



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT MACHAKOS**  
**APPEAL NO. 6 OF 2021**

*(Formally Machakos HCCA No. 26 of 2018)*

**Before Hon. Lady Justice Maureen Onyango**

**APEX STEEL LIMITED.....APPELLANT**

**VERSUS**

**ONESMUS MUTUKU KOMU.....RESPONDENT**

**(Being an appeal against the judgement and decree of Hon. J. A. Agonda, Senior Resident Magistrate delivered on 16<sup>th</sup> February 2018 at Mavoko in PMCC No. 50 of 2015 – Onesmus Mutuku Komu v Apex Steel Limited)**

**JUDGMENT**

1. Apex Steel Limited, the Appellant herein filed an appeal against the Judgment and Decree of the Senior Resident Magistrate at Mavoko PMCC No. 50 of 2015 delivered on 16<sup>th</sup> February, 2018. In the Judgment the Learned Trial Magistrate found the Appellant 100% liable and awarded the Respondent general damages in the sum Kshs.100,000/- together with costs and interest thereon at Court rates as against the Appellant.

2. The Appellant being dissatisfied by the Judgment of the Trial Magistrate seeks to set it aside on the following grounds as raised in its Memorandum of Appeal:

- i. The Learned Trial Magistrate erred in law and fact by totally ignoring the evidence placed before her which clearly demonstrated that no accident occurred on 18<sup>th</sup> October, 2013 involving the Respondent and thereby arrived at an erroneous conclusion.
- ii. The Learned Magistrate erred in law and fact by totally ignoring the evidence placed before her, including the Appellant's Wage Roll and a Manual Attendance Register, all which clearly demonstrated that the Respondent reported to work at 8:30 am and left work at 2.46 pm without reporting any accident and thereby arrived at an erroneous conclusion.
- iii. The Learned Magistrate erred in law and fact by totally ignoring the evidence placed before her, including the Appellant's Accident Register, which clearly demonstrated that the Respondent was never injured on 18<sup>th</sup> October, 2013 while in the course of employment or at all.
- iv. The Learned Magistrate showed extreme prejudice by totally ignoring the testimony of the Appellant's witnesses which clearly demonstrated that the Respondent's claim is fraudulent, thereby arriving at an erroneous conclusion.
- v. The Learned Magistrate misapprehended the medical evidence in material respects and thus arrived at an extremely high award of damages.
- vi. The Learned Magistrate showed extreme prejudice by totally ignoring the Appellant's Counsel's submissions on the issue of law and evidence and thereby arrived at an erroneous conclusion.

3. The Appellant seeks the following orders: -

- a. That the Appellant's appeal be allowed.

b. That the Judgment of the Trial Court be set aside and the Order allowing the Respondent's suit be set aside with an Order dismissing the said suit with costs to the Appellant.

### **Brief facts of the case**

4. The facts of this case are not contested. The Respondent in his Complaint filed on 20<sup>th</sup> January, 2015 contended that he was employed by the Appellant and that on or about 18<sup>th</sup> October, 2013, while in the course of his lawful duties he was involved in an accident and as a result sustained a blunt injury to his chest.

5. The Respondent attributed the occurrence of the said accident to negligence, breach of contract and breach of statutory duty on the part of the Appellant Company.

6. In its defence, the Appellant denied the allegations made in the Complaint and in particular that the Respondent was its employee as at the date of the alleged accident or that any accident occurred on 18<sup>th</sup> October, 2013 involving the Respondent herein within its premises.

7. The Appellant further argued that if any accident occurred (which it denied) then the same was solely caused by the Respondent's negligence and duly particularized the same.

8. The Trial Magistrate and upon consideration of the facts of the matter, the evidence on record and submissions by the Parties presented before it found the Appellant 100% liable for the injuries sustained by the Respondent and awarded him Kshs.100,000/- as General Damages. The Claim for special damages of Kshs.4,500/- was however dismissed for want of proof. The Respondent was awarded costs of the suit together with interest at court rates.

9. The parties agreed to dispose of the appeal by way of written submissions and each party filed its respective submissions.

### **Appellant's Submissions**

10. The Appellant submitted that the Trial Court failed to exercise its discretion properly thus giving this court the requisite jurisdiction in disturbing the Trial Court's decision. To buttress this argument the Appellant relied on the case of **Mbogo & Another v Shah (1968) EA 93** where it was held that *Courts' will not interfere with the exercise of jurisdiction by an inferior court unless it is satisfied that its discretion is clearly wrong.*

11. The Appellant in its submissions has pointed out instances that it believes that Trial Court failed to exercise its discretion judiciously and fairly. It argues that the Trial Court failed to consider the evidence of its witnesses DW1 and DW2 as well as exhibits produced including the accident register on account that the witness producing it was not its author and therefore arriving at a wrong determination.

