REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

APPEAL NO. 8 OF 2017

(Before D. K. N. Marete)

UNILEVER TEA (K) LIMITED.....APPELLANT

VERSUS

JOHNSON MOGIRE AYIOKO.....RESPONDENT

JUDGMENT

This is an appeal dated 25th August, 2014and is grounded as follows;

1. THAT *learned Chief Magistrate erred in fact and misdirected himself on the facts of the case in finding that the Respondent had on a balance of probability proved that he was an employee of the Appellant despite overwhelming evidence to the contrary.*

2. THAT *the learned Chief Magistrate erred in fact and in law in arriving at a finding that the Respondent had proved his case against the Appellant on a balance of probability yet the Respondent failed to discharge the burden of proof as to his employment with the Appellant..*

3. THAT *the learned Chief Magistrate erred in fact in failing to that on the 7/7/2007 the Respondent was actually not on duty when he alleges to have been injured as he had resigned and left the Appellant employment on 31/12/2006.*

4. THAT *the learned Chief Magistrate erred in law and in fact on failing to consider the submissions by counsel for the Appellant and refusing and/or ignoring to benefit from the material facts supplied by the Appellant thus rendering an untenable judgment.*

5. THAT *the learned Chief Magistrate erred in law and in fact in awarding manifestly excessive damages to the respondent which damages are not in keeping with current trend.*

6. THAT *the trial Magistrate erred in law and in fact failing to give concise statement of the case, the points of determination, the decision thereon and reasons for his judgement pronounced on 6th August 2014.*

She prays as follows;

1. THAT *this appeal be allowed and judgment and decree of the lower court in Kericho Cmcc*

No.358/2011 be set aside and substituted with an order dismissing the Respondent claim.

***2. <u>THAT</u>** the Appellant be granted costs of this appeal and costs in the lower court.*

The Respondent in his written submissions dated 15th September, 2017 opposes the appeal and prays that the same be dismissed with costs.

At the onset of her written submissions dated 30th August, 2017, the appellant reaffirmed and cautioned this court on its role as a court of first appeal as follows;

> *The present appeal being a first appeal, this court is duty bound to re-evaluate the facts and evidence on record and reach its own independent assessment; this proposition has been stated in various decisions, in **Mahira Housing Co. ltd vs Mama Ngina Kenyatta & Another KLR 2008 P.31** the court of Appeal quoting **Sir. Clement De Lestang**, **V.P** in **Selle v. Associated Motor Boat Company** [1968] E.A 123 at p. 126 stated as follows;*
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> > *An appeal to this court from a trial by the High court is by way of re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that, this court must consider the evidence, evaluate it itself and draw its own conclusions thought it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular this court is not bound necessary to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demaeanour of a witness is inconsistent with the evidence in the case generally***.***

The appellants case is that the respondent instituted a claim against herself vide a plaint dated 8th December, 2001 for injuries sustained on his right leg while at work.The appellant disputed this and stated that the respondent had resigned her employment on 2006 and therefore cannot have been injured in the cause of work and employment. The appellant also countered the respondents evidence that he had been re-employed in December 2007, a position which was not evidentially supported by the respondent.

The respondent's evidence at trial was that on 7th July, 2007, he was preparing culverts when his right leg entered into a hole occasioning injury. He blamed this on the appellant's failure to supply him with gumboots for his work. The respondent further states that the accident was reported to his team leader. He was treated Mosobet dispensary and later Kericho District Hospital.

The respondent, through DW 1, testified that the respondent was not seen at Mosobet dispensary on 7th July, 2007 as alleged. His name and number did not appear on the treatment register for that date.

DW 2, the appellants other witness further testified that the respondent would not have been at work on 7th July, 2007 as he had resigned in December 2006. A history card – DNF1 produced by the witness in evidence indicated that the respondent had left work on 31st December, 2006 and has not returned to date. This is despite the respondents claim that he had been re-employed which was not in any way substantiated.

The appellant sough to rely on section 107(1) of the Evidence Act in support of her claim that the burden of proof of employment, injury and negligence on herself lies on the respondent. This is as follows;

> *"…..whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which exist. Section 107(2) of the evidence Act further states that "… … when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

In the circumstances, the respondent was always duty bound to proof his case on a balance of probabilities which burden he did not discharge.

The appellant sought to buttress this principle of burden of proof by relying on the authority of **ISINYA ROSES LIMITED V ZAKAYO NYONGESA [2016] EKLR** where the court observed thus*;*

> *"Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove those facts exist."*

The appellant reiterates his submission that the respondent's assertion that he was repairing culverts on 7th July, 2007 is mere fabrication, he having resigned from work in December, 2006. Further, he did not produce any documentary or other evidence on his assertions of injury at work or any correlation between the injury, if at all, and the appellant's work place.

The issues for determination therefore are;

1. Whether the respondent had proved his case on a balance of probability?

2. Whether the learned chief magistrate's award of damages was excessive in the circumstances?

The 1st issue for determination is whether the respondent had proved his case on a balance of probability? An analysis of the respective cases of the parties above culminates in a finding for the appellant.

Subscribing to the rule and practice that a court of first appeal must relook and re-evaluate the evidence of the court of first instance and come up with a

determination on the same, I have scrutinized this and come up with a conclusion that the respondent did not meet the onus and burden of proof vested on him in the circumstances. He brought out a case that raised more questions than answers. His evidence in support of his case had gaps that renders it incomplete.

As established in the authorities cited by the appellant, the respondent always carried the onus of proof of the facts and evidence he sought to rely on in support of his case. This was not done, or at all. His evidence comprised of blank statements which were not supported by any material facts. Even when the evidence of the appellant overwhelmed his, and the burden of proof shifted to the respondent, he did not rise to the occasion. I therefore find that this appeal tilts in favour of the appellant. This is because the case was not proven on balance of probability.

On a finding of no proof on a balance of probability of the respondent's case at trial, the issue on award of damages dissipates into nothingness.

I am therefore inclined to allow this appeal with orders that each party bears their own cost of the appeal.

Delivered, dated and signed this 17th day of October 2017.

D. K. Njagi Marete

JUDGE

Appearances

1. Mr. Obosso holding brief for Mr. Rono instructed by Rono & Company Advocates for the Apellant.

2. Mr. Mbeche instructed by S. B Mbeche & Company Advocates for the Respondent.