



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**APPEAL NO. 32 OF 2018**

*(Before Hon. Justice Mathews N. Nduma)*

**JACOB LUBWA WATAYI ..... APPELLANT**

**VERSUS**

**WEST KENYA SUGAR CO. LTD .....RESPONDENT**

**JUDGMENT**

1. This is an Appeal by the Appellant from a decision of Honourable P. Achieng delivered on the 23<sup>rd</sup> January 2015 at Kakamega Chief Magistrates Court.
2. The learned trial magistrate dismissed with costs the suit by the Appellant against the Respondent founded on alleged injuries sustained by the Appellant in the Course of this employment by the Respondent as a cleaner.
3. In the Judgment the learned Magistrate found as follows on the issue of liability as presented by the plaintiff:-
4. *“ From his testimony there is no indication that he ever informed anybody at the company that he was injured and nobody seems to have witnessed the said accident. It was during cross examination that he stated that his supervisor was Wycliffe Odhiambo and that he reported the accident to the said supervisor who took no action”.*
5. The learned trial Magistrate speaking of the Respondent’s accident register book produced before Court by DW1 stated:-
6. *“ There was no accident recorded on 22<sup>nd</sup> July 2011. From the evidence of the plaintiff, I am not convinced that the defendant company ever came to know about his alleged injury on 2<sup>nd</sup> July 2011. “*
7. With that the learned trial Magistrate found.
8. *“ I find that the plaintiff has not proved his case against the defendant on balance of probabilities, I therefore dismiss his claim against the defendant with costs to the defendant. “*
9. The appellant raised the following grounds of appeal:-
  1. The Learned Magistrate erred in fact and in law in awarding general damages and compensation that is too Low regarding the injuries suffered by the Appellant.
  2. The Learned Magistrate erred in fact and in law in relying on uncorroborated inadmissible and contradictory evidence of the Respondent in dismissing the Appellants’ case.
  3. The Learned Magistrate erred in fact and in Law by making a determination as to the cause of action on facts not adduced by the Respondent.
  4. The learned Magistrate erred in fact and in Law by placing the burden of proof as regards employment of the Appellant when the same had shifted to the Respondent and
  5. The Learned Magistrate erred in fact and in law by failing to appreciate the Appellants’ evidence in record.

## **Determination**

10. This being a first Appeal the Court is guided by the decision in **Selles –Vs- Associated Motor Boat Company (1968) EA 123 at page 126** where Sir Clement De Lestang V. P made the following finding:-

11. “ *An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed at some point to take account of particular circumstances on probability materially to estimate the evidence in the case generally ( Abdul Hameed Saif –Vs- Ali Mohamed Sholah (1955) 22 E. A. C. A 270) followed*”.

12. Guided as above, the court has carefully considered the pleadings as filed, the testimony by PW1 Jacob Lubwa Wataya the Appellant, PW2 Dr. Charles Audai and that by DW1 Eliud Ebu and the written submissions by the parties and has arrived at the following findings of law and fact:-

13. PW1, the Appellant did not in his evidence in chief adduce any evidence that he had reported an injury to any person in the course of duty with the respondent. The finding by the trial magistrate in this respect is correct and cannot be faulted.

14. PW2, Dr. Charles Audai testified that he was a Medical practitioner practicing at Lubin Medical Clinic. That he examined the Plaintiff/Appellant sometimes in October 2011 who claimed he had sustained a cut wound while on duty at West Kenya Sugar Company on 22<sup>nd</sup> July 2011. PW2 stated that the Cut wound was on the left leg. PW2 opined that the Appellant had sustained soft tissue injuries to the left leg. That the wound was expected to heal well without permanent impairment. PW2 produced a medical report in that respect.

15. This testimony by the doctor gave a clear picture of the injury suffered by the Appellant but this evidence had no probative value as to where the injury was sustained. The testimony did not therefore fill the gap in the Appellant’s testimony as regards lack of a report made to the respondent of the occurrence of the injury to the Appellant in the course of his employment on 22<sup>nd</sup> July 2011. PW2 examined PW1 more than two months later from the dated of the alleged incident.

16. DW1 Eliud Ebu testified that he was a supervisor in the employee of the respondent and knew the Appellant well. DW1 testified that the Appellant was at the material time working as a sugar hopper attendant. In this capacity his work was to remove sugar as and when it got stuck on the sieve and unblock the same. DW1 testified that he was not notified of any injury sustained by the Appellant. DW1 also produced the record for the period between 16<sup>th</sup> July 2011 and 28<sup>th</sup> July 2011 and the record showed no entry of any injury to an employee including the Appellant on 22<sup>nd</sup> July 2011.

17. The accident register was produced as exhibit “ DEXH 1”.

18. The learned trial Magistrate did not err in arriving at the decision that the alleged injury to the Appellant was neither reported nor recorded with the respondent by the Appellant.

19. The learned trial Magistrate therefore arrived at the correct conclusion of fact that the Appellant had failed to prove on a balance of probabilities that the injury he sustained occurred in the course of his employment at the premises of the respondent.

20. This Court finds no reason to fault the finding of the trial Magistrate in this respect and the Court therefore finds that the Appeal lacks merit on the issue of liability.

21. From the above it is not necessary to revisit the assessment of damages by the learned Magistrate. However, the evidence by PW2 clearly showed that the Appellant had suffered soft tissue injuries from a cut on the left leg. That the injury did not leave any permanent disability. I do not find that the trial Magistrate erred in fact and in law in granting the hypothetical award of general damages in sum of Kshs. 70,000. The Appeal on the issue of damages also lack merit and is equally dismissed.

22. In the final analysis the Appeal lacks merit and is dismissed with no order as to Costs given that the Appellant was a lowly paid employee of the respondent who was kept on casual terms for inordinately long period having worked for the respondent from the year 1998 until the time of the alleged accident on 22<sup>nd</sup> July 2011.

23. For the avoidance of doubt no costs are payable in respect to this Appeal and the trial Court proceedings.

**Judgment Dated, Signed and delivered at Nairobi this 11<sup>th</sup> day of June, 2020**

**Mathews N. Nduma**

**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 15<sup>th</sup> March 2020, this ruling 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**

Mr. Abok for Appellant

Mr. Ojuro for Respondent

Chrispo – Court Clerk