REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

APPEAL NO.4 of 2018

[formerly Naivasha High Court Civil Appeal No.69 of 2015

Previously Nakuru High Court Civil Appeal No.162 of 2010]

HOMEGROWN (K) LIMITED.....APPELLANT

VERSUS

DAVID KABUGO MUCHIRI.....RESPONDENT

(Being an appeal from judgement and decree of the Chief Magistrate Naivasha in CMCC No.383 of 2007 - N.N. Njagi Principal Magistrate delivered on 18th May, 2010.)

JUDGEMENT

The appellant being dissatisfied with the judgement of the trial court in Naivasha Chief Magistrate Court Civil Case No.383 of 2007 delivered on 18th May, 2010 has filed the appeal challenging the whole of the judgement and seeking the judgment be set aside and be dismissed with costs.

The appeal is premised on the following grounds;

1. *That the learned trial magistrate erred in law and in fact in finding that the respondent was injured on 7th June, 2003 while at work for the appellant where there was unrequited documentary evidence that the respondent had been summarily dismissed from employment by the appellant on 9th February, 2003.*

2. *The learned trial magistrate erred in law and in fact in making a finding that the respondent had proved his case against the appellant on a balance of probability when there was no evidence in support of such a finding.*

3. *The learned trial magistrate erred in law and in fact in making a finding that the respondent had proved his case against the appellant on a balance of probability in the absence of documentary proof that the respondent was injured on 7th June, 2003 as no initial medical treatment records were tendered in evidence.*

4. *The learned trial magistrate erred in law and in fact in awarding the respondent kshs.120, 000/= as general damages for alleged mere soft tissue injuries which award was excessive and not proportional to the alleged injuries.*

5. *The trial magistrate erred in law and in fact in failing to evaluate and analyse the evidence of the appellant's case to include the appellant's submissions on record when judgement was delivered.*

On these grounds the appellant is seeking that the appeal be allowed.

The facts leading to the appeal are that the respondent filed suit before the Principal Magistrate Civil Suit No.383 of 2007 on the grounds that he was the employee of the appellant and while at work undertaking his duties at Flamingo Farm, on the 7th June, 2003 he sustained injuries following an accident. Such accident resulted from the negligence of the appellant.

The defence before the trial magistrate was that the respondent was not an employee of the appellant and did not commit the alleged acts of negligence against him. the particulars of negligence wee therefore denied.

The trial court heard the evidence and in the judgement made a finding that on 7th June, 2003 the respondent was at work with the appellant

as set out in the Plaint and was inured as alleged. He was however to blame and liability was apportioned at 20:80% and on this basis made an award of Kshs.100, 000.00 to the respondent.

Aggrieved by the findings, judgement and decree of the trial court, the appellant filed the appeal.

Both parties filed written submissions.

The grounds of appeal are collapsed into two, the issue of liability and the assessment of quantum

The appellant submits that the respondent herein had been summarily dismissed on 9th February, 2003 and the alleged injury on 7th June, 2003 a period of 4 months after dismissal from employment could not have occurred within its work space. The respondent had testified that he was employed by the appellant in the year 1998 and that he was orally dismissed vide letter dated 10th February, 2003. The claimant also testified that he was injured on 7th June, 2003.

The respondent was not a causal employee and by the time of his alleged injury he had already been dismissed form his employment with the appellant on 10th February, 2003. The trial court did not address this fact and had this been done it would have been apparent that the respondent was not in the employment of the appellant at the time of his alleged injury.

The appellant also submits that the court rejected the documents and evince of the defence before it on the basis that it had not complied with the Evidence Act while the court had already admitted such documents. To reject it at the stage of judgement was to deny the appellant a fair chance to urge its case.

The trial court failed to appreciate that the respondent failed to tender evidence to prove that he was injured on 7th June, 2003 and that he was treated for such injury. The evidence that he was treated at Naivasha District Hospital was without any evidence. The evidence that he was treated by Dr Omunyoma and filed a medical report and testified in support of the case is that he examined the respondent on 5th May, 2007, a period of over 3 years since the alleged accident. The Doctor testified that the respondent had suffered soft injuries to the right wrist and back and which had healed. The Doctor had relied on a treatment chit that did not have the necessary details to confirm it had been issued at Naivasha District Hospital. Such error was fatal and there was no treatment record as held in **Eastern Produce (K) Limited (Kaite Estate) versus Joseph Lemiso Osuku, Civil Appeal No.21 of 2004 (Eldoret).**

The appellant also submits that the only injury to the respondent based on his evidence was soft tissue injury to the back. The award of Ksh.120, 000.00 in damages was excessive in the circumstances. Such injury can be redressed with the award of Ksh.40, 000.00 where there is a finding that indeed he was at work and was injured which has been challenged.

The respondent submits that the trial court established that the appellant was liable and apportioned liability upon making a finding that the documentary evidence submitted by the appellant did not comply with the rules of evidence. The appellant had tried to demonstrate that the respondent had been dismissed form employment but the letter was rejected. No master roll was produced to confirm or challenge that the respondent was not at work at the material time of his accident.

