



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL NO. 9 OF 2018

(Before Hon. Justice Mathews N. Nduma)

VICTOR OYOO OTIENO.....APPELLANT

VERSUS

BUILDERS DEPORT LIMITED.....RESPONDENT

J U D G M E N T

1. The Appellant was an employee of the Respondent. On or about 21st July, 2016, the Appellant was in the course of his lawful duties as a loader when he was hit by a metal bar on his left wrist as a result of which he suffered serious injuries.

2. The Appellant in his plaint accused the Respondent of not keeping the work place safe, failing to provide the Plaintiff with proper and suitable plant tackle and equipment and protective gear; failing to provide suitable instructions and training to the Appellant. The Appellant's case was that the negligence by the Respondent exposed him to danger and as a result he suffered loss and damage and claimed damages.

3. The Respondent denied the particulars of claim and the reliefs sought by the Appellant and prayed the suit be dismissed with costs.

4. The learned trial magistrate Hon. Yalwala delivered judgment on 19th December, 2017 and dismissed the Appellant's suit.

5. The Appellant faults the decision by the learned magistrate on grounds set out in the Memorandum of Appeal filed on 20th March, 2018 which may be summarized as follows:-

That the trial magistrate erred in law and fact in dismissing the suit when there was sufficient evidence on a balance of probabilities.

The Magistrate failed to appreciate the seriousness of the injuries sustained by the appellant in the course of duty hence causing the Appellant great injustice by dismissing his case.

6. This being a first appeal, the court shall evaluate the evidence afresh, keeping in mind that it did not have advantage of listening to the witnesses and observing their demeanor. The court is also minded not to substitute the decision of the Magistrate simply because it would have arrived at a different conclusion unless the decision by the Magistrate is based on no evidence at all or on serious misdirection on law or fact.

7. PW 1, the appellant testified under oath to the effect that he was employed as a loader by the Respondent in January 2016 to December 2016. That he loaded building material from the store to the lorries. That he was paid Kshs.11,000 per month and worked from 8 am to 5 pm.

8. On 21st July, 2016, he reported to work as usual and was loading iron bars from the store to the vehicle. A metal bar slid on his shoulder which was approximately 60 kg. He was being helped by a colleague named Barnabas. They were carrying 3 pieces of metal and he was at the front whilst Barnabas was behind. That the Appellant got tired and did not have gloves. The iron bar slid on the Appellant's left hand and hit his left wrist which was cut. Appellant testified that he could not have a firm grip on the metal bar since he was using bare hands. The wrist was dislocated. At the time his supervisor was one Mr. Imar. The manager Mr. Abdala, gave the Appellant permission to go to hospital and he went to AP line dispensary and was treated and discharged. He was given off duty for one week and reported back to work upon recovery. Appellant blamed the Respondent for the accident for failure to provide him with gloves. Appellant denied he was careless under cross examination. He said cases of metal falling were frequent and injuring workers. The Claimant produced the medical notes as exhibit P1. He was examined by Dr. Okombo who prepared a medical report. He produced the report and receipt of Kshs.1,500 for the report. The Appellant stated he had not fully recovered and prays for compensation.

9. The Respondent called DW 1 Patrick Okuta Ogutu. He testified that he was a supervisor and had worked for the Respondent since 2012. DW 1 denied the allegations of injury made by the Appellant. DW 1 said no accident occurred on 21st July, 2016. That he was on duty at the time and did not witness any accident. He said Mr. Imar was not at work on the day.

10. DW 1 testified that all injuries at the work place were normally recorded in the injury book. That there was no such record for 21st July, 2016. That the company also usually paid for treatment. DW 1 stated further that the Appellant was at work on the material day from the master roll which was marked 'P' for Victor Oyoo at No.4. DW 1 further said that metal bars are loaded into trucks 3 or 6 at a time. DW 1 confirmed that the Appellant was an employee of the Respondent as a loader. That he had about 12 loaders at the store at a time. He was their supervisor.

11. Under cross examination he confirmed he saw the Appellant carrying metal bars on 21st July, 2016 but did not witness any accident and none was reported to him. That no money was given by the manager for treatment of an employee as was customary on the day in question. DW 1 further stated that the Appellant left the company when the contract ended. The contract was not renewed.

12. DW 2 was one George Owino. He testified that he was a community health volunteer attached to AP line Dispensary at Kisumu. He testified that the hospital register for 21st July, 2016 did not indicate that the Appellant, Victor Otieno Oyoo was attended to at AP Line Dispensary. That the OB Number in the book is not in the register either. That AP Line Dispensary did not have any patient number 3994/16 on 21st July, 2016. That the first entry in the register for the day was 9260 onwards. The previous day had closed at 9259. It is thus not possible for OB No. 3994/16 to apply for July 2016. That OB No. 3994/16 must have been an OB number for early in the year 2016. DW 1 concluded that the patient with that number was not treated at AP Line Dispensary.

13. Under cross examination DW 2 stated that he issued cards to incoming patients of AP Line dispensary. That he was the only one at the reception on 21st July, 2016. That patients make payment directly to the doctor. That they buy hospital booklet for Kshs.20. DW 2 stated that he could not have issued patient record book with OB No.3994/16 on 21st July, 2016.

14. Based on the aforesaid evidence, the learned trial magistrate delivered a judgment on 19th December, 2017 in which after a careful analysis of the evidence by PW 1, DW 1 and DW 2 reached the conclusion that –

“I find that the treatment notes relied upon by the Plaintiff are of doubtful authenticity and cannot be relied upon. In effect therefore, there are no treatment notes before court that can corroborate the Plaintiffs’ allegations that he was indeed injured on 21st July, 2016 and was treated of the injuries.

... I find that I am not satisfied that the Plaintiff was indeed injured on the material date while on duty in the course of his employment with the Defendant nor that he was treated at AP Line, Dispensary for such injury. The Plaintiff has thus failed to prove on a balance of probabilities that indeed the accident the subject matter hereof occurred as alleged. To that extent, his suit herein fails and is dismissed with costs.”

15. This court finds no grounds at all to fault the finding by the learned trial magistrate. In **Amalgamated Saw Mills v Lucy Wanjiru Ndungu Nakuru HCCC No. 28 of 2001 and Thadayo Obunga Okonjo v Comply Industries Nakuru HCA 64/06**, the court clearly stated that he who alleges that certain facts exist must prove the same on a balance of probabilities in terms of sections 107 and 108 of the Evidence Act Cap 80 Laws of Kenya.

16. The Learned Magistrate did not err in law or fact therefore in reaching the conclusion that the plaintiff had not proved his case on a balance of probabilities.

17. Accordingly, the Appeal is dismissed with no order as to costs given the indigent status of the Appellant, a low paid loader whose contract of employment was not renewed by the Respondent after one year of service.

Judgment Dated, Signed and delivered this 24TH day of January, 2019

Mathews N. Nduma

Judge

Appearances

M/s. Simiyu Opondo and Kiranga & Co. Advocates for the Appellant

Odhiambo Ouma & Company Advocates for the Respondent

Chrispo – Court Clerk