



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

APPEAL NO. 2 OF 2017

BETWEEN

ZAKARIA SAWALA CHOKA.....APPELLANT

AND

TILE & CARPET CENTRE.....RESPONDENT

[An Appeal from the Judgment of the Learned Resident Magistrate G.O.Kimanga

at Mombasa, given in SRMCC No. 1461 of 2013 on 12th May 2015]

BETWEEN

ZAKARIA SAWALA CHOKA.....PLAINTIFF

VERSUS

TILE & CARPET CENTRE.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Kanyi J & Company Advocates for the Appellant

Murimi, Ndumia, Mbago & Muchela Advocates for the Respondent

JUDGMENT

1. The Appellant was an unsuccessful Plaintiff at the Trial Court. He was an Employee of the Respondent. He was injured on 27th November 2011, while playing football at a recreational event on a Sunday, organized by his Employer, the Respondent herein. He alleged that the Respondent was liable for his injury because the Respondent did not supply him with a pair of shoes fit for purpose; the Respondent permitted him to work in dangerous conditions; the Respondent failed to take adequate precautions for the safety of the Appellant while the Appellant was engaged in the said work; the Respondent exposed the Appellant to foreseeable risk of injury; the Respondent permitted the Appellant to work in circumstances which were inherently dangerous; and the Respondent failed to provide a safe system of work.

2. The Trial Court dismissed the Claim with costs to the Respondent on 12th May 2015, relying on the doctrine of *volenti non fit injuria*.

3. The Appellant challenges the decision on 4 Grounds: -

i. The Trial Court erred in application of the laws pertaining to negligence.

ii. The Trial Court misapplied the defence of *volenti non fit injuria*.

iii. The Trial Court erred in not finding that the Appellant was working under the Respondent's compulsion.

iv. The Trial Magistrate erred in failing to adopt Judicial Authorities supplied by the Appellant.

4. The Appellant urges the Court to: set aside Judgment of the Trial Court; the Case is heard afresh by a different Magistrate; in the alternative the Court grants orders in favour of the Appellant based on the record; and costs of the Appeal be paid by the Respondent.

5. Parties agreed on 4th July 2018, to have the Appeal considered and determined on the strength of the record.

The Court Finds:-

6. At page 64 of the Record of Appeal, the Appellant states: -

- It was end of year celebrations.
- It was not work day.
- The game was part of entertainment.
- I was also celebrating.
- I was employed as a Loader.
- I worked 6 days a week.
- Work station was at Ganjoni.
- I was injured at KPA Grounds on a Sunday, playing football.

7. Evidence by the other Witness in the proceedings, Alfa Chibui, similarly states the Appellant was injured in the course of a recreational activity. The proceedings are not clear whether Chibui was a Witness for the Plaintiff or the Defendant. It is also recorded rather intriguingly, that the Advocate for the Plaintiff stated, before Chibui gave evidence, " *I am ready for Investigation Officer.*" Where did an Investigation Officer come in? Chibui described himself as an Administrator, so who was an Investigation Officer?

8. The Trial Court correctly held that the Appellant was not injured in the course of his work. He was injured outside the scope of his ordinary duty, in a recreational activity which he freely consented to participate in. There is a series of Judicial Authorities establishing that there can be no liability on the part of an Employer, for work injury occasioned to an Employee, without fault.

9. In the incident subject matter of the Appeal, there was no work injury, but a recreational activity injury. The Court does not think that activities organized by Employers, which are recreational and voluntary in nature, would attract liability on the part of the Employer in event an Employee is injured.

10. The incident happened on a Sunday, outside the Appellant's ordinary schedule and place of work. The Appellant was not compelled to be there, and to participate in the event.

11. The Trial Court did not misapply the law of causation in work injury Claims. There is a catena of decisions such as ***Kiema Muthuku v Kenya Cargo Handling Services Limited [1991] KLR; Nakuru HCCA No. 75 of 2005 Statpack Industries v James Munyao*** which support the position that there can be no liability without fault.

12. On application of the doctrine of ***volenti no fit injuria***, the Trial Court was spot-on and can hardly be faulted. The Appellant was not contracted by the Respondent to play football. He was not paid to play football. He was far removed from a Professional Footballer. The Respondent is not in the business of professional football. It deals in tiles and carpets. The Appellant chose to play recreational football and was injured in the process. He was contracted to load. He was not injured while loading. He could have stayed at home on the particular Sunday, without the risk of being charged with the employment offence of being absent from work without the leave of the Employer, or without lawful cause. Sunday was his rest day. He played football as part of his pastime. He was not injured while playing professional football, for a team sponsored by the Respondent to play competitive professional football. The Respondent aptly relies on ***High Court decision in Homegrown [K] Limited v. Jackline Bonareri Otieno [2014] e-KLR***, where encountered with a similar set of facts as obtaining in the present Appeal, the High Court stated:-

"In this case, the Respondent has not demonstrated that football game was for the benefit of the Appellant. It was for her own pleasure and the Appellant cannot be said to have had a duty of care. The Respondent took some risk of injury while playing football and liability cannot therefore attach against the Appellant."

13. The decision of the Trial Court is founded on clear Judicial Authorities. The Appeal has no merit.

IT IS ORDERED:-

a. The Appeal is rejected.

b. No order on the costs.

Dated and delivered at Mombasa this 19th day of July 2019.

James Rika

Judge