12. It is further submitted that the Trial Court failed to consider the contents of the attendance register (produced as Defence Exhibit 1) that clearly indicated that the Respondent was on duty as from 8.30 am and left at 14.46 hours, that there was no entry made on the injury column on any injuries and/or accident(s) recorded on that day as the Respondent wrote "NO" on the said column a clear indication that the alleged accident did not take place.

13. The Appellant maintained that the Trial Court failed to consider the evidence of DW1, Leonard Musyoki who stated that the Respondent's name did not appear in the Accident Register produced as Defence Exhibit 2 and that further all injured employees were referred to Athi River Medical and not Shalom Hospital as contended by the Respondent. The Appellant based on the foregoing argued that the Respondent did not sustain any injuries at its premises on the material date.

14. The Appellant maintained that the Trial Court left out entirely the account of its witnesses DW1 and DW2 as well as the Respondent's account during cross examination. It further maintained that no evidence was tendered to support the Respondent's contention that he was injured in the course of his duties with the Appellant.

15. The Appellant contended that the Respondent failed to discharge the burden of proof during the trial of this matter and that as a result the Trial Magistrate erred in law and fact in finding the Appellant 100% liable.

16. The Appellant urged this Court based on its submissions to find that the Respondent was never injured as alleged.

17. In conclusion the Appellant urged this Court to find in its favour and allow the Appeal as prayed.

### **Respondent's Submissions**

18. The Respondent on the other hand urged this Court to perform its duty of being an appellate court judiciously and as guided by the case of **Abok James Odera t/a A.J Odera and Associates v John Patrick Machira t/a Machira & Co. Advocates (2013) eKLR** as cited in the case of **Dorcas Wangithi Nderi v Samuel Kiburu Mwaura & Another (2015) eKLR** where it was held that *on a first appeal courts should reconsider the evidence, evaluate and draw its own conclusions despite the fact it has never seen or heard the witnesses in the case.*

19. The Respondent further submitted that from the evidence on record and his oral evidence, he was injured while in the lawful course of his assigned duties at the Appellant's premises as a result of the Appellant's failure to provide him with a safe working environment and protective gear.

20. The Respondent argued that the Appellant failed to call 2 key witnesses being the company nurse, to confirm whether or not the Respondent had been injured while on duty and the safety and health officer, to confirm whether or not he was issued with protective gear to fully support its case.

21. He further argued that in the absence of these two key witnesses the evidence as adduced by the Appellant was treated as hearsay evidence and was therefore not admissible as rightfully pointed out by the Trial Magistrate.

22. The Respondent argued that the decision of the Trial Court is sound and that it is clear from the Judgment that the Trial Magistrate considered the evidence adduced and submissions made by all the parties before arriving at the final determination. It is on this basis that the Respondent maintained that this Court should not interfere with the Judgment delivered on 16<sup>th</sup> February 2018. For emphasis the Respondent relied on the case of **Naftali Ruthi Kinyua v Patrick Thuita Gachure and Another (2015) eKLR** where the Court adopted the ruling in **Mbogo & Another v Shah (1968) EA** where the Court held that a court will not interfere with the exercise of the discretion of an inferior court unless it is satisfied that the decision is wrong as the court misdirected itself.

23. In conclusion the Respondent submitted that the instant Appeal has no merit and therefore urged this Court to dismiss the same with costs to the Respondent.

### **Analysis and Determination**

24. I have considered the grounds of appeal and the record of appeal. I have further considered the parties' submissions and find that the issues for determination are-

- i. Whether the Trial Court erred in law and fact for finding the appellant wholly liable for the Respondent's injuries;
- ii. Whether the orders sought by the Appellant should be granted.

25. Being a first appeal, this Court has a singular duty to re-evaluate the entire case and come up with my own findings in the matter this is as enumerated in the case of **Selle v Assorted Motor Boat Company 1968 EA Company 1968 EA 123-126** have since been long settled to guide Appellate Court such as this one in the determination of such appeals. In the said case it was held that:

“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 appear earlier that he has clearly failed on some part to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

### **Whether the Learned Magistrate erred in law and fact for finding the Appellant wholly liable for the Respondent's injury**

26. The Appellant denied that the Respondent was injured while on duty as his name is not reflected in the accident register produced in Court.

27. The Appellant maintained that the Trial Magistrate failed to consider the evidence given by its witnesses, the Attendance Register (DEX 1) and the Accident Register (DEX 2) which clearly pointed out the fact that the Respondent was never injured while on duty at the Appellant's premises.

