REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

APPEAL NO.17 OF 2018

(Formerly Nakuru High Court Civil Appeal No.206 of 2013)

RICHARD MOGUCHE ARATI.....APPELLANT

VERSUS

MENENGAI OIL REFINERIES LTD..... RESPONDENT

(Being an appeal against the judgement and decree of Hon. J Mwaniki, Magistrate delivered on 8th October, 2013 in Nakuru CMCC No.414 of 2009)

JUDGEMENT

The appeal arose following judgement in Nakuru CMCC No.414 of 2009 delivered by Hon. Mwaniki on 8th October, 2013 following suit filed by the appellant against the respondent on the grounds that as an employee, on 23rd August, 2008 while on duty arranging timber from the stake, one piece of timber hit him and he sustained serious injuries. Such arose out of negligence by the respondent and in breach of his employment contract to ensure a safe work environment. The appellant alleged he suffered a deep cut wound to the chest.

The defence before the trial court was that the appellant was not an employee of the respondent and if he was at the workplace and got injure don 23rd August, 2008 such arose out of his own negligence for failing to work with due care and attention and failing to use the protective devices provided and contributed to the accident and injuries suffered.

The trial magistrate heard the parties and made a finding that there was no negligence or breach of contract on the part of the respondent and the appellant was the author of his own misfortune. The case was dismissed with costs to the respondent.

Aggrieved by the judgement, the appellant filed the appeal on four (4) grounds that;

1. The learned trial magistrate erred in law and in fact in finding that the appellant had not proved his case on a balance of probabilities.

2. The learned trial magistrate erred in law and in fact in disregarding and/or ignoring the evidence adduced by the appellant in his testimony, exhibits produced and his submissions against the respondent.

3. The learned trial magistrate erred in law and in fact in being guided by irrelevant facts to reach his conclusion.

4. The learned trial magistrate erred in law and in fact in dismissing he plaintiff's claim

The appellant is seeking that the appeal be allowed and judgement of the trial court be set aside and damages payable to the appellant under pain, suffering and loss of amenities be assessed.

The parties addressed the appeal by way of written submissions.

The appellant's case is that he proved his case on a balance of probabilities where he was on duty on 23rd August, 2008 as a permanent employee of the respondent and was injured while on duty. It was his duty to arrange timber and while undertaking such work one piece hit

him and got injured to the chest. Such arose out of negligence of the respondent as held in **John Barasa Wasike & another versus Devki Steel Mill Ltd [2013] eKLR** an employer has a duty at common law and under statute to provide working conditions and to take reasonable care to ensure the safety of employees.

The appellant also submits that the trial magistrate failed to consider the evidence adduced that the appellant had been treated at Nakuru provincial hospital for injuries suffered at work and in the report of Dr. Omuyoma upon assessment he was found to have suffered a deep cut would on the chest wall. The submissions filed by the appellant were not considered that the appellant had been injured by a nail while at work when he was removing some piece of timber. Documents relied upon by the defence were prepared wholly by them and have remained in their custody and this should have been considered by the court as held in **Sokoro Saw Mills Ltd versus Grace Nduta Ndung'u Civil Appeal No.99 of 2003 (Nakuru).**

The judgement of the trial court should be set aside and the appellant awarded damages at Ksh.95, 000.00.

The respondent submits that the claim that the appellant was on duty on 23rd August, 2008 when he was injured while arranging timber and that this arose out of negligence by the respondent was found without merit or justification by the trial court which proceeded to dismiss the claims. The defence witness demonstrated that the appellant was not injured on 23rd August, 2008 and the shift injury report was produced to confirm no accident or injury was reported to the respondent on this date. Though the master roll was not produced, the presence of the appellant at the work place was left to speculation.

The appellant was doing manual duties which did not require expertise and there was no evidence that the respondent had deliberately exposed the appellant to injury as held in **Wilson Nyangu Musigisi versus Sasini Tea and Coffee Ltd Civil Appeal No.15 of 2003 (Kericho).** The employer cannot be held liable under statute or common law where an employee is engaged in manual work and which does not require exceptional skill and the employees injures himself. In this case had the appellant been diligent, the accident should have been avoided. He exposed himself to injury and cannot hold the respondent liable in negligence or under statute.

The respondent also submits that the trial court applied correct principles of law in finding that the appellant had not proved his case to the required degree and properly dismissed the case.

On the quantum the principles in assessing damages are set out in the case of **West H. & Son Ltd versus Shepherd (1964)** which case was relied upon in the case of

Cecilia W Mwangi & another versus Ruth W Mwangi Civil Appeal No.251 of 1996. Courts must give reasonable compensation and secure uniformity in the general method of approach and with moderation. Comparable injuries should be compensated with comparable awards. The appellant suffered soft tissue injuries and in similar cases an award of ksh.30, 000.00 was found appropriate.

Determination

The court has considered the evidence, submissions from both counsels and is now my singular duty to re-evaluate the entire case and come up with my own findings.

The issues which emerge for the court determination are summarised as follows;

Whether the appellant was an employee of the respondent at the time he alleges to have been injured;

Whether there was negligence or breach of a statutory duty; and

Whether there was proof to the required standard.

