



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

APPEAL NO.27 OF 2018

[Formerly Nakuru High Court Civil Appeal No.158 of 2009]

FESTUS NYAMBEKA.....APPELLANT

VERSUS

TEXCO SPINNING MILLS.....RESPONDENTS

[Being an appeal from the judgement and decree of Hon. Onyiego, Magistrate delivered on 23rd June, 2009 in Nakuru CMCC No.869 of 2003]

JUDGEMENT

The appellant had filed Nakuru CMCC No.869 of 2003 on the grounds that he was employed by the respondent as a casual labourer when on 15th October, 1998 while at work the ladder he was using slid causing him to fall where he sustained injuries. That such fall and injury arose out of the negligence of the respondent who failed to ensure a safe environment and work by providing a defective machine for him in breach of statutory duty. The appellant was claiming special and general damages.

In response the respondent filed a defence and denied all the allegations made by the appellant and on the grounds that there was no employment between the parties and the alleged acts of negligence and breaches did not occur and where there was injury such arose out of the negligence of the appellant and he was sufficiently compensated under the Workman's Compensation Act.

The trial court delivered judgement on 23rd June, 2009 and made a finding that the appellant got injured while at work but the same was not due to the negligence of the respondent, the appellant failed to discharge the burden of proof and thus dismissed the suit.

Aggrieved, the appellant filed the appeal on the grounds that the trial court did not address the evidence fully and therefore arrived at a wrong finding by blaming the appellant for the accident, that he had proved his case and damages are payable.

The parties filed written submissions.

The appellant submitted that he got injured while at work with the respondent when he was climbing on a ladder and injured his leg and which evidence the court ignored. The appellant was required to use a two-legged ladder to climb and Mr Yegon was to help support it but he left it unattended. The ladder in use was not fit for purpose required. After the accident the respondent was required to have statements written which was not done and the trial court should have believed the appellant. The finding that there was no independent witness to explain the circumstances leading to the accident after the defence witness stated that the appellant fell while trying to catch a dove should not have been at the instance of the appellant but for the respondent. The appellant had discharged his duty of confirming there was negligence and breach of duty and the judgement of the trial court should be reviewed and special and general damages be awarded.

The respondent submitted that the trial court heard the witnesses and arrived at a finding that the appellant had not proved his case to the required standard as he had been contradicted in his evidence as to the circumstances leading to the accident. Without proof of the case, there was no liability established that there was negligence or breach of duty. The findings of the trial court be upheld.

I have considered the submissions of the parties in this appeal. This being a first appellate court, it was held in **Selle versus Associated Motor Boat Co. [1968] EA 123** that;

The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular

circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.

this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

In this regard, the appellant had pleaded in his case that on 15th October [year inserted by hand, 1998] while at work with the respondent he was using a ladder when it slid and he fell and got injured. The accident occurred after he was required to use a defective machine and thus placed in unsafe work environment without any protective gears.

In his evidence, the appellant had testified as follows;

... I do recall 15/10/98 on that day I was working with Texco Spinning Ltd. I was employed as a cleaner. ...while climbing on a ladder, I fell down and inured my leg. I was cleaning the store. The person who was holding it left unattended. I was not aware when I stepped on it. I slipped and I fell down. The ladder was two legged. The ladder was always supported by another person. It was Yegon who was supporting it. I did not know why he left is unattended. I got injured on my left leg at the middle. ...

In cross-examination the appellant testified that in his pleadings he had not indicated the year he got injured as this was inserted later. He also testified that;

... according to exhibit 1 I was employed as a machine operator. My work was

[...] cleaning duties ... Yegon saw me injured. I did not know Yegon had released the ladder. I was not injured by a machine. I do not know why paragraph 6 [of the Pleadings] says I was injured by a machine. I had worked as a cleaner for nine years. ...

In evidence the claimant also called Dr Obed Omuyoma who produced the medical report.

In defence the respondent called Wesley Yegon its employee and who was working with the appellant and testified that they were working in stores allocated cleaning duties and while doing so with the appellant a dove was hovering around. The appellant climbed the belt in attempt to catch the dove. This was not part of his duties. There was no ladder and stood on the leather belt.

The defence witness was cross-examined and testified that the appellant did not have a ladder to use in his cleaning duties as this was only required in the warehouse.

On the facts, the evidence and submission by the parties, the trial court assessed the same and established that the appellant was working with Yegon who had given a different course of events leading to the accident and injury. This court reading of the record is clear to the extent that Yegon as the witness for the defence was not questioned beyond his contradiction of the appellant's evidence. I take it his evidence was taken as the truth. This court has no doubt that such evidence related the true position as to how the appellant got injured to his leg and this arose out of his line of duty as a cleaner and while using a belt to chase at a dove hovering in the stores where he was required to clean with Yegon.

The pleadings filed by the appellant made a major omission, the dates of injury are not stated and to this the respondent had defended the suit by denying liability. The year of injury in inserted by hand without being countersigned and not clear when, how and who made the insertion. The contradiction of the circumstances leading to the appellant's injury from what he claimed to be sliding from a ladder and failure by Yegon to hold it and the pleading that injury arose from a machine leaves so many gaps in the claims made. The defence then rendered the fatal blow to the entire claim where yegon testified that he was working with the appellant in cleaning duties and he got injured while using a belt to chase a dove in the stores and there was no ladder at all.

The trial court thus examined the material before it and arrived at a proper finding, the appellant failed to prove his case to the required standard. This court too does not find any material basis to disturb these findings. No good grounds exist to make a contrary finding.

Accordingly, the appeal is found without merit and is hereby dismissed. Costs to the respondent.

Delivered in open court at Nakuru this 30th day of April, 2019.

M. MBARU JUDGE

In the presence of: