REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

APPEAL NO. 12 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

IBRAHIM TANGA NANDELI.....APPELLANT

VERSUS

N. K. BHATIA.....1ST RESPONDENT

MUMIAS SUGAR COMPANY LIMITED.....2ND RESPONDENT

Being an appeal against the judgment of E. K. Makori, Principal Magistrate, Mumias delivered on 6th September 2011.

JUDGMENT

The instant Appeal is against the decision of Hon. E. K. Makori, Principal Magistrate, delivered on 6th September 2011. In the judgment the learned Magistrate found the appellant 100% liable and awarded the appellant general damages in the sum of Kshs.800,000 and special damages in the sum of Kshs.44,100 with costs as against the 1st respondent. The case against the 2nd respondent was dismissed with costs.

The appellant was aggrieved by the dismissal of the case against the 2nd respondent and filed the instant appeal raising the following grounds of appeal –

1. That the Learned Principal Magistrate errored in both law and fact in dismissing the 2nd Respondent to controvert the Appellant s evidence on record, that the 2nd Respondent was liable. Wholly and/or partially for the accident as he owed a duty of care to the Appellant while engaged in his duty at the place of work and at worst liability should have been shared between the Respondents.

2. That the Learned Principal Magistrate errored in both law and fact by not taking into account, that both the 1st Respondent and the Appellant were employees, servant and/or contractor of the 2nd Respondent in view of the Amended plaint more specifically paragraphs 3a, 8, 8a, 8b and the particulars thereof touching on the Respondents on negligence. Which in the appellants view the 2nd Respondent being the Principal employer of both the Appellant and the 1st Respondent was wholly to blame for the accident against the Appellant caused by the 1st Respondent who was transporting the 2nd Respondents workmen, labourers, fertilizer and other merchandize to the field.

3. That the Learned Principal Magistrate errored in both law and fact by failing to take into account the evidence of the Appellant and the documents tendered in support of his case and the maxim and principle of "*Resp. Ipsa Loquitor*" which was pleaded by the Appellant and effectively discharged by the Appellant against the Respondents which had not been controverted against as the Respondent did not tender their evidence to rebut the appellant claim.

4. That Learned Principal Magistrate errored in both law and fact by not finding the 2nd respondent negligent by not providing a separate vehicle for travel in and that the 2nd respondent had delegated the strict duty of providing safe travel to workmen to wreck less and negligent, drivers agents, servants and/or contractors thereby exposing the accident and the 2nd respondent is wholly to blame.

5. That the learned Principal Magistrate errored both in law and fact by misapprehending the fact and not properly analysing the evidence, pleadings and submissions placed before him leading to miscarriage of justice.

6. That in all fairness the Learned Principal Magistrate's judgment was biased based on no sound law and or legal basis which was against the weight of evidence tendered in support of the case.

7. That the Learned Principal Magistrate's judgement was arrived at in a cursory and perfunctory manner and his decision was unfair biased and has occasioned a miscarriage of justice by not apportioning liability between the Respondents.

The appellant seeks the following orders –

a. The appeal be allowed with costs.

b. That the lower court judgement of the subordinate court be set aside and substituted with an order finding the 2nd Respondent wholly liable for Kshs.804,100.

c. That in the alternative the lower court judgement of Kshs.804,100 be reviewed and varied and/or shared between the Respondents in terms of liability equally and/or other appropriate orders.

The appeal was disposed of by way of written submissions. Only the appellant and the 2nd respondent participated in the trial and the appeal. The 1st respondent did not participate following withdrawal by counsel for the 1st respondent from acting for the 1st respondent.

At the trial only the claimant testified. Both the 1st and 2nd respondents did not call any witnesses although the 2nd respondent cross examined the appellant.

Facts of the Case

The facts of the case are not contested. The appellant was employed by the 2nd respondent, Mumias Sugar Company Limited as a casual worker. His work entailed packing fertilizer into lorries to be supplied to farmers contracted by Mumias Sugar Company. The appellant also offloaded the fertiliser and issued it to farmers.

The appellant testified that on 16th June 2001, he together with his co-workers packed fertiliser onto motor vehicle registration No. KAG 173U which belonged to N. K. Bhatia, the 1st respondent who was a contracted transporter. The 2nd respondent was supposed to provide its own transport for the loaders to follow the lorry transporting the fertiliser. On this particular day the 2nd respondent's Supervisor informed the loaders, among them the appellant, that there was no motor vehicle to transport them. He instructed them to use the same lorry transporting the fertiliser.

