REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYAAT MERU

APPEAL NO. 2 OF 2017

(Formerly MERU HCA No. 20 of 2014)

KISIMA FARM LIMITED.....APPELLANT

VERSUS

JULIUS KAIREBA MARETE.....RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. D. W. Mburu Principal Magistrate in Meru CMCC No. 69 of 2013 delivered on 23rd May 2014)

JULIUS KAIREBA MARETE.....PLAINTIFF

VERSUS

KISIMA FARM LIMITED.....DEFENDANT

JUDGMENT

The Appeal before me was filed on 24th June 2014 against the entire judgment of the learned Principal Magistrate. The appeal was on three grounds. These were as follows:-

1. That the learned magistrate erred in law and fact in failing to appreciate the burden of proof law squarely on the respondent to prove he suffered any damage under the appellant employment

2. That the learned magistrate misdirected himself in fact and law in finding that the appellant was to blame in the accident yet the respondent did not prove he suffered the alleged injuries in the course of his employment at the appellant company

3. That the learned magistrate misdirected himself on the assessment of quantum on general damages to be awarded to the respondent.

2. A careful scrutiny of the High Court file does not reveal any Grounds filed by the Respondent. However, submissions were filed on 23rd May 2017 by the Appellant while the Respondent filed submissions on 25th May 2017. The submissions by the Appellant were to the effect that the learned magistrate erred in law and in fact by failing to consider that the Respondent had not discharged his duty of proving that he had suffered any damage during the employment. The Appellant took issue with the finding of the learned magistrate's judgment at page 12 paragraph 2 where the court held that having carefully considered the evidence on record as well as the submissions on record, it had not been denied that the plaintiff (Respondent) was an employee of the defendant (Appellant) and that he sustained injuries in the course of his employment and in the premises the learned magistrate found the defendant 100% liable. The Appellant submitted that the court did not consider or appreciate the defendant's statement of defence, witness statement and exhibits produced in court and the counsel's submissions. The Appellantargues that the learned magistrateonly relied on the Respondent's exhibits to determine the suit. The Appellant further submitted that the learned magistrate relied on a medical report produced by consent without the input of the maker. The Appellant argued that consent to produce a document does not mean the Appellant admitted the same as genuine or valid and that it was the duty of the court to treat the same with caution before relying on it. The Appellant submitted that the Respondent did not deny the documents produced by the Appellant which were in agreement with the Respondent's notice of resignation. The Appellant submitted that the learned magistrate erred in not considering that these facts show that the Respondent's case was an afterthought orchestrated after leaving employment. The Appellant argued that its two witnesses proved that the accident never occurred but that the learned magistrate ignored the clear documents which were never disputed by the Respondent. The Appellant submitted that the Respondent was examined initially before joining the Appellant and he had the scars in question and that on leaving signed an indemnity form. The Appellant argued that the learned magistrate awarded the

Respondent Kshs. 150,000/- and costs without any justification or criteria as to how the aforementioned sum was arrived at. The Appellant relied on the cases of **Mini Bakeries Ltd *v* Reuben Kaloki Muindi [2010] eKLR** and **Rashid Ali Faki *v* Said Transporters [2016] eKLR**. The Appellant urged the court to allow the appeal and set aside the lower court's judgment, decree and costs.

3. The Respondent submitted that the learned magistrate was right in finding that the Respondent had proved his case in the lower court through his testimony and evidence adduced. It was submitted that the Respondent had been instructed to move fertilizer using a wheelbarrow and that he was injured as a result. The Respondent argued that he produced a medical report which set out the particulars of the injuries he sustained. He argued that the learned magistrate analysed the evidence and ascertained that the Respondent suffered the injuries. On quantum, the Respondent submitted that the sum he had sought was Kshs. 800,000/- and the award of Kshs. 150,000/- was deemed low and in need of enhancement. The Respondent distinguished the case cited by the Appellant and stated the case referred to a turn boy who was burnt during welding while in the instant case the Respondent was employed as a general worker in a farm where he slipped and fell while carrying fertiliser on a wheel barrow under the direction of the Appellant which clearly showed the Appellant had not provided him with the suitable tools to carry the fertiliser. The Respondent urged the court to dismiss the Appellant's appeal with costs.The Respondent was the plaintiff before the honourable learned magistrate and in his plaint had averred that he had suffered injury. He asserted the injury was as a result of the Appellant not giving him suitable tools. The Appellant attacked the decision on three fronts – burden of proof, finding the Appellant blameworthy against the weight of evidence and misdirection on the assessment of quantum. The Appellant was of the firm view the learned magistrate erred in relying on a medical report produced by consent.

4. As the first, and possibly the last appellate court in the matter, I must assess the facts and weigh the evidence adduced at the trial. I have the benefit of the original record of the lower court. The assertion by the Appellant was that the medical report should not have been relied upon without calling the maker. The impugned medical report was produced on 16th October 2013 by consent of the plaintiff's (Respondent) and defendant's (Appellant) lawyers Mr. Ogoti and Ms Waithaka respectively. Mr. Ogoti for the plaintiff informed the court as follows:- **we have agreed that due to unavoidable circumstances and because the doctor who prepared the medical report has left Meru we produce the medical report by consent. That MFI 5 be produced as P. Exhibit 5**. The advocate for the defendant Ms. Waithaka stated:-**I confirm the terms of the consent**. The court adopted the consent as an order of the court and PMFI 5 produced as P. Exhibit 5 by consent. In order for a party to set aside a consent there must be in existence sufficient grounds to set it aside. Such include, but are not limited to fraud, coercion or similar grounds as would be advanced to set aside a contract. In the case of the In the case of the **Board of Trustees National Social Security Fund *v* Michael Mwalo [2015] eKLR**, the Court of Appeal held as follows:-

> *The law pertaining to setting aside of consent judgments or consent orders has been clearly stated. A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court*.

