



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CIVIL APPEAL NO 10 OF 2018

RICHARD MAKORI NYAMBUKU.....APPELLANT

VS

DODWELL & COMPANY EAST AFRICA LIMITED.....RESPONDENT

(Appeal from the Judgment and Decree of Hon. Francis Kyambia, SRM in Mombasa SPMCC No. 1062 of 2017)

JUDGMENT

1. This appeal arises from the judgment of Hon. Francis Kyambia delivered in ***Mombasa SPMCC No. 1062 of 2017*** delivered on 21st September 2018.
2. The facts of the case as recorded by the lower court are that the Appellant, Richard Makori Nyambuku was an employee of the Respondent and that he sustained injuries at some point.
3. There was divergence between the Appellant and the Respondent on the actual circumstances surrounding the Appellant's injuries. On his part, the Appellant pleaded that on 7th May 2013, he was at work at the Respondent's premises at Port Reitz, Mombasa, when he slid on a greased slippery surface and fell sustaining serious injuries on the left elbow.
4. The Appellant pleaded that the said accident was caused by the Respondent's negligence and/or breach of contract and/or breach of statutory duty.
5. In its defence, the Respondent denied having breached any contractual or statutory duty to the Appellant. Infact the Respondent stated that no accident occurred within its premises as pleaded by the Appellant.
6. After considering the pleadings and evidence of both parties, the learned trial Magistrate drew the conclusion that the existence of an employment relationship and the Appellant having sustained injuries were undisputed facts. The disputed issue was whether the Appellant was injured in the course of his employment.
7. In the fullness of time the trial court dismissed the Appellant's claim on the ground that he was not injured in the course of his employment with the Respondent.
8. Being dissatisfied with the decision of the trial court, the Appellant filed a Memorandum of Appeal citing the following grounds:
 - a) The learned trial Magistrate erred in law and fact in completely disregarding and failing to consider, evaluate and admit the Appellant's testimony, documentary evidence and submissions and hence arrived at a wrong conclusion on the issues of liability and quantum despite there being evidence on record proving that the Appellant had been injured at work and that he had acquired an incapacity which required him to be retired on medical grounds, which factors ought to have been considered in the assessment of damages;
 - b) The learned trial Magistrate erred in law and fact in failing to find that the Appellant had proved his case to the required standard thereby arriving at a wrong decision against the weight of the evidence on record, considering the Appellant's evidence was not controverted by the Respondent;
 - c) The learned trial Magistrate erred in law and fact in entering judgment for the Respondent when there was no basis for the said judgment which was arrived at after failing to consider relevant issues and instead considering irrelevant issues;
 - d) The learned trial Magistrate erred in law and fact in failing to admit the evidence produced in court and thereafter not considering the evidence adduced before him arriving at his judgment which was against the weight of the evidence on record;

- e) The learned trial Magistrate erred in law and fact in failing to appreciate that on the basis of the documentary materials and evidence placed on record, specifically the Appellant's Exhibit 4 being letter from the Respondent and Exhibit 5 being work injury evaluation form the Appellant had been injured at work;
- f) The learned trial Magistrate erred in law and fact in relying on a recanted accident report/statement and its contents when the said statement had been forged and no document examiner was summoned by the Respondent to verify the veracity of the statement produced as Respondent's Exhibit 2;
- g) The learned trial Magistrate erred in law and fact by completely failing to find that the Respondent's pleadings, testimony and documents were all inconsistent coupled with the fact that the Respondent's witness failed to prove that he was an employee of the Respondent hence not a credible witness;
- h) The learned trial Magistrate erred in law and fact by completely failing to rely on documentary evidence produced by the Appellant and instead relying on oral evidence of the Respondent's witness who failed to produce injury records as required by law;
- i) The learned trial Magistrate erred in law and fact in failing to consider pertinent factors which he ought to have considered while making the awards on both liability and quantum on general damages as pleaded, proved and submitted by the Appellant whose testimony and evidence on record clearly demonstrated that he had suffered loss of amenities, loss of earning capacity and/or diminished earning capacity as a consequence of the injuries sustained as a result of the accident;
- j) The learned trial Magistrate erred in law and fact when he failed to find that he would have awarded the pleaded and proved special damages;
- k) The learned trial Magistrate erred in dismissing the Appellant's suit when the Appellant had proved his case beyond reasonable doubt.

