REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI

CIVIL APPEAL NO 3 OF 2019

[FORMERLY MALINDI HIGH COURT CIVIL APPEAL NO 13 OF 2018]

MULI MUSYOKA...APPELLANT

VERSUS

STEEL MAKERS LIMITED...RESPONDENT

(Appeal from the judgment of Hon L.K Gatheru, SRM delivered on 14th February 2018 in Mariakani SRMCC No 402 of 2016)

JUDGMENT

1. This appeal was initially filed in the High Court in Malindi as ***Civil Appeal No 13 of 2018***. Upon perusal of the Record of Appeal on 26th April 2019, **Nyakundi J** declined to admit the appeal for hearing on the ground that the High Court had no jurisdiction. The matter was therefore referred to this Court for hearing and determination.

2. The Appellant was the Plaintiff and the Respondent was the Defendant in ***Mariakani SRMCC No 402 of 2016***.

3. Having lost the day at the trial stage, the Appellant filed the present appeal. In his Memorandum of Appeal dated 8th March 2018, he 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 17th December 2013;

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 need for a witness to corroborate his evidence 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 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 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's injury ought to have been a burn and not a cut without any expert evidence contrary to the Appellant's evidence;

m) 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 the treatment notes;

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

4. I am sitting as a first appellate court in this appeal and I am therefore under a duty to re-evaluate and re-consider the evidence on record so as to draw my own conclusions, bearing in mind that I have not had the opportunity to see and hear the witnesses for myself (see ***Selle v Associated Motor Boat Company Ltd (1968) E.A 1*** and ***Wambaira & 17 others v Kiogora & 2 others [2004] eKLR***).

5. The Appellant raises fifteen related grounds of appeal all touching on the twin issues of liability and quantum of damages.

6. In his judgment delivered on 14th February 2018, the learned trial Magistrate faulted both the Appellant and the Respondent for presenting inconclusive evidence. He however went ahead to hold that the Appellant bore the responsibility of proving his case. He stated thus:

> ***"Nevertheless, 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 proceeding lies on that person who would fail if no evidence at all were given on either side. I have already analysed the misgivings I have with the plaintiff's case and I believe that the evidence fell short of convincing the court he was injured at work as he alleged. He was bound to call evidence to tilt the balance in his favour but he failed to do so."***

7. In denying the Appellant's claim, the Respondent stated that the claim was fictitious. In this regard, the Respondent took issue with the Appellant's failure to call corroborative evidence and to produce the treatment notes.

8. In its decision in ***Kesi Jindwa Karuku v Steel Makers Ltd [2020] eKLR*** this Court held that failure to formally produce treatments could well be fatal in certain cases. In this case, the Respondent dismissed the Appellant's claim as fictitious and very early at the pre-trial stage, the Appellant was put on notice that formal production of the treatment notes would be required.

9. The Appellant neither produced the treatment notes nor did he call any independent evidence to support his word.

10. In his decision in ***Timsales Ltd v Wilson Libuywa [2008] eKLR*** **Maraga J** (as he then was) stated that:

> ***"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."***

11. All the Appellant presented by way of his evidence was his own testimony and that of Dr. Ajoni Adede who examined the Appellant 2 years and 7 months after the accident.

12. The Appellant therefore failed to establish the claim on liability and the decision of the learned trial Magistrate on this account is thus confirmed.

13. On quantum of damages, the learned Magistrate returned a figure of Kshs. 130,000 for general damages and Kshs. 2,000 for special damages.

14. In arriving at this assessment, the trial Magistrate was exercising judicial discretion and as held by the Court of Appeal in ***Farah Awad Gullet v CMC Motors Group Limited [2018] eKLR*** an appellate court may only interfere with the discretion of a trial court where the said discretion has been exercised injudiciously or is based on wrong principles.

15. There is nothing to suggest that the learned trial Magistrate did not exercise his discretionary power properly and this Court therefore has no reason to interfere.

16. Finally, this appeal fails and is dismissed with no order for costs.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 15TH DAY OCTOBER 2020

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Ms. Osino for the Appellant

Ms. Vanani for the Respondent