REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

APPEAL NO. 19 of 2017

(Appeal from the Judgment of C. Obulutsa, Ag. CM Nairobi)

(FORMERLY HCCA NO. 135 OF 2013)

(Before Hon. Justice Hellen S. Wasilwa on 5th March, 2019)

TEITA ESTATE LIMITED.....APPELLANT

VERSUS

MUTUA KATIKU.....RESPONDENT

JUDGMENT

1. The Respondent herein filed an Amended Plaint at the Chief Magistrate's Court at Nairobi on 10th May 2010.He averred that on or about 6th February 2008 he was engaged in his duties as a Machine Operator when the machine broke down and one of its part hit the Respondent's leg occasioning him serious injuries. The Learned Magistrate in his Judgement delivered on 14th February 2013 found the Appellant 100% liable and awarded the Respondent damages of Kshs. 352,000 plus costs of the suit and interest.

2. The Respondent dissatisfied by the Judgement filed this Appeal at the High Court at Nairobi being Civil Appeal No. 135 of 2013 prior to the Appeal being transferred to this Court on 17th November 2012.

3. The Appeal is premise on the following grounds:

> ***1. The Learned Magistrate erred in fact and in law by introducing into the Judgment matters not pleaded and not in issue from the pleadings that the third member of the team was at fault.***
>
> ***2. That the Learned Magistrate erred in act and in law in failing to find that the machine operator, the Plaintiff was solely responsible for running the machine.***
>
> ***3. That the Learned Magistrate erred in fact and in law in finding the Defendant liable for the Plaintiff's injuries despite lack of any fault by the Defendant.***
>
> ***4. That the Learned Magistrate erred in fact and in law in failing to take into consideration that the Plaintiff had well over thirty (30) years of experience as a machine operator and that the Plaintiff had previously been warned prior to the accident for negligent use of a machine in the Defendant's premises.***
>
> ***5. That the Learned Magistrate erred in fact and in law in failing to consider what was the cause of the flyer breaking off the machine and injuring the Plaintiff.***
>
> ***6. That the Learned Magistrate erred in fact and in law in awarding the Plaintiff general damages of Kshs. 350,000/=.***

4. The Appellant therefore prays that the Appeal be allowed with costs. Each party filed its respective written submissions to the Appeal.

Appellant's submissions

5. The Appellant submits that this being a first appeal this Court is obligated to re-evaluate the evidence within the laid down legal principles as held in **Selle & another v Associated Motor Boat Co. Ltd & Others (1968) EA 123** and **Peters v Sunday Post Limited [1958] EA**

6. The Appellant submits that the trial Court erred in finding the collector of twine responsible for the injuries suffered by the Respondent since the Respondent did not plead that the accident was caused by the Appellant having employed incompetent staff.

7. The Appellant submits that the Respondent was under a duty to discharge the burden of proof as required under Sections 107,108 and 109 of the Evidence Act. However, all the Respondent stated was that he was injured when a piece of metal came of the machine and struck his left leg therefore blaming the Appellant for providing him with a faulty machine.

8. The Appellant submits that the holding of the trial Court that the accident was caused by a faulty machine is contradicted by the evidence of Robert Wafula DW1 who stated that he saw a broken metal and that by looking at the machine he could tell the flyer had broken.

9. The Appellant further submits that the primary cause of the Respondent's injuries was that the flyer was broken because the bobbin had exceeded the required diameter and not because the machine was faulty. The Appellant therefore submits that the Respondent failed to discharge the burden of proof on any default by the Appellant.

10. The Appellant submits that the Respondent testified that he had fractured his leg as a result of a piece of metal hitting him and that the PW3 Dr. Waithaka Mwaura testified that the Respondent sustained a displaced fracture of the left tibia.

11. The Appellant therefore submits that a sum of Kshs. 200,000 would suffice as damages. The Appellant relies on the decision in **Isaac Mwenda Micheni v Mutegi Murango [2004] eKLR** where the Court awarded Kshs. 100,000 as general damages for a sustained compound fracture of left tibia and fibula, cut wound on scalp and right knee and multiple soft tissue injuries.

Respondent's submissions

12. The Respondent submits that a party cannot plead evidence. The Respondent submits that it was not conceivable that the Respondent would have pleaded the issue of a third party in the pleadings since the issue of the third party came up during PW2's evidence.

13. The Respondent submits that the evidence that the third person who was part of the team that was to operate the machine was not available and that the Appellant had provided the Plaintiff with boots. Thus, this evidence led the Court to conclude that the Appellant was negligent.

14. The Respondent submits that the circumstances under which an Appellate Court may interfere with quantum of damages awarded by a lower Court or High Court was stated in **William Kinyanjui & another (suing as the legal representative of the estate of Jane Florence Njeri Kinyanjui) (Deceased) v Benard M. Wanjala & Another [2015] eKLR**.