The appellant testified before the trial court that he was employed by the respondent in the year 2007 and issued with a letter of appointment. He left such employment in the year 2009. While on duty on 23rd August, 2008 he was injured while arranging timber when a nail stabbed his chest. He was treated at Nakuru general hospital.

Upon cross-examination, the appellant testified that he singed terms and conditions of employment letter and on 1st August, 2007 were employed as a general worker. His ordinary duties were to arrange oils which entailed removing oil barrels from the road and replacing them.

The fact of the appellant being an employee of the respondent and that he was issued with a letter of appointment as a general worker with terms and conditions of such employment was therefore not challenged in any material way. This is affirmed by the trial court. Equally not challenged was the fact of injury while at work on 23rd August, 2008. The defence by Peter Karenje for the respondent that the procedures for small injuries is to take the employee to the Nakuru provincial hospital is confirmed by the appellant who testified that indeed he was taken to such hospital and treated. A medical report was prepared in this regard by Dr Obed. The failure by the respondent as the employer to keep a work record on the injuries reported and opted to refer the employee to the provincial hospital cannot be visited upon the employee who attended as required.

The duty of the employer to ensure the employees who are sick or unwell are treated within reasonable limits is a burden that the employer retains in law. On the evidence adduced before the trial court, the appellant was injured while at work and received treatment in this regard.

Were such injuries to the appellant as a result of negligence or and or breach of a statutory duty on the part of the respondent as the

employer?

Before the trial court, the appellant testified as follows;

> .. I was employed in the year 2007. … On 23/8/07 I was on duty as a permanent employee. I was injured on the chest. We were removing some pieces of timber when a nail on one of the timber stabbed me on the chest. I went to Nakuru General Hospital in the company of my colleagues among them Leonard. I was given treatment chit.
>
> On 31/8/2008 I went back to hospital to have the sticker removed. In year 2009 I was examined by Doctor Omuyoma … I blame the accident on the company. It never provided me with protective gears including apron, gloves and mask. I have not fully healed. …

On this evidence, the trial court made a finding as follows;

> ....the plaintiff blamed the defendant for failing to provide protective apparel. In his pleadings he accused the defendant of failing to provide him with a safe system of work. He said he was removing pieces of timber when he was stabbed by a nail lodged on one of the pieces.
>
> It was never explained properly how that imported civil liability on the part of the defendant.
>
> The work plaintiff was doing cannot be said to be inherently dangerous. The plaintiff had full control of what he was doing.
>
> The defendant in submissions said an employer is not expected to babysit or watch over the employee constantly. That master-servant relationship cannot be equated to that of school-master and a pupil or that of a nurse and … child.

In addressing the question of whether the employer was negligent for the injuries caused to an employee while at work, the court in In **Van Daventer versus Workmen's Compensation Commissioner [1962] 4 SA** held as follows;

> An employer owes a common law duty to a workman to take reasonable care for his safety. The question arises in each particular case as to what reasonable care is required. This is a question of fact and depends upon the circumstances in each particular case. A master is in the first place under a duty to see that his servants do not suffer through his personal negligence, such as failure to provide a proper and safe system of working and a failure to provide proper and suitable plant.
>
> If he knows or ought to have known of such failure, he is not bound to give personal superintendence to the conduct of his workings and there are so many in which it is in the interest of the workman that the employer should not personally undertake such superintendence. He may for instance be not sufficiently qualified to do so. In that event the master would be liable for the negligence of persons so acting on his behalf. If a servant is employed on work of a dangerous character, the employer is bound to take all reasonable precautions for the workman's safety. This may entail provision of a proper and safe system of work …

And the questions which ought to be asked in addressing whether there was negligence are;

> i. Was the injury to the claimant foreseeable?
>
> ii. Is it fair, just and reasonable to impose a duty?

In the case of **Wilson Clyde Coal Co. Ltd versus English [1937] 3 All E.R 68**. the court held that where the employer had entrusted the task of organising a safe system of work to an employee as a result of whose negligence another employee was injured, the employer could not have been held liable for its own negligence, since it had taken all reasonable care in entrusting the job to a competent employee, nor could it have been held liable vicariously since common employment would have been a defence.

An Employer's duty, as held in **Nairobi High Court Civil Case Number 152 of 2005 between Stat Pack Industries versus James Mbithi Munyao**, is to take all reasonable steps to ensure the Employee's safety, but he cannot babysit an Employee. He is not expected to watch the Employee constantly. The Employer has no obligation to follow the activities of the Employee, even where the Employee has decided to go outside the scope of his employment. See **Isinya Roses Limited versus Zakayo Nyongesa [2016] eKLR** and **Rashid Ali Faki versus A.O. Said Transporters [2016] eKLR.**

The foregoing excerpts from the impugned judgment shows clearly that the trial court perused and considered the appellant's case on its merit, addressed the defence on the merits, case law and submissions of the parties. There are findings and reasons given. This court finds no material to disturb the findings of the trail court as set out above.

Accordingly, the appeal is found without merit, the judgement of the trial court is hereby confirmed save for costs of the appeal go to the respondent.

Delivered at Nakuru this 28th day of March, 2019

M. MBARU

JUDGE

In the presence of: ……...…….. ……..……..