



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

APPEAL NO. 43 OF 2018

(Before Hon. Justice Mathews N. Nduma)

JOHN MAKORI MASWARI.....CLAIMANT

VERSUS

OGEMBO TEA FACTORY.....RESPONDENT

JUDGMENT

1. This is an Appeal from the Judgment and decree of the Senior Magistrate at Ogembo, C. M. Kamau delivered on 3/5/2012. The Appeal impugns the decision of the trial Magistrate in finding in favour of the respondent against the weight of the evidence adduced and applying wrong principles of law whilst assessing liability while no negligence had been established on the part of the appellant.

2. This being a first appeal the court shall be guided by the principles set out in the case of **Selle –VS- Associated Motor Boat Company Ltd. (1968) E.A 123** where Sir Clement De Lestang stated: -

“This court must consider the evidence evaluated in itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

3. The facts before the trial court as presented by PW1 were that the plaintiff was on 13/6/2018 working at Ogembo Tea Factory in the sorting section and was carrying tea from the drier to the sorting machine. The plaintiff was using a sack to carry about 50kg of tea.

4. While doing that the plaintiff slipped and fell down and the left leg was injured. The plaintiff was given a sick sheet by a supervisor Mr. Evans Bichange and went to Gucha District Hospital.

5. The plaintiff was treated and returned the sick sheet to the company. The plaintiff produced the treatment sheet.

6. The plaintiff was later seen and examined by Dr. Ajuoga who prepared a medical report and paid Kshs. 6,500 for it. The plaintiff produced the medical report. The plaintiff stated that the injuries had healed. The plaintiff testified that he blamed the company for the injuries sustained for not giving him an overall and gumboots whilst working.

7. The plaintiff said that the overall usually covered the whole body and would have prevented the injury. The plaintiff added that if he had gumboots he would not have slipped and fell down. The plaintiff prayed for damages in respect of the injuries.

8. Under cross examination by Mr. Anyumba for the defendant, the plaintiff stated that the floor had been wiped and had not dried up and that the was aware that the floor was wet. That there was no warning placed by the defendant to warn workers of the slippery floor. That the plaintiff had no alternative but to walk on the wet floor to do his work.

9. That the floor had holes hence the cuts he received when he fell. That the work was not stopped when the floor was wiped. That he had asked the storekeeper Mr. Makori for gumboots and overall but was not given. The plaintiff added that he was aware that it was dangerous to work without gumboots. The plaintiff further said that there was no clinic within the factory. That he had worked for the Defendant from

the year 2004 up to 2009.

10. DW1, Zablun Mbera testified that he was a production supervisor at Ogembo Tea Factory and that on 13/6/2008 he was on duty. That he remembers the plaintiff and that he worked for the defendant. That the plaintiff was at work on 13/6/2008 and he earned overtime. That he was not aware if an accident occurred at work on the day since the accident register did not indicate that.

11. DW1 said that if the plaintiff was involved in an accident the register would have indicated the same. DW1 produced the register. DW1 stated that the plaintiff no longer worked for the company. Under cross examination DW1 testified that the plaintiff was supervised by one Mr. Ndolo who was since deceased.

12. That if there was an accident, it was reported to the immediate supervisor who would in turn record the same in the register. DW1 stated that injured workers were referred to Gucha District Hospital and forms are issued to them.

13. In his Judgment, the learned magistrate carefully recapped and analysed the testimony by PW1 and that by DW1 and correctly found that it was not in dispute that the plaintiff worked for the defendant on 13/6/2008.

14. The magistrate found that the plaintiff had demonstrated that an accident occurred whilst he was at work and he had injured his leg.

14. The magistrate noted that the plaintiff had produced a treatment book dated 13/6/2008 showing that the plaintiff who was out patient no. 12960/08 had sustained a deep cut wound on the left leg.

15. That the plaintiff had also produced a medical report by Dr. Ajuoga dated 12/5/2009 which showed the same injury had been sustained by the plaintiff. Further a notice of occupational accident issued to the plaintiff by the defendant showed that the plaintiff was injured on 13/6/2008.

16. The magistrate found that the only evidence adduced to counter the testimony of the plaintiff was the defendant's accident register in respect of which DW1 conceded to some anomaly in the entries and that DW1 was not directly involved in the matter as he was not the immediate supervisor of the plaintiff.

17. It is the court's considered finding that there was sufficient evidence to prove on a balance of probabilities that the plaintiff slipped on a wet floor in the factory of the defendant in the course of duty.

18. The court further finds that the plaintiff established on a balance of probabilities that the accident would not have occurred had the respondent stopped work temporarily whilst the floor was being cleaned and by providing the plaintiff with protective gear and in particular gumboots that would have prevented the plaintiff from slipping and overalls that would have prevented or minimized the cut sustained on the left leg of the plaintiff.

19. The appellant has consequently failed to demonstrate that the learned Magistrate misdirected himself on the facts adduced by the plaintiff and the defendant did not err on the principle of law applicable in assessment of liability in respect of this case.

20. The Appellant did not expressly challenge the quantum of damages awarded by the trial Magistrate, the grounds of appeal having been wholly directed on the finding and apportionment of liability.

21. The court finds that the appellant was negligent in the manner discussed in this Judgment and the respondent contributed to the accident that occurred resulting in injuries in the course of duty.

22. The finding that the appellant was 80% liable for the injuries sustained cannot be faulted by this court. The appellant has not satisfied the principles applicable to warrant disturbing the Quantum of damages set out in ***Kango –VS- Manyoka (1961) E.A 414 echoed in Kemfro Africa Limited T/a Meru Express Service; Gathugo Kamin –VS- Air Lubia and Olive (1982 -1988) IKAR 727 and Ziphora Wambui Wambira & 17 others –VS- Gachuru Kogura, David Mwaniki Kuria –VS- Kiongore Saw Mills (2004) eKLR , cited by Asike Makhadia, J. (As then was) in HCC at Kisii Appeal No 125 of 2008 Josephine Angwenyi –VS- Samuel Ochillo*** as follows: -

“ Those Principles are that an appellant court in deciding whether it is Justified in disturbing the quantum awarded by the trial court, it must be satisfied that either the trial court in awarding damages took into account an irrelevant factor or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.”

23. In the present case the trial court awarded the respondent Kshs. 70,000 as general damages on 80% liability which worked out to kshs. 56,000. The court also awarded the respondent Kshs. 6,500 special damages bringing the total award to Ksh. 62,000.

24. The court upholds the Judgment of the trial magistrate in its entirety and dismisses the appeal with costs to the respondent in respect of the proceedings in the trial court and this court.

Dated, Signed and Delivered at Nairobi this 17th Day of September 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 15th 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

Appearance

L. G. Menzes & Co. for the Appellant

M/S Too Nyagosi & Co. for the respondent.

Chrispo: Court Clerk