While on the way the driver of the lorry lost control and the lorry overturned. The appellant was injured by bags of fertiliser which fell on him. He was taken to St. Mary's Mission Hospital while unconscious and was admitted for one month.

In the Amended Plaint filed on 5th April 2005 with leave of the court, the appellant blamed both the 1st and 2nd respondents for the accident.

In the particulars of negligence he pleads as follows –

"That on or about the 26th June 2001 at around 12.20 pm while the Appellant was in the course of his employment aboard motor vehicle registration number KAG 173U at Kholers along Matungu-Kholera road when the 1st Respondent's driver, servant, authorised agent and/or employee so negligently, carelessly and/or recklessly drove, managed and/or controlled motor vehicle registration number KAG 173 U that it lost control and veered off the road and overturned thus causing serious bodily injuries to the appellant ,

The aforesaid accident was caused by the sole negligence of the 1st respondent's driver, agent, servant and/or employee.

Particulars of the 1st respondent's driver, servant employee and/or agent's negligence

a) Driving at an excessive speed in the circumstances

b) Failing to exercise and/or maintain any sufficient control of the said motor vehicle.

c) Driving carelessly and/or without any due care and attention.

d) Failing to stop, slow down and/or swerve in any other way to avoid the accident.

e) Driving in a manner contrary to the Highway Code.

f) Overloading the accident vehicle.

g) Driving a defective vehicle.

h) *Permitting the accident to occur.*

The appellant states that the accident occurred due to negligence of the 1st respondent, his agent or servant in the ordinary course of duty and in performing the contract of hire for the joint benefit and with authority of the 1st and 2nd respondent. Consequently the 1st and 2nd respondents are vicariously liable for the negligence complained of.

The appellant further avers that he was at all material times an employee of the 2nd respondent and that it was the duty of the 2nd respondent to take all reasonable precautions for the safety of the appellant while in the said employment and not to expose the appellant to any risk, damage or injury and to provide a safe place of work, safe means of travel to and from the place of work and a proper working system. The appellant avers that the said accident was wholly caused as a result of the respondents' negligence and/or breach of duty."

He lists the particulars of injury and damages as follows –

a) Blunt injury to the back (Sacral region)

b) Blunt injury to the left forearm.

c) Fracture of the left ulna midshaft

d) Dislocation of the left wrist joint.

e) Dislocation of the right elbow joint

f) Blunt injury to the left hip joint.

g) Fracture of the right ilium of the pelvis

As observed above, both respondents did not call any witness although both filed defences. The 2nd respondent filed submissions in the lower court.

Appellant's Submissions

The appellant submits that the appellant's evidence was not controverted by the respondents. It is submitted that the appellant testified that he blamed the 1st respondent because the vehicle was driven at high speed and the driver was not careful. That he further blamed the 2nd respondent for failing to confirm whether the motor vehicle was defective or the driver experienced. He further blamed the 2nd respondent for not providing a separate motor vehicle to transport the workers, that the 2nd respondent's Supervisor and clerk were to blame for making the workers travel in the same vehicle ferrying fertiliser.

It is further submitted that PW3 (on the record erroneously referred to as PW1) No. 81692 CPL ROSSE JEPKORIR, a police officer attached to Mumias Traffic Police testified that although motor vehicle marked KAG 173U Isuzu Lorry was owned by N. K. Bhatia, it was edorsed on the body with the words Mumias Sugar Company.

It is submitted that the 2nd respondent was liable for the following reasons –

1. The company did not provide a separate motor vehicle to transport its workers to work

2. The supervisor and the clerk forced the appellant to board the motor vehicle of the 1st respondent

3. The blame squarely lies in Mumias Sugar Company Limited.

It is submitted that the Learned Trial Magistrate relied heavily on the written submissions of the 2nd respondent which were not supported by evidence, especially on the submissions that the 1st respondent was an independent contractor.

