



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**APPEAL NO. 46 OF 2018**

**(Previously Kakamega High Court Civil Appeal No. 81 of 2015)**

**AYOKI FABRICATORS DVT COMPANY LIMITED.....APPELLANT**

**v**

**OSCAR ONGWENI OCHOLA.....RESPONDENT**

**(Being an Appeal from the Ruling and decree of the Chief Magistrates Court**

**in Kakamega CMCC No. 224 of 2014 delivered on the 9/9/2015)**

**JUDGMENT**

1. Oscar Ongweni Ochola (Respondent) sued Ayoki Fabricators DVT Co Ltd (Appellant) before the Chief Magistrates Court alleging breach of duty of care/negligence.
2. In a judgment delivered on 9 September 2015, the Court found the Appellant liable 90%.
3. The Respondent was awarded general damages of Kshs 200,000/- and special damages of Kshs 7,000/-.
4. The Appellant was aggrieved with the judgment and it filed a Memorandum of Appeal before the High Court in Kakamega contending that

1. The learned trial Magistrate erred in law and in fact in failing to take into account and/or disregarding the viva voce and documentary evidence adduced by the Appellant's witnesses which clearly demonstrated that the documents relied on by the Plaintiff, in particular the Mumias Sugar Company Limited medical referral chits were blatant forgeries and indeed had been used in numerous other cases.

2. The Learned trial Magistrate erred in law and in fact in failing to appreciate the Appellant's witness testimony that Mumias Sugar Company Limited had phased out manual treatment notes and only utilised computerised/electronic systems and documents hence the records relied on by the Plaintiff were forgeries and could not have been in the Plaintiff's possession unless they had been fabricated for use in the case.

3. The Learned trial Magistrate erred in law and in fact in failing to appreciate the Appellant's witness evidence that the entry permits issued to employees bore serial numbers unlike the document presented by the Plaintiff which had been fabricated.

4. The Learned trial Magistrate grossly misdirected himself in treating the evidence and submissions and the law pertaining thereto before him superficially and consequently came to a wrong conclusion.

5. The Learned trial Magistrate misdirected himself in ignoring the evidence and written submissions presented and filed by the Appellant in its entirety.

6. The Learned trial Magistrate erred in not sufficiently taking into account the fact that the Plaintiff's case failed to meet the threshold of proof required and hence the finding of liability and the award relating thereto offend the legal principles and is untenable.

7. The Learned trial Magistrate failed to apply himself judicially and adequately evaluate the Appellant's evidence and submissions thereto and applicable law and thereby arrived at a decision unsustainable by law.

5. The Appellant filed its submissions on 17 September 2018.

6. However, on 17 December 2018, the High Court, citing lack of jurisdiction transferred the Appeal to this Court.

7. Pursuant to Court orders, the Respondent filed his submissions on 11 November 2020.

### **Role of Court on a first Appeal**

8. The role of a first appellate Court has been the subject of discussion by the Court of Appeal.

9. In *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates (2013) eKLR*, the Court of Appeal stated as follows regarding the duty of a first appellate court:-

**This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.**

10. The Court will keep the interdict in mind.

### **Forged documents (medical and entry permit)**

11. The first 2 Grounds of Appeal set out by the Appellant were that the Respondent had produced and the trial Court had relied on forged medical records from a clinic operated by Mumias Sugar Co Ltd.

12. In trying to impugn the authenticity of the medical records, the Appellant's witness stated that the clinic run by Mumias Sugar never used to issue sick-sheets to patients and, therefore, the sick-sheet produced by the Respondent was a forgery.

13. Addressing the question of forged medical records, the trial Court noted that the testimony by the Appellant was of little probative value as it had not made any complaints about the forgery to the criminal investigative authorities.

14. The Court has re-evaluated the evidence relating to the medical records presented before the trial Court.

15. The Appellant knew the documents to be produced by the Respondent. It never sought that the medical records be produced by the authors/clinic.

16. Apart from the medical record from Mumias, the Respondent produced a treatment card from Matungu Sub-district hospital opened on the date of the accident and a medical report confirming the accident.

17. Further, the Appellant's witness was not an employee of Mumias Sugar and therefore his assertions that there had been a move from manual records to an electronic system of record-keeping at the clinic were bare allegations which needed to be confirmed by an employee of Mumias Sugar.

18. The Appellant also challenged the gate pass produced by the Respondent on the ground that it bore different dates and were usually kept by Mumias Sugar and not by the employees.

19. The Court has looked at the original entry permit. It is not very legible and the parties did not produce to the Court evidence to demonstrate the difference in dates.

20. This Court also notes that the Appellant did not direct any questions to the Respondent during cross-examination to explain how he came to have the permit to lend credence to the contention that they were kept by Mumias Sugar and not by employees.

21. The Court finds no error of law or fact by the trial Court in considering the exhibits produced by the Respondent.

22. It is noteworthy that the Appellant did not challenge the production and admissibility of the exhibits during the trial nor disclose the source of medical records itself had put on record.

### **Burden of proof**

23. Despite contending that the Respondent did not satisfy the burden of proof which was expected of him, the Appellant did not set out in its submissions how the Respondent failed to meet the test.

24. The Court has however reviewed the testimony of the Respondent. He produced a gate pass to demonstrate he was allowed into the factory as a subcontracted employee. He testified without being challenged that the accident was caused by a forklift driver employed by the Appellant. He explained how gas cylinders fell off the forklift.

25. The Appellant did not attempt to rebut the testimony or explain the failure to call the forklift driver.

26. The Court is satisfied that the Respondent met the burden of proving his case on a balance of probabilities.

#### **Untenable award**

27. The Appellant challenged the award made to the Respondent as untenable and contrary to applicable legal standards.

28. Regrettably, the Appellant did not advance this ground of appeal in its submissions.

29. Be that as it may, the trial Court considered the authority of Nyeri High Court Civil Case No. 320 of 1998, *Catherine Wanjiku Kingori v Gibon Theuri Gichubi* and held it was not applicable.

30. The Court also considered that the Appellant made no proposal on quantum.

31. The Court has looked at the submissions by the Appellant before the trial Court. No reference to quantum or case law was included.

32. This Court, therefore, finds the challenge to the quantum as being untenable as an attempt to remedy the casualness in the prosecution of the Appellant's case during the trial before the trial Court. The challenge is without merit.

#### **Conclusion and Orders**

33. From the foregoing, the Court finds no error of law or fact on the part of the trial Court. The Appeal is without merit and is dismissed.

34. The Judgment of the trial Court is upheld in its entirety.

35. Respondent to have costs of the Appeal as well as before the trial Court.

**Delivered through Microsoft teams, dated and signed in Kisumu on this 27<sup>th</sup> day of November 2020.**

**Radido Stephen**

**Judge**

#### **Appearances**

For Appellant	L.G. Menezes & Co. Advocates
For Respondent	Abok Odhiambo & Co. Advocates
Court Assistant	Chrispo Aura