15. The Respondent submits that the facts and circumstances of the accident herein are similar to those in **Devki Steel Mills Ltd v James Makau Kisuli [2012] eKLR** where the Court agreed with the Learned Magistrate's finding that the Appellant was 100% liable for the severe soft tissue injuries suffered by the Respondent. The Respondent further relies on the decision of **Ben Kiptum Ego v Joseph Karanja [2009] eKLR** and submits that the Court in that matter awarded Kshs. 360,000 for similar injuries.

16. The Respondent submits that the Appellant has failed to establish that the trial Court erred in its decision and the Appeal herein should fail.

17. This is a first appeal to this Court and so it is the duty of this Court to re-evaluate the evidence before it.

18. From the Pleadings of the Plaintiff, the Amended Plaint was filed before the CM's Court on 10/5/2010. The Plaintiff pleaded that he was employed by the Respondent as a Machine Attendant. He averred that on or about the 6th February 2008, while on duty at the Defendant's premises when the machine broke down and one of the parts hit his leg thus occasioning him serious injuries.

19. The Plaintiff averred that the said accident was occasioned by the Defendant's negligence, in that the Defendant did not keep the place of work safe and failed to warn the Plaintiff of the dangers and risks involved in the said work.

20. The Plaintiff particularised the Defendant's negligence as failing to keep the machines in good condition and also issuing him with defective machines of work.

21. The Defendants filed their defence "under protest" on 28/4/2010. They denied the negligence and averred that they took all reasonable precautions for the safety of all its employees. They also averred that they provided and maintained adequate and suitable plant and appliances to enable its employees carry out their work in safety.

22. They indicated that if the Plaintiff was injured, it was solely and substantially caused by his own negligence, in that he did not adhere to the laid down work regulations and procedures and failed to have any regard to his own safety thus exposing himself to risk of injury.

23. In response to the defence, the Plaintiff filed a Reply to the Defence on 10/5/2010 reiterating the averments in the Plaintiff.

24. The case proceeded through viva voce evidence whereby the Plaintiff testified that he was injured while on duty. The Plaintiff called one witness who also testified that he was working with the Plaintiff when a piece of metal from the machine broke and injured the Plaintiff. He also testified that at the time of the accident, the supervisor was not at the scene. The other witness was the doctor who testified and

confirmed the Plaintiff suffered injury due to the accident.

25. The supervisor Robert Wanjala testified on behalf of the Respondent and stated that he was not at the scene but heard screams and rushed to the scene after the accident had already occurred. He said he suspected the filled bobbins caused the metal to shift hitting him.

26. The Respondent also called DW2 who also indicated that he was not present when the accident occurred but indicated that the Plaintiff had been properly trained on the use of these machines and was an instructor who used to train others and had also previously broken the silting rail.

27. Based on the above evidence and submission of the parties, the Learned Magistrate in his judgement indicated that though it had been alleged the Plaintiff delayed in removing the twine, PW2, Kimanzi was the feeder and a third person was to collect the product. The Plaintiff was only to operate the machine. He made a finding that the delay in removing the produce was the fault of the third person and not Plaintiff.

28. I have considered the evidence submitted before the lower Court and which I have re-evaluated. It is true that the whole production process was managed by three people – with the Plaintiff being the Machine Operator.

29. The Respondent's witnesses were never eye witnesses to the accident. The Respondent however indicated in their evidence that they gave Plaintiff protective gear, which he did not deny. DW1 indicated he suspected the filled bobbins caused the metal to shift. The Plaintiff being a Machine Operator, he was not responsible to emptying the filled bobbins.

30. The submissions by the Respondent that the Plaintiff caused his own injury cannot therefore stand. The submissions that the Plaintiff was solely responsible for running the machine is also not true. There was no error in finding the Defendant liable for the injuries as the 3rd party responsible for emptying the filled bobbins was an employee of the Defendant and therefore the Defendant shares liability in his omission which caused the injury to the Plaintiff.

31. There is no indication that the Plaintiff did commit or omit to do anything which caused the accident. It is therefore my finding that based on the evidence before me and the submissions on record, there is nothing to warrant disturbing the learned Magistrate's findings. I am convinced that the Learned Magistrate was guided by proper evidence to arrive at the finding that the Defendant was 100% liable for injuries occasioned to the Plaintiff.

32. On quantum, I am also guided by the submissions and case law. This was quantum given by the Learned Magistrate in exercising his discretion. There is no indication that the discretion was exercised based on wrong principles.

33. I therefore find the Appeal has no merit. I dismiss it accordingly and confirm the lower Court's judgement.

34. The Appellant to bear costs of this appeal and of the Lower Court's.

Dated and delivered in open Court this 5th day of March, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ngecho for Appellant – Present

Miss Kiugia holding brief Mutua for Respondent – Present