REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

APPEAL NO. 4 OF 2016

(Formerly Kakamega HCCA No. 37 of 2014)

Before Hon. Lady Justice Maureen Onyango

MUMIAS SUGAR COMPANY LIMITED……CLAIMANT

VERSUS

JOHNSTONE MATETE……..……..….RESPONDENT

Being an appeal against the judgment of L. M. Nafula, Senior Principal Magistrate, Mumias in Mumias PMCC No. 436 of 2012

JUDGMENT

The instant Appeal is against the decision of Hon. L. M. Nafula, Senior Principal Magistrate which was initially filed before the High Court in Kakamega and by an Order of the Court of 28th April 2016, was transferred to this Court for judgment.

The Appellant filed the Record of Appeal on 24th November 2015, directions were given that parties file written submissions. Thereafter they appeared before the court on 11th April 2016, for highlighting of submissions.

The Appeal is based on the grounds that:

1. The Learned Trial Magistrate grossly misdirected himself in treating the evidence and submissions on liability before him superficially and consequently coming to a wrong conclusion on the same.

2. The learned Trial magistrate grossly erred in finding the defendant 100% liable

3. The learned Trial Magistrate misdirected himself in ignoring the written submissions presented and filed by the Appellant in their entirety.

4. The learned Trial Magistrate erred in not taking into account the evidence presented before him in totality and in particular the evidence presented on behalf of the Appellant.

5. The learned Trial Magistrate erred in failing to hold that the Respondent had failed to prove negligence on the part of the Appellant while the onus of proof lay with the Respondent.

6. The analysis of the evidence as per the judgment is extremely wanting in material respects.

7. The Trial Magistrate misapprehended the evidence on record to a material degree resulting in his arriving at a wrong conclusion.

8. The learned Trial Magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.

Submissions by the Appellant

On behalf of the Appellant it is submitted that the Respondent at the trial did not discharge the burden of proof required in law in order for

the trial magistrate to find the Appellant 100% liable. Mr. Mshindi for the Appellant submitted that under section 107 of the Evidence Act Cap 80, the burden of proof is on the person who desires the court to give judgment as to any legal right or liability dependent on the existence of those facts which he asserts.

He further submitted that the Respondent in his trial pleadings pointed out the particulars of negligence to include:

1. Failure to provide safe working conditions to the plaintiff
2. Failure to ensure the Plaintiff's safety
3. Exposing the plaintiff to work without protective devices.
4. Exposing the plaintiff to danger it knew or ought to have known.
5. Failure to introduce to the plaintiff any other safer means of performing the said work
6. Failure to warn the plaintiff of the existing risks in the said work.
7. Failure to introduce convenient and safer means of work
8. Failure to provide proper supervision at work

That the Plaintiff narrated how he was injured but the trial magistrate did not deal with the issue of liability but went on to deal with secondary issues of sick sheets and proof of injury which would come after causation had been established.

Mr. Mshindi further submitted that by looking at the pleadings and the evidence adduced and judgment the Respondent never led evidence on how the Appellant failed both in common law and statutory duty and thus failed to prove causation. He relied on the case of ***Statpack Industries Limited Vs. James Mbithi Munayo Civil Appeal No. 152 of 2003(2005) eKLR*** where it was held:

> "*An employer's duty at common law is to take all reasonable steps to ensure the employee's safety. But he cannot baby-sit an employee. He is not expected to watch over the employee constantly. (See* ***Woods Vs Durable Suites Ltd (1953)2 AER 391****)*
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> *In any event the Respondent did not plead in his Plaint that the Applicant was negligent by providing a dust coat instead of overalls. And this allegation should not have been the basis of a judgment on liability. ….There must be a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which on a balance of probability a connection between the two may be drawn. Not every injury per se is necessarily as a result of someone's negligence. An injury per se is not sufficient to hold some liable for negligence*."

The appellant further relied on the case of ***Wilsher vs Essex Area Health Authority (1988)2 W.L.R. 557*** in which the House of Lords held that*;*

> "*where a Plaintiff's injury could have been caused by six possible factors of which the defendant's negligence was only one, the onus was on the Plaintiff to establish "causation" and that, in that case he failed to establish that the Defendant's negligence was the cause of the accident. It is instructive to note that in the Willsher case, the House of Lords noted that at least one of the factors of negligence could be attributed to the defendant. Here in this case before me, not a single element of negligence has been pleaded or proved against the Appellant, who took all reasonable steps to provide protective clothing, and to instruct employees on safety issues."*

On quantum counsel submitted that in the Respondent's pleadings on record. He stated that he suffered blunt injury to the head and chest respectively while in his witness statement he stated that he was injured on the head, shoulder and chest. That the Plaint on record never stated where the Plaintiff was treated but in the witness statement he stated that he was treated at Mumias Medical Centre and then later at Matungu Sub-District Hospital. That in evidence the Plaintiff never adduced any evidence in the form of treatment notes or discharge summary from any medical facility to prove the said injuries or that he was still undergoing any specialised treatment. That the medical report on record was made almost 3 years after the accident. The doctor in the report stated that the Plaintiff was treated in Mumias Sugar Medical Centre and later at Matungu sub-District Hospital. That the magistrate erred in not evaluating the evidence since there is no evidence of treatment notes or discharge summaries or any drugs ever taken.