28. The Appellant argued that the Respondent did not discharge his burden of proof as required by law. It further argued that the allegations levelled against it having been specifically denied, the burden was on the Respondent to tender evidence to support his assertions. To fortify this argument the Appellant relied on the Court of Appeal decision in the case of **Wareham t/a A. F. Wareham & 2 Others v Kenya Post Office Bank**.

29. It is majorly on this basis that the Appellant urged this Court to find merit in its Appeal and allow it as prayed.

30. The Respondent on the other hand maintained that the Trial Magistrate took the Appellant's witnesses testimonies into consideration as well as all the documentary evidence produced.

31. He contended that the Trial Magistrate clearly took into consideration all the evidence and testimonies that were placed before her. He further contended that the Appellant should not blame the Court for its failure to call key witnesses to testify on its behalf.

32. The Respondent maintained that the decision of the Trial Court is well reasoned and that there are no reasons to disturb it.

33. I have examined the record of appeal and the proceedings of the Trial Magistrate and wish to state that I disagree with the Appellant's contention that the Trial Magistrate failed to take into consideration the evidence of its two (2) witnesses as well as the documentary evidence adduced.

34. It is clear from the Judgment delivered by the Honourable J. A. Agonda at pages 3 and 4 she clearly makes a record of the evidence of the Appellant's two (2) witnesses Bernard Musyoki (DW 1) and Abraham Ombogo Ondara (DW 2). The Trial Magistrate goes on to capture the documents produced by the two witnesses being the appellant's attendance register and the accident register marked as DEX 1 and DEX 2 respectively.

35. The Trial Magistrate goes on at page 5 of her Judgment to state that the Appellant in its defence ought to have called two key witnesses that is the Company Nurse and the safety and health officer to produce the two documents (DEx 1 and DEx 2) and further to corroborate the evidence given DW1 and DW2.

36. The Trial Magistrate found the evidence of DW1 and DW2 as inadmissible hearsay as none of them were present when the accident occurred.

37. The Appellant maintained that it should not be held liable as it provided the Respondent with the necessary protective gear to enable him perform the assigned duties in a safe environment. It in-fact goes on to state that if an accident occurred the same was as a result of the Respondent's negligence.

38. At the hearing both Defence witnesses maintained that the Respondent was provided with protective gear but failed to produce the Protective gears register to support this assertion.

39. Indeed, the Appellant had that obligation to provide the Respondent with a safe working environment as stipulated in Section 101(1) of the Occupation and Safety Health Act, 2007 which provides as follows–

**Every employer shall provide and maintain for the use of employees in any workplace where employees are employed in any process involving exposure to wet or to any injurious or offensive substance, adequate, effective and suitable protective clothing and appliances, including, where necessary, suitable gloves, footwear, goggles and head coverings.**

40. Further, the Appellant ought to have adduced evidence to demonstrate that it had indeed exercised reasonable care and due diligence as was reasonably expected to ensure the Respondent's safety, and that the Respondent's injury had been on account of contributory negligence.

41. In light of the foregoing, I find that the Learned Magistrate's apportionment of liability was sound and proper in law and in fact, and the same cannot be faulted. Reference is made to the case of **Kenya Knit Garments (EPZ) Limited v Patrick Muomo Mwololo (2018) eKLR** the Court observed as follows–

“The case relied on by the Respondent's Counsel of **Oluoch Eric Gogo v Universal Corporation Limited (2015) eKLR**, which cited the decision in **Mumias Sugar Co. Ltd v Charles Namatiti** is applicable in this case. The Court of Appeal held thus:

“An employer is required by law to provide safe working conditions of work in the factory and if an accident occurs while the employee is handling machinery the employer is responsible and will be required to compensate the injured employee.”

42. The Appellant failed to prove that it had provided the Respondent with a safe working environment to perform his duties. It further failed to avail key witnesses for cross examination to ascertain exactly how the accident occurred and whether the same could be attributed to negligence.

43. The Appellant can therefore not blame the Trial Court when it did not put up a spirited defence supported by evidence.

44. For the foregoing reasons I find no reason to interfere with the findings and decision of the lower court.

45. The Appeal is dismissed in its entirety. The Respondent is awarded costs and interest at court rates from the date hereof until payment in full.

**DATED, SIGNED AND DELIVERED AT MACHAKOS ON THIS 26<sup>TH</sup> DAY OF NOVEMBER, 2021**

**MAUREEN ONYANGO**

**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 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. 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 1B 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.

**MAUREEN ONYANGO**

**JUDGE**