



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAKURU
APPEAL NO. 28 OF 2017

(Originally Nakuru High Court Civil Appeal No. 63 of 2013)

JOSHUA SINDIGA MOGUSU

APPELLANT

v

MENENGAI OIL REFINERIES

RESPONDENT

(Being an Appeal from the Judgment/Decree and Orders of

Honourable J. Mwaniki AG. Senior Principal Magistrate

dated 3rd of May, 2013 in Nakuru CMCC No. 839 of 2011)

JUDGMENT

1. On 3 May 2013, the trial Court dismissed the Appellant's claim founded on breach of contract/negligence and this prompted the Appellant to file a Memorandum of Appeal before the High Court contending

1. **That** The Learned Trial Magistrate erred in law and in fact in finding that the Appellant had not proven her case on a balance of probabilities.

2. **That** The Learned Trial Magistrate erred in law and in disregarding and/or ignoring the evidence adduced by the Appellant in his testimony, exhibits produced and his submissions against the Respondent.

3. **That** The Learned Trial Magistrate erred in law and in fact in dismissing the Plaintiff's claim.

2. The Appeal was admitted by the High Court on 14 April 2016 and the parties were directed to file written submissions, and to highlight the same on 28 May 2016.

3. The Appellant filed her written submissions on 22 July 2016 while the Respondent filed its submissions on 26 April 2016.

4. The High Court took the highlights of the submissions on the scheduled date, and judgment was fixed for 23 March 2017.

5. However, on 6 April 2017, the High Court declined jurisdiction and ordered that the Appeal be transferred to this Court.

6. On 12 October 2017, after hearing from the parties, the Court directed that it would deliver judgment today.

Role of Court on first appeal

7. The role of Court on first appeal was set out in the case of *Kamau v Mungai* (2006) 1 KLR 150 thus this being a first appeal, it was the duty of the Court.... To re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard the witnesses and hence making due allowance for that.

8. The Court has re-evaluated and assessed the evidence tendered before the trial Court.

Re-evaluation

9. All the grounds of appeal presented by the Appellant generally relate to standard of proof and can be considered as such.

10. The Appellant's testimony was that he was working with 2 other employees in the boiler room when an accident occurred and that he not provided with protective gear while the Respondent's Human Resource Clerk stated that protective gear was provided to the Appellant (gumboots and gloves) and that there were 9 employees working the boiler.

11. The Clerk acknowledged that the Appellant got injured while on duty.

12. In reaching a decision to dismiss the suit, the trial Court noted that the Appellant did not explain how the accident happened.

13. The Respondent on its part also failed to produce records as required by the *Occupational Safety and Health Act*.

14. Had the documentary evidence been produced or had the Appellant explained how the accident occurred, this Court would have reached a different from the trial Court.

15. What the Court notes from the record is that the parties' advocates were so casual and dilatory in prosecuting their respective client's cases.

16. Perhaps this would have been a case pursued under the Work Injury Benefits Act where negligence is not a factor.

17. This Court finds no errors of law or fact in the conclusions reached by the trial Court.