REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CIVIL APPEAL NO 17 OF 2019

[ORIGINALLY MOMBASA HIGH COURT CIVIL APPEAL NO 11 OF 2018]

ONESMUS NJENGA GACHIE.....APPELLANT

VS

HYDERY (P) LIMITED.....RESPONDENT

(Appeal from the judgment of Hon J. A. Kassam, SRM dated 2nd February 2018

in

Mombasa CMCC No 581 of 2016)

JUDGMENT

1. This appeal was originally filed in the High Court at Mombasa as ***Civil Appeal No 11 of 2018***.

2. The appeal was canvassed before the High Court (**Chepkwony J**) by way of written submissions. In her judgment dated and delivered on 27th March 2019, the learned Judge of the High Court determined that she had no jurisdiction to hear the appeal because the Appellant's claim arose from a work place injury based on an employment relationship. This is how the appeal found its way to this Court.

3. The facts of the case as recorded by the trial court are that on 9th February 2016, the Appellant was working for the Respondent, loading bags of fertilizer from a go-down to a lorry, when a colleague, who was throwing bags from a stack to the floor miscalculated and threw a 50 kg bag on the Appellant's back.

4. The Appellant, who already had another bag on his back, fell and sustained an injury. In his Plaint filed in the lower court the Appellant gives the following particulars of injuries:

a) Cut wound on the right hand;

b) Blunt object injury on the head and ears;

c) Blunt object injury on the eye and back;

d) Blunt object injury on the chest and abdomen.

5. The Appellant blamed the Respondent for the accident, citing the following particulars of negligence/breach of contract by the Respondent:

a) Failing to take any reasonable care to see that the Appellant would be reasonably safe while engaged in his work;

b) Exposing the Appellant to risk of damage and injury which the Respondent knew or ought to have known;

c) Failing to provide the Appellant with safety clothes and/or gloves;

d) Failing to provide any sufficient supervision;

e) Having an inherently dangerous system of work.

6. The Respondent denied the Appellant's claim stating in the alternative that the accident was caused and/or contributed to by the negligence of the Appellant.

7. The Respondent pleaded the following particulars of negligence against the Appellant:

a) Failing to work in a careful manner and working in a careless manner;

b) Failing to take sufficient heed for his own safety;

c) Failing to take and/or to follow instructions on safe working practice;

d) Failing to wear the safety gear provided.

8. After hearing the parties, the lower court dismissed the Appellant's claim.

9. Being dissatisfied with the judgment of the trial court, the Appellant filed the present appeal. In his Memorandum of Appeal dated 9th February 2018, he raises the following grounds:

a) That the learned Magistrate erred in fact and in law in failing to find that an accident occurred when the Appellant was in the course of his employment with the Respondent;

b) That the learned Magistrate erred in law and fact by failing to attribute negligence on the part of the Respondent and failing to analyse the Appellant's evidence in the particulars of negligence;

c) That the learned Magistrate erred in law and fact in failing to analyse the evidence adduced by the Respondent's witnesses as well as the

Appellant's evidence;

d) That the learned Magistrate erred in law and fact in failing to find that the Respondent was vicariously liable for the accident that occurred on 9th February 2016;

e) That the learned Magistrate erred in fact and in law in failing to consider that the Respondent corroborated the evidence of the Appellant *in toto;*

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

10. This is a first appeal and as held in ***Selle & another v Associated Motor Boat Co. Ltd (1968) EA 123***, I am obligated to reconsider and re-evaluate the evidence and draw my own conclusions bearing in mind that I have had no chance to observe the demeanour of the witnesses.

11. In a rather short judgment, the learned trial Magistrate states:

"I have carefully considered and evaluated the evidence before court. I have also taken note of the submissions filed by the Plaintiff and Defendant. There was no dispute that an accident occurred on 9th day of February 2016 whereby the Plaintiff being a casual laborer of the Defendant whilst in the course of his duties sustained injuries.

The main issue was whether the accident was caused by the negligence of the Plaintiff and/or the Defendant."