On the specific grounds of appeal the appellant submits as follows –

1) On ground one of the memorandum of appeal. There was no evidence tendered by the 2nd respondent to controvert the appellant's evidence. The 2nd respondent wholly or partially owed duty of care to the appellant while engaged in his duty at the place of work. The appellant was an employee of Mumias Sugar Company and he got injured during and in the course of employment of the 2nd respondent who through its supervisor and clerk had ordered the appellant to board the 1st respondent's motor vehicle as there was no alternative means of transport, that it is clear that both the appellant and 1st respondent were employees of the 2nd respondent Mumias Sugar Company Limited. The 2nd respondent being the principal employer of both the appellant and the 1st respondent were ordered to ferry workmen, labourers, fertilizer to the field and deliver merchandize and in so doing an accident happened and the 2nd respondent is to be blamed. That no evidence pointing to the contractual obligation between the 1st and 2nd respondents was availed in court to prove the relationship between the 1st and 2nd respondents was contractual based in an employer and independent contractor.

2) On ground 3, the Learned Trial Magistrate failed to take into account the overwhelming evidence of the appellant against the respondent which had not been controverted or rebutted that there was no separate motor vehicle given to ferry the workers to the field. That they were ordered to board the motor vehicle in the presence of the 1st respondent it meaning that both the workers and 1st respondent were employees of the 2nd respondent and liability ought to lie heavily to the 2nd respondent. That there was coercion from Mumias Sugar Company Limited to the appellant to board the motor vehicle KAG 173U.

3) It is clear from ground 4 of the memorandum of appeal at page 2 of the record of appeal that the learned Magistrate misapprehended facts of the case by not analysing the evidence and pleadings and the submission tendered leading to a miscarriage of justice and in so doing he was biased based on sound law and legal basis given the weight of evidence on record. He treated the case in a cursory and perfunctory manner leading to a miscarriage of justice by not apportioning liability between the respondents.

4) The judgment of the learned Senior Principal Magistrate is so sketchy and scanty which does not give reason how the Learned Magistrate arrived at the decision in dismissing the appellant's case against the 2nd respondent.

2nd Respondent's Submissions

It is the 2nd respondent's submission that the appellant did not prove that the 2nd respondent was negligent and thus liable for the accident. Further that there was no proof that the vehicle was defective and the driver inexperienced. That the 1st respondent was a contract transporter and responsible to ensure the safety of the vehicle and competence of its driver. It is further submitted that the appellant did not prove that he was forced to board the vehicle and that he could not recall the name of the Supervisor who allegedly forced him to board the said motor vehicle.

Relying on the case of ***Startpack Industries –V- James Mbithi Munyao*** the 2nd respondent submitted the Learned Trial Magistrate rightly held that the 1st respondent was entirely to blame for the accident.

It is further submitted that under Section 13(1) of the Occupational Safety and Health Act, the appellant was responsible to ensure that he was safe and that he did not expose himself to danger, which he did by boarding the said motor vehicle.

On quantum the 2nd respondent submitted that the award of Kshs.800,000 was too high in light of the injuries suffered by the appellant and submitted that an award of Kshs.300,000 was sufficient relying on the case of ***George Okowe Osawa –V- Sukani Industries Limited (2015) eKLR*** where the court awarded Kshs.400,000 in 2016 for similar injuries.

The 2nd respondent submitted that Section 107(1) of the Evidence Act Cap 80 requires that: -

> **"Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."**

That in **Halsbury's, Laws of England, 4th Edition** it is stated at paragraph 662 (page 476) as follows:-

> ***"The burden of proof in an action for damages for negligence rests primarily on the appellant who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the appellant , some breach of that duty, and an injury to the appellant between which and the breach of duty a causal connection must be established."***

Section 13(1)(A) of the Occupational Safety and Health Act provides:- **"13(1) Every employee shall, while at the workplace -**

> **(a) Ensure his own safety and health and that of other persons who may be affected by his acts or omissions at the workplace.**
>
> **Therefore, the employee is also required to take reasonable precaution to ensure his/her safety at the workplace while performing his/her duties."**

In ***Charlesworth & Percy*** on negligence page 301, it is stated:

> *"... Once the existence of a duty of care has been established, which has been followed by a breach of that duty, the final element to be proved of these essential components of actionable negligence has that the consequential damage has been suffered."*

In ***Startpack Industries vs. James Mbithi Munyao; Nairobi HCCA No. 152 of 2003*** Visram J. held that –

> *"It is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove the causal link between someone's negligence and his injuries. The appellant must adduce evidence from which, on a balance of probabilities a connection between the two maybe drawn.... not every injury is necessarily as a result of someone's negligence." An injury per se is not sufficient to hold someone liable for the same"*

The 2nd respondent prays that the appeal be dismissed with costs to the 2nd respondent.