It was also submitted that even if the injuries had been proved the amount of Kshs.120,000/= awarded as compensation was on the higher side and he cited the case of ***Gilbert Odhiabmo Owuor Vs Nzoia Sugar Co. Ltd 92012) eKLR*** in which the Respondent was awarded Kshs.51,500/= for similar injuries.

Counsel urged the court to allow the appeal with costs to the Appellant.

Submissions by the Respondent

On behalf of the Respondent it was submitted that the Appeal is misplaced and incompetent as the learned magistrate after considering all the evidence before her and the law, arrived at a just decision. It was submitted that the appeal should be dismissed for the reasons that the

Respondent in his evidence stated how the accident occurred and thus established liability. That he proved that he was hit by a falling 2 kg sugar ballets from a forklift. The fork lift was under the control of the Appellant's agent and/or servant and as a result he suffered injuries on the head, shoulder and chest which he proved and established.

Further the Respondent submitted that the award by the trial magistrate was fair and should not be disturbed. The Respondent prayed for the appeal to be dismissed with costs.

Determination

The duty of an appellate court in a first appeal is to evaluate the evidence and arrive at an independent decision. It is further the duty of the appellate court to keep in mind that the trial court had the advantage to hear and observe the demeanour of witnesses.

The facts of this case according to the evidence on record are that the respondent (plaintiff in the subordinate court) hereinafter called Matete was employed by the appellant (Mumias Sugar) as a casual labourer from 1st May 2009 to 31st May 2009. His work was to arrange bags of sugar onto trays at the sugar store. On 29th May 2009 at around 10.00 am while on duly some trays of sugar that were being lifted by a forklift slipped and fell on Matete injuring him on the head, shoulders and chest. He was treated at the medical centre of Mumias Sugar and discharged with a sick sheet. He was later treated at Matungu Sub-District Hospital.

Matete was later examined by Dr. Charles Andai who prepared a medical report for which Matete paid Kshs.4,000. The receipt was produced in court. The medical report was also produced in court, together with the sick sheet and Accident Occurrence Report Form from Mumias Sugar Company.

After hearing the case, the learned Senior Principal Magistrate decided in favour of Matete on liability at 100% and awarded him general damages of Kshs.120,000 and special damages of Kshs.4,000. He was also awarded costs.

It is against this decision that Mumias Sugar, the appellant, has appealed on both liability and quantum. Counsel for the appellant tackled grounds 1 – 4 together and grounds 5 and 6 together.

On liability the appellant argues that the learned trial Magistrate erred to connect the particulars of negligence to the appellant and further that the respondent did not satisfy the burden of proof under Sections 107, 109 and 110 of the Evidence Act.

The evidence before the court included the gate pass which proved that Matete was employed by the appellant. The Accident Occurrence Form Report for the appellant which was produced in court has particulars of the injured person (Johnstone Matete), the place of work (Mumias Sugar Company Limited, sugar store packaging at the factory), date of accident (the 29th May 2009) and the time, (10 am).

Under paragraph 14 titled "*PARTS OF THE BODY INJURED*" the following have been ticked off in the Accident Occurrence Form– head, chest and shoulder. The form confirms the injured person was engaged in the course of employment and was taken to Mumias Medical Centre at 11.51 am where he was seen as an outpatient by a Clinician.

Under paragraph 28 the general nature of the work going on at the time of the accident is stated as "*Arranging of 2 kg sugar ballers on the pallets*". The nature of injury is stated "*As per doctor's report*".

Under paragraph 30 it is stated that Shadrack Ouma witnessed the accident and under paragraph 34, that the accident occurred "*while the man was busy arranging 2 kg sugar ballers. He was knocked down by falling pallet, slipped from the forklift*".

The report is made by Mr. Natembea, the Supervisor. It is approved by Mr. Akaba the Section Manager and endorsed by Mr. Muyoma, the Head of Department. All of these are employees of the appellant.

The sick sheet, also from the appellant's clinic states that the respondent's complaint was that he was knocked by falling pallet and injured on the head, chest and shoulder while on duty.

DW1 testified on behalf of the appellant to the effect that the respondent was not injured on 29th May 2009 and produced a list of names of persons seen at the Mumias Company Clinic on that date. He however admitted during cross-examination that the list was not complete as some numbers were missing.

The foregoing are proof that the respondent was an employee of the appellant and was injured in the course of employment. I find no merit in the argument by the appellant's counsel on liability based on the evidence I have referred to above and the testimony of the witnesses in court.

On quantum, the appellant's counsel did not make any submission orally in court. However in the written submissions counsel submitted that Kshs.120,000 was on the higher side, citing the case of ***Gilbert Odhiambo Owuor –V- Nzoia Sugar Company Limited (2012) eKLR*** where the court awarded Kshs.51,500. The said authority was not filed and the court did not have the opportunity to consider the same. In the circumstance I have no reason to disturb the award by the learned trail Magistrate.

For the foregoing reasons the appeal must fail. I accordingly dismiss the same with costs to the respondent both in the lower court and the appeal.

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