12. Testifying for the Respondent before the trial court, Kibanda B. Mwingo stated that the Appellant was the sole author of his own misfortune that led to his injuries as he did not take precautions during the course of his duties. Mwingo did not however have any record to show that the Appellant had been supplied with safety gear.

13. Further, the Respondent's witness did not dispel the details given by the Appellant that a colleague miscalculated the flow of work and threw a 50 kg bag of fertilizer on the Appellant's bag. The trial court appears to have found as much. In this regard, the learned Magistrate concluded the following:

"The Plaintiff was injured when his co-worker threw a 50 kgs sack of manure at him and therefore the Court cannot link the Defendant negligence (sic) to the injury sustained by the Plaintiff."

14. From the record, it is clear that the learned Magistrate absolved the Respondent from blame without considering the issue of vicarious liability. I say so because there was no dispute that the accident occurred in the course of work at the Respondent's premises.

15. In ***Rose v Plenty & another [1976] 1 ALL ER 97***, **Lord Scarman LJ** stated the following:

> ***"But basically as I understand it, the employer is made vicariously liable for the tort of his employee not because the employee is an invitee nor because of the authority possessed by the servant, but because it is a case in which the employer having put matters into motion should be liable if the motion that he has originated lead to damages to another."***

16. Having found that the accident occurred when the Appellant's colleague wrongfully threw a bag at the Appellant, the learned Magistrate ought to have applied the principle of vicarious liability and thus found the Respondent liable for the accident.

17. My analysis of the evidence adduced before the trial court reveals that the allegations of negligence made against the Appellant were mere statements not supported by any evidence. The issue of contributory negligence by the Appellant does not therefore arise.

18. There is one more thing that the trial Magistrate failed to do; and that is to undertake an assessment of damages he would have awarded had he found in favour of the Appellant. Unless a court is the final port of call on a matter such as this one, assessment of damages is a required step as it saves precious judicial time and assures expeditious disposal of cases.

19. This issue was well captured by **Mabeya J** in ***Lei Masaku v Kulpana Builders Ltd [2014] eKLR*** in the following words:

> ***"There is the issue of failure to assess damages as it has been held time and again by the Court of Appeal that the court of first instance must assess damages even if it finds that liability has not been established, to have causally dismissed the suit and failing to address the issue of damages is serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the Appellate court needs to know the view taken by the court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behoves this court to assess quantum….."***

20. In his submissions before the trial court, the Appellant relying on the decision in ***Munza Investment Company Limited v Makau Mwonewa [2012] eKLR*** asked for an award of Kshs. 200,000 in general damages and Kshs. 2,000 in special damages.

21. The Respondent on the other hand, relied on ***Sokoro Saw Mills Limited v Grace Nduta Ndungu [2006] eKLR*** and submitted that Kshs. 30,000 would adequately compensate the Appellant.

22. According to the medical report prepared by Dr. Ajoni Adede on 23rd February 2016, the Appellant suffered soft tissue injuries with no permanent disability. This was corroborated by the report by Dr. Udayan R. Sheth dated 26th April 2016; the only addition being that at the time of examination, the Appellant complained of back pain.

23. Both medical reports record the Appellant's age as 44 years at the time of accident. This, coupled with the degree of injuries lead me to the conclusion that he could well continue working into the foreseeable future. However, because of the manual nature of work he was engaged in and his complaint of back pain as recorded by Dr. Sheth, his earning capacity appears to have been diminished by the accident.

24. Taking all these factors into account, guided by awards in similar cases (see ***Rosemary Nanjala Baiba v Benson Irungu (Nairobi HCCC No 577 of 1991)*** and allowing for inflation, I find an award of Kshs. 150,000 in general damages reasonable. I also allow the sum of Kshs. 2,000 in special damages.

25. In the final analysis, the judgment by the trial court dated 2nd February 2018 is set aside and replaced with an award in favour of the Appellant in the sum of **Kshs. 150,000 in general damages** and **Kshs. 2,000 as special damages**.

26. The Respondent will pay the costs of this appeal and those in the court below.

27. It is so ordered.

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:

Mrs. Kariuki for the Appellant

Miss Mutune for the Respondent