9. This is a first appeal and the duty of the first appellate court is clear and it is this; to re-consider and re-evaluate, the evidence on record and draw its own conclusions taking into account that it has had no opportunity to encounter the witnesses (see *Kenya Ports Authority v Kuston Kenya Limited [2009] eKLR* and *Abok James Odera & Associates v John Patrick Machira T/A Machira & Co Advocates [2013] eKLR*).

10. In its written submissions filed on 24th May 2019, the Respondent introduces a new twist to this appeal. In this regard, the Respondent submits that the trial court had no jurisdiction to entertain the Appellant's claim in the first place. In advancing this argument, the Respondent relies on Section 16 of the Work Injury Benefits Act which ousts the jurisdiction of the courts with regard to claims for damages in respect of any occupational accident or disease.

11. The issue of jurisdiction is a substantive matter which was raised by the Respondent before the trial court. For some reason however, the Respondent chose not to file a cross appeal on it, only to bring it up in submissions. To my mind, this was not the proper procedure to adopt. The Respondent ought to have raised it substantially in order to allow the Appellant an opportunity to respond appropriately. For this reason, the Court will not make any finding on this issue.

12. On his part, the Appellant raises eleven (11) grounds of appeal, which in my view may be placed in two (2) broad categories being; liability and quantum of damages.

13. On the issue of liability, the Appellant told the trial court that he was injured while at work at the Respondent's premises. He accused the Respondent of negligence by failing to ensure a safe work environment.

14. The Respondent denied the Appellant's claim and maintained that the Appellant was not injured at work.

15. In his judgment delivered on 21st September 2018, the learned trial Magistrate states:

“The onus is on the plaintiff to prove that he was injured while in the course of employment or at least at the defendant's premises (see Evidence Act Section 108). In the instant case the defence witness was categorical that the defendant's premises operates 24 hours. The plaintiff alleges that at the time he was injured there was only security guard has long left employment. He said he was taken to hospital by a passerby. This evidence by the plaintiff raises doubts in view of the evidence by the defendant's witness that the premises operates 24 hours. If the plaintiff was injured at work, at least one of his workmates would have witnessed the same.

Secondly, the defence witness testified that every accident must be reported. The plaintiff concurred with the defence witness. However, there is no indication that this accident was reported. There is also the statement the plaintiff recorded which is attached to the accident claim form. The plaintiff clearly stated that he was injured at Likoni Ferry. Although the plaintiff attempted to disdain the said statement, I find the same credible and make a finding that the same was recorded by the plaintiff. The plaintiff did not strike me as a truthful witness.”

16. In the written submissions filed on behalf of the Respondent on 24th May 2019, reference was made to the decision in *Statpack Industries v James Mbithi Munyao [2005] eKLR* where **Visram J** (as he then was) affirmed that in an action of negligence, the plaintiff must establish a causal link between the plaintiff's injury and the defendant's negligence.

17. In similar fashion, **Ibrahim J** (as he then was) in *Treadsetters Tyres Ltd v John Wekesa Wepukhulu [2010] eKLR* held that in an action for negligence, the burden to establish each element of the tort falls upon the plaintiff.

18. With this firm jurisprudence in mind, I find the reasoning and resultant finding by the learned trial Magistrate sound and I have no reason to interfere with it.

19. I therefore confirm the finding by the trial court that the Appellant failed to prove that he was injured in the course of duty at the Respondent's premises.

20. This seals the fate of this appeal. However, as he was required to do, the learned trial Magistrate went further to pronounce himself on the quantum of damages he would have awarded the Appellant had he found the Respondent liable (see *Lazarus Muthama Kamota v Kinatwa Co-operative Savings & Credit Society Limited [2018] eKLR*).

21. In considering the issue of quantum of damages on appeal, the guiding principle as restated in *Printing Industries Limited & another v Bank of Baroda [2017] eKLR*, is that an appellate court will not interfere with an award unless it is shown that the trial court had failed to direct itself properly in law and fact, taking all relevant considerations into account.

22. I found nothing to suggest that the trial court had flouted this basic principle and I will therefore not interfere with its hypothetical award.

23. In the end, the Appellant's appeal fails and is dismissed with costs to the Respondent in this Court and the Court below.

24. These are the orders of the Court.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 11TH DAY OF DECEMBER 2019

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JUDGE

Appearance:

Mr. Kalimbo for the Appellant

Mr. Tsofwa for the Respondent