5. In the foregoing case, the Court of Appeal cited with approval the case of **Kenya Commercial Bank Ltd *v* Specialised Engineering Co. Ltd [1982] KLR 485**, where Harris J held *inter alia*, that –

> *A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.*

6. The consent that was entered into was in the absence of any proof that it was procured illegally binding on the Appellant and the Respondent. Having dealt with the issue of the consent and the medical evidence, let me turn to the appeal proper.

7. The first and second ground of appeal can be collapsed into one. The argument advanced was that the learned magistrate erred in law and fact in failing to appreciate the burden of proof law squarely on the Respondent to prove he suffered any damage under the Appellant's employment and that the learned magistrate misdirected himself in fact and law in finding that the appellant was to blame in the accident yet the respondent did not prove he suffered the alleged injuries in the course of his employment at the appellant company. The Respondent testified how he got injured while pushing a wheelbarrow loaded with fertiliser at the behest of the Respondent. There was medical proof of injury as indicated on the medical report of Dr. Mutuku Mwende who stated that the Respondent had suffered injuries due to handling of chemicals without protective gear, persistent back aches due to falling and the nature of his previous work. The prognosis was that the Respondent would require medication for the side effects of the fertiliser chemicals he handled without protective gear and the persistent pains on the back require pain killers. The Respondent could not carry heavy loads. The Respondent had averred that he had fallen and caused injury to his spine and to his hands. From the medical report and the testimony of the 2nd Appellants witness Emma Muthoni Mwangi, the Respondent was partly to blame for the injuries to his hands. She was emphatic that the Respondent was issued with protective gear such as gumboots, overalls, mask and gloves. In regard to the said testimony, it was plausible that the Respondent was not entirely blameless. I would have apportioned blame at 10% to the Respondent as he was careless in handling chemicals leading to the injuries on his palms. In evaluating the evidence and the testimony adduced I find that the Respondent indeed suffered injury while in the course of his employ with the Appellant as the learned magistrate correctly did.

8. The final ground of appeal was that the learned magistrate misdirected himself on the assessment of quantum on general damages to be awarded to the Respondent. The Appellant asserted that the award of Kshs. 150,000/- was inordinately high as it was not backed by any analysis. The court statedat page 12 of the judgmentthat the medical evidence confirmed that the plaintiff suffered injuries in the course of his duties and having carefully considered the evidence on record as well as submissions filed by either side he held the defendant 100% liable. The learned magistrate proceeded to analyse the decisions submitted and the claim for damages of Kshs. 800,000/- sought by the Respondent pitted against the sum of Kshs. 5,000/- proposed by the Appellant and awarded the Respondent Kshs. 150,000/-. The Respondent was subjected to a medical test on 5th June 2008 which the Appellant produced. The report in summary found the Respondent to be ok save for his injuries to the hands. This perhaps explains why the learned magistrate did not award more than he did. The injuries to the Respondent's palms revealed the injury was due to handling chemicals without gloves, a pattern the 2nd Appellant's witness also noted.

9. The Appellant raised an issue regarding a waiver by the Respondent. Though the ground was not expressly advanced in the appeal or the amended memorandum of appeal which was amended to include the prayer for costs, the Appellants attack on the conduct of the Respondent in argument led to an evaluation of the waiver. The waiver dated 20th January 2012 was in respect of all amounts, claims, expenses, expenses, losses, liabilities, rights, benefits or entitlements (whether known or unknown) due from or against the company and arising from employment by the company or the termination of my employment and release the company from any further liability to me. The document was signed and a name of a witness given. There is no indication that the witness signed as the handwriting on the document seems to have been done by one person. The certificate of waiver is therefore of dubious provenance and would not be relied on to be a waiver of the claim on injuries allegedly suffered by the Respondent. Given that nothing much turns on the purported waiver, the award by the learned magistrate in the case was not erroneous in fact or law.

10. In my view however, given the extent of injury which was permanent in nature, the sum in quantum was low as the Respondent is to be permanently on pain killers for the pain on his back. There is no cross-appeal and therefore I would not disturb the sum awarded and will not even discount it with the 10% liability that I would have slapped on the Respondent for his carelessness.

11. The appeal is not successful as I uphold the decision of the learned magistrate who awarded the Respondent Kshs. 150,000/-, costs of the suit before the Magistrate's Court and interest on the sums at court rates which was to run from the date of judgment in the court below. He did not err in fact or principle or misdirect his mind on the evidence and the law. The only minor defect was not factoring the Respondent's contribution which contribution was mitigated by the low award on quantum. The final result is that the Appeal is dismissed with costs to the Respondent.

It is so ordered.

Dated and delivered at Meru this 9thday of May 2018

Nzioki wa Makau

JUDGE