd - vs – Citibank N.A (2013) eKLR, it was restated that failure for a party to call and avail its witnesses with knowledge concerning facts to a party's case gives rise to an inference that the testimony of such witness may injure such parties (sic) testimony. I can deduce this inference as true with respect to the treatment notes and probably an eye witness…………………………***
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> ***The plaintiff does not explain at all why he left out such critical evidence noting that the doctor saw the patient after 4 months 28 days and only saw some scars, which to my mind were not sufficient proof of injury at the respective time and place……………………………..***
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> ***That said, it has not escaped my mind that the plaintiff still bore the burden of proving his case on a balance of probabilities and it was not for the defendant to prove the negative. Section 108 of the Evidence Act, Cap 80 Laws of Kenya is specific that the burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side."***

12.In their written submissions, the parties spared no effort in citing case law of a persuasive force on the effect of failure to formally produce treatment notes. My view on this matter is that in a personal injury claim, treatment notes are to be considered alongside other evidence placed before the Court.

13.While failure to the produce treatments may not always be fatal to the plaintiff's case, it could well be so in certain cases. In this particular case, the Appellant was accused of filing two fictitious claims alleging a similar accident and relying on fraudulent treatment notes.

14.Right from the pre-trial stage, the Respondent expressed doubt on the authenticity of the claim and insisted that the treatment notes be formally produced. The Claimant appears to have ignored the Respondent's doubts and did not bother to either produce the treatment notes or call any independent testimony to back his word.

15.The Court was referred to the decision in ***Timsales Ltd v Wilson Libuywa [2008] eKLR*** where **Maraga J** (as he then was) stated the following:

> "***In any alleged factory accident which is disputed by the employer it is the duty of the employee, as the Plaintiff, to prove on a balance of probabilities that he indeed suffered the alleged accident. A medical report by a doctor who examined him much later is of little, if any, help at all. Although it may be based on the doctor's examination of the plaintiff on whom he may……have observed the scars, unless it is supported by initial treatment card it will not prove that the plaintiff indeed suffered an injury on***

the day and place he claimed he did. The scars observed on such person could very well relate to the injuries suffered in another accident altogether."

16.Similarly, in ***Peter Migiro v Valley Bakery Limited [2015] eKLR*** **Mulwa J** stated:

> "***I find that the trial magistrate failed to address his mind to the fact that without production of the initial treatment notes, the fact of an injury, and without any other corroboration by way of witnesses, could not be proved."***

17.In light of the Respondent's stiff opposition to the Appellant's claim in its defence, witness statement and pre-trial conference, the Appellant ought to have gone out of his way to present all the evidence available in support of his case. Instead, he only gave his word and a post injury medical report which, in my view, was not adequate to prove that the alleged accident actually occurred.

18.For this reason, I must agree with the learned Trial Magistrate that the Appellant failed to prove the limb of liability.

19.Having so decided, the issue of quantum of damages is moot. However, the Trial Magistrate, did as he was required to do, return a figure of Kshs. 130,000 in damages for pain and suffering and Kshs. 2,000 in special damages. In reaching this assessment, the learned Trial Magistrate took into account that the Appellant had not sustained permanent injuries.

20.Assessment of damages is an exercise of judicial discretion. In ***Kemfro Africa Limited T/A Meru Express Service Gathogo Kanini v A.M Lubia and Olive Lubia [1982-1988] 1 KAR 727 at p. 730*** **Kneller JA** stated:

> "***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 were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See Ilango v Manyoka [1961] E.A. 705709, 713; Lukenya Ranching and Farming Cooperative Society Ltd v Kavoloto [1970] E.A. 414, 418, 419."***

21.I find nothing in the assessment by the learned Trial Magistrate to cause me to interfere with his award.

22.On the whole, this appeal fails and is dismissed with costs to the Respondent.

DATED SIGNED AND DELIVERED AT MACHAKOS THIS 9TH DAY OF APRIL 2020

LINNET NDOLO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to 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 electronically, with their consent. The parties 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, the Court is guided by Article 159(2)(d) of the Constitution of Kenya which commands the Court to render substantive justice without undue regard to technicalities, Article 40 of the Constitution which guarantees access to justice, and Section 18 of the Civil Procedure Act which imposes a duty to employ suitable technology to facilitate just, expeditious, proportionate and affordable resolution of civil disputes. Further, in view of the ensuing disruption of the court diary, this judgment has been delivered during the court recess.

LINNET NDOLO

JUDGE

Appearance:

Miss Osino for the Appellant

Mrs. Maithya for the Respondent