The quantum awarded was based on findings made upon the pleadings, evidence of the respondent and doctor and the fact that there was no challenge to the fact that the respondent has suffered such injuries while in the service of the appellant. The trial court relied on decided cases in making the assessment of damages and the award of Ksh.120,000.00 an taking into account the apportioned liability is not too high and should be confirmed as held in **Douglas Mwirigi Francis & 2 others versus Andrew Miriti, HCA 34 of 2005 (Meru).**

The issues for appeal are summarised into two; Whether liability was properly established; and

Whether the quantum was properly assessed.

I have considered the appeal as well as the submissions and the cases cited. I am bound to re-evaluate the evidence on record in order to come to an independent conclusion.

From the pleadings before the trial court, the respondent pleaded that he was injured on 7th June, 2003 while at work with the appellant. Such injury arose following breach of his employment contract and the duty of care to ensure he was working in a secure environment and therefor the appellant as negligent for exposing him to such injury.

In his evidence, the respondent testified that while at work on 7th June, 20033 he slipped fell and got injured on the spinal cord and waist. He was treated at Naivasha District hospital. At work, the people he was working with witnessed the accident and were directed to take him to hospital.

Upon cross-examination, the respondent testified that he was orally dismissed form his employment with the respondent when he was informed to go and collect his dues and was issued with letter dated 18tth February, 2003. The evidence is recorded as follows;

> ***…*** *I was informed in writing to go and collect the dues for the company. The letter is dated 18th February, 2003. I was injured on 7th April, 2003. I collected the dues. They were paid. I did not say that I was called by writing. I was not dismissed by the company. I did not receive the dismissal letter or a certificate of service. …*

What then was the content to the letter dated 18th February, 2003? Was it a letter inviting the respondent to collect his dues or was it a letter of his summary dismissal form employment?

In defence, the appellant's denied the employment of the respondent save that when he remained in employment he had been directed with regard to his safety and taking of reasonable precautions while at work. At paragraph 5 of the defence the appellant avers that;

> **…** *the defendant denies that on the date mentioned … or on any other date the plaintiff was lawfully on duty or otherwise doing authorised work when she sustained serious injuries and all the matters alleged in the said paragraph are denied having occurred as alleged …*

The appellant has submitted that the respondent had been dismissed by 7th June, 2003 when he alleges to have been injured. He was cross-examined on his evidence and confirmed that he was injured on 7th April, 2003 and was issued with letter dated 18th February, 2003 to collect his dues.

I have read through the pleadings, the typed records of the trial court and further to be satisfied that indeed the same is correct, I have confirmed with the handwritten record that indeed the respondent testified as noted above. On the one hand his pleadings and evidence-in-chief is to the effect that he was injured on 7th June, 2003 while on cross-examination he changed this to be 7th April, 2003. I take this is not by error. It was deliberate and the truth. Had this been the case, such error ought to have addressed upon re-examination. This was not the case.

The evidence is at variance. With regard to letter dated 18th February, 2003 this is a schedule of payment for terminal dues. the schedule notes that the claimant was a seasonal worker from 15th January, 2003 and was paid his terminal dues for work up and until 6th February, 2003.

The schedule is singed by the employee on 18th February, 2003. My reading of the signature thereon and compared to other signatures of the respondent on his Verifying Affidavit in support of his Plaint, even with the naked eye and without expert assistance, the similarity and resemblance leaves no doubt that the respondent accepted such terminal dues on 18th February, 2003.

In employment relations as at February, 2003 the law allowed summary dismissal of an employee and the payment of owing terminal dues. the letter of summary dismissal was admitted in evidence confirming that the respondent was dismissed from his employment with the appellant on 10th February, 2003.

The defence then is correct to the extent that upon summary dismissal, the respondent was paid his terminal dues on 18th February, 2003. The admission of these records during the trial process cannot be negated as having failed to comply with the rules of evidence at the point of judgement. To do so is equivalent to changing the rules of the game as it were and to convolute justice.

Had the trial court addressed itself to the matters before the court properly, it would have emerged that the contradictions in the evidence went to the core of the respondent's case and ultimately he was a stranger at the shop floor having been dismissed from his employment on 10th February, 2003 and thus could not have been injured while at work on 7th April or 7th June, 2003.

To proceed and find there was liability for negligence in the circumstances was in error.

In arriving at this finding, consideration is given to The Court of Appeal in the case of **Embu Public Road Services Limited Versus Riimi [1968] EA 22** and the findings that;

> *where the circumstances of the accident give rise to theinference then the defendants,in order to escapeliability,has to show that there was a probable cause of the accident which does not connote negligence or that the explanation for the accident was consistent only with an absence of negligence.*

Rationale is established in Court of Appeal judgement in the case of **Mwangi versus Wambugu (1984) KLR 453,** in which that court pronounced itself as follows;

> *A court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.*

In this case, the fact of employment having been thus challenged, the presence of the respondent at the shop floor came into doubt. His contradictory evidence did not aid his case. The suit ought to have been dismissed instantly.

To proceed and assess quantum was in error.

Accordingly, the appeal is found with merit and the same allowed with the setting aside the trial court judgement in its entirety. Each party shall meet own costs.

Delivered at Nakuru and dated this 24th day of January, 2019.

M. MBARU JUDGE

In the presence of:

…….. **……**