Analysis and Determination

The only issue arising for determination from all the grounds of appeal is

whether the Learned Trial Magistrate erred in discharging the 2nd respondent from liability.

It is not contested that the respondents did not call any witnesses. In addressing the issue of liability the Learned Trial Magistrate states as follows–

> *"1st defendant never called evidence to show that his agent driver never controlled/drove the vehicle in issue in a manner that was negligent hence the accident.*
>
> *He will be held vicariously liable at 100%. Besides he mixed people with fertilizer.*
>
> *Its allegation by the plaintiff that he ought to have been ferried with a separate vehicle as usual. That I was ordered to the lorry by the supervisor of 2nd defendant. Whether this was part of negotiation/contract of employment with 2nd defendant company is not clear as to lead to a duty of care to provide separate means of transport of fertilizer. This was not proved hence 2nd defendant will not be held liable."*

The Learned Trial Magistrate failed to consider the fact that both respondents did not call evidence to controvert the averments of the appellant that both the 1st and 2nd respondents were liable. The Learned Trial Magistrate further failed to take into account the evidence of PW3 CPL Rosse Jepkoriir to the effect that the 1st respondent's lorry although owned by the 1st respondent had the name of the 2nd respondent written on it. No evidence was adduced concerning the relationship between the 1st and 2nd respondent as far as the use and control of motor vehicle KAG 173U was concerned, or whether the driver of the said lorry was an employee or under the control of the 1st or 2nd respondents.

The Learned Trial Magistrate further failed to consider the evidence that the appellant was an employee of the 2nd respondent and was in the course of employment when the accident occurred, a matter that was not controverted by the 2nd respondent even in its defence. Further no evidence was adduced to controvert the evidence of the appellant that he and the other employees were supposed to be provided with separate transport but were directed by the 2nd respondent's Supervisor to use the lorry that was transporting the fertiliser.

The use of a lorry transporting fertiliser to transport workers was negligent and exposed the workers to danger. It is the duty of an employer to ensure safe working environment for is employees and not to expose employees to a dangerous working environment. It was therefore incumbent upon the 2nd respondent to prove that it was not negligent or that it did not expose the appellant to a dangerous working environment. Had the 2nd respondent supplied alternative transport to the workers which it has not denied it used to do, the appellant would not have been in the lorry and would not have been involved in the accident which cause his injuries. I therefore find that the Learned Trial Magistrate misdirected himself in holding that the 2nd respondent was not liable for the injuries sustained by the appellant. I further find that the Learned Trial Magistrate erred in failing to consider the evidence of PW3 that the lorry in which the appellant was travelling had the name of the 2nd respondent. Further that the Learned Trial Magistrate erred in failing to hold that by failing to provide separate transport and ordering the appellant to travel in the back of a lorry transporting fertiliser it exposed the appellant to danger which resulted in his injuries.

On the issue of quantum the 2nd respondent submitted that the award of Kshs.800,000 was too high. With due respect to the 2nd respondent, it cannot make pleadings in submissions. The 2nd respondent did not file a cross appeal contesting the quantum. It can therefore not make any prayers not supported by a memorandum of appeal.

The prayers is thus dismissed as having been improperly made.

In the final analysis, the appeal succeeds. I set aside the finding of the Trial Magistrate dismissing the case against the 2nd respondent and substitute therefore orders as follows –

1. Judgment is entered for the appellant jointly and severally against the 1st and 2nd respondents in the sum of Kshs.800,000 in general damages.

2. I note from the record that the appellant prayed for special damages in the sum of Kshs.4,100 while in the judgment the Learned Trial Magistrate awarded a sum of Kshs.44,100. I set aside the award of Kshs.44,100 and substitute therefore an award of special damages in the sum of Kshs.4,100 jointly and severally against the 1st and 2nd respondents.

3. The 1st and 2nd respondents shall pay the costs of the appellant jointly and severally both at the subordinate court and in the appeal.

4. The decretal sum shall attract interest at court rates from date of judgment in the subordinate court being 6th September 2011, to date of payment in full

DATED AND SIGNED AT NAIROBI ON THIS 22ND DAY OF JANUARY 2019

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 21ST DAY OF FEBRUARY 2019

MATHEWS NDERI NDUMA

JUDGE