



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT KISUMU**  
**APPEAL NO. 41 OF 2018**

(Previously Kakamega Civil Appeal No. 53 of 2012)

**JOHNSTONE KATSIKA MALALA.....APPELLANT**

v

**MUMIAS SUGAR COMPANY LIMITED.....RESPONDENT**

(An Appeal arising from the Judgment and decree of Hon. P. Achieng, Senior Resident Magistrate

in Chief Magistrate's Court in Kakamega Civil Suit No. 420 of 2011

delivered on the 8<sup>th</sup> day of June 2012).

**JUDGMENT**

1. In a judgment delivered on 8 June 2012, the Senior Resident Magistrate dismissed a suit brought by Johnstone Katsika (Appellant) against Mumias Sugar Co Ltd (Respondent).
2. The Appellant had alleged breach of statutory duty/negligence on the part of the Respondent.
3. The Appellant was not satisfied and he filed a Memorandum of Appeal before the High Court in Kakamega contending that
  1. The Learned trial Magistrate erred in law and fact in dismissing the Appellant's suit against the weight of evidence on record.
  2. The Learned trial Magistrate erred in law and fact by taking into account irrelevant factors and this making a finding that was contradictory to the Appellant's evidence.
  3. The Learned trial Magistrate erred in law and fact by failing to consider the Appellant's pleadings on record.
  4. The Learned trial Magistrate erred in law and fact by awarding general damages that were excessively low in view of the injuries sustained by the Appellant.
  5. The Learned trial Magistrate erred in law and fact in dismissing the Appellant's suit when the Appellant proved his case beyond reasonable doubt.
  6. The Learned trial Magistrate erred in entering the arena of being a document examiner/witness by going out of her way and holding that the Appellant's medical examination report was altered thus arriving at a decision which was patently biased towards the Appellant and thus occasioning a miscarriage of justice.
4. The Appellant initially filed his submissions on 4 April 2013 (and further submissions on 10 July 2018) while the Respondent filed its initial submissions on a date which is not clear from the record.
5. The High Court then scheduled Judgment for delivery in 2014, but that was not to be. The judgment was later rescheduled to 30 October 2018 (it is not clear why the High Court did not deliver judgment on 30 October 2018).

6. On 3 December 2018, the High Court declined jurisdiction and referred the Appeal to this Court.

7. The Court has considered all the material placed before it.

### **Role of first appellate Court**

8. The role of a first appellate Court was discussed in *Kamau v Mungai* (2006) 1 KLR 150 where it was held that this being the first appeal, it was the duty of the Court.... To re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard the witnesses and hence making due allowance for that.

### **Accident in the workplace on 20 May 2009**

9. The determination of the Appellant's suit before the trial Court turned on the question whether he had established through requisite evidence that he sustained injuries in the workplace on 20 May 2009 as a result of a breach of duty of care/negligence on the part of the Respondent.

10. The Appellant's testimony was that he was at work on the material day (he stated that there were 10 employees in the section present) and that at around midnight while moving down the stairs, he reached a slippery section, slipped and fell.

11. The Appellant testified that the section had no lights and that he sought medical treatment in the morning.

12. According to the Appellant, he would not have sustained the injuries if he had been provided with protective gear.

13. The primary document produced by the Appellant was a medical examination report from Bora Medical and Dispensing Clinic.

14. On the other hand, the Respondent's principal defence was that the Appellant was on duty from 7.00 am to 7.00 pm on 20 May 2009 and that no accident was registered in the records kept for that purpose.

15. A copy of the Appellant's pay record for the period 18 May 2009 to 30 May 2009 was produced (it shows he worked for 11 hours on 20 May 2009 but did not report to work on 21 May 2009 but worked thereafter through to 30 May 2009).

16. Addressing the question whether the Appellant got injured in the workplace on 20 May 2009, the trial Court considered the fact that the Appellant did not report to work on 19 May 2009 to discount his contention that he got injured at midnight on 20 May 2009, as that would mean he had been on duty from 19 May 2009.

17. The trial Court also considered the record which shows that the Appellant was on duty for 11 hours on 20 May 2009 (the record show he was not at work on 21 May 2009). If indeed the Appellant worked up to midnight on 20 May 2009, it is curious that he did not seek for overtime beyond the 11 hours endorsed on the payment record.

18. The trial Court further considered that the medical records produced by the Appellant had dates altered without any explanation.

19. In the view of this Court, the Appellant needed to explain the alterations to the medical reports in order to substantiate the exact date he got injured in the workplace.

20. The Court also has doubts as to how the Appellant continued to work till morning and resumed duty on 22 May 2009 considering the emphasis put on the fact that he sustained a *serious hip injury*.

21. Having re-evaluated the evidence, the Court finds no error of law or fact in the judgment of the trial Court.

22. To the contrary, the Court notes that both parties took the litigation casually, hence the conclusion that the Appellant did not meet the standard of proof.

### **Conclusion and Orders**

23. From the foregoing, the Court finds no merit in the Appeal. It is dismissed.

24. Each party to bear own costs of the Appeal and proceedings 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 Abok Odhiambo & Co. Advocates

For Respondent L.G. Menezes Advocates

Court Assistant Chrispo Aura