REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

APPEAL NO. 1 OF 2016

(Before D. K. N. Marete)

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

VERSUS

JOSEPH AGURA MOKAYA.....RESPONDENT

JUDGEMENT

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

*1. **THAT** learned Chief Magistrate's finding was manifestly against the weight of evidence in reaching a decision that the Respondent had proved his case on a balance of probability contrary to the evidence on record.*

*2. **THAT** the learned Chief Magistrate erred in law and in fact in failing to consider that the Appellant was actually not injured on the alleged date or at all.*

*3. **THAT** the learned Chief Magistrate erred 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 judgement.*

*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 in Kericho Cmcc No.361/2011 be set aside and substituted with an order dismissing the Respondent's claim.*

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

The respondent in his written submissions dated 23rd June, 2017 opposes the appeal and prays that the same be dismissed with costs.

The appellant in her written submissions dated 20th April, 2017

The appellant in her written submissions and in reliance to the authority of **Mahira Housing Co. ltd v. Mama Ngina Kenyatta & Another KLR 2008 P.31** reminded this court that being a court of first appeal, it was bound to reconsider and re-evaluate the evidence on record afresh and give an independent conclusion on the same. This is as follows;

> *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 n 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 trials 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 demeanour of a witness is inconsistent with the evidence in the case generally.*

It is the appellant's case that the respondent in his testimony stated that on 22nd December, 2015 he was plucking tea and thereafter as he was going to weigh the tea, he slipped and fell down. He blamed the appellant for not supplying him with gumboots. The respondent, apart from stating that he was not issued with gumboots did not lead any other evidence to demonstrate how gumboots would have helped to prevent the accident. The appellant submits that the respondent failed to satiate the onus of proof falling upon him. It is trite law that he who alleges must proof. This laid out in the authority of **Kiema Mutuku v. Kenya Cargo Hauling Service Ltd. (1991) 2 KAR 258**, where it was held that;

> "*there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence*".

The appellant, through his witness DW 2 stated that the respondent was at the material time and date assigned the work of infilling tea bushes and not tea plucking as alleged. DW 2 further stated in evidence that he knew the respondent and was indeed his supervisor. Further, and in support of his evidence, DW 2 produced daily attendance register DES3 thereby shifting the burden of proof that he was plucking tea on 23rd December, 2005 to the respondent.

Again, the appellant seeks to rely on section 107 (1) of the Evidence Act which places the burden of proof upon the party who desires the court to give judgement in his favour. 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.*

Further, section 108 adds that the burden of proof lies on the person who would fail if no evidence was given on either side. This is supported by the authority of **Mulla on the code of Civil Procedure, 16th Edition, Vol. 2** as follows;

> *"The right to begin is to be determined by the rules of evidence. As a general rule, the party on whom the burden of proof rests should begin…the burden of proof lies on that party who would fail if no evidence at all were given on either side. It is well settled law that a person who sets the law in motion and seeks a relief before the court, must necessarily be in a position to prove his case and get relief moulded by the law."*

The appellant further countermands the evidence of the respondent by producing the outpatient register at her dispensary DEX6 which did not indicate treatment of the respondent on the material day. His name was also not on the appellant accident register - DEX7. The appellant further submits that the respondent did not call Joseph Akinyi, whom he claimed escorted him to dispensary to give evidence in support of his case. All this casts a shadow on the credibility of the evidence of the respondent in the circumstances.

The respondent in his written submission brings out a case in opposition to the appeal. It is his case that he had adduced enough evidence at trial to support a case of liability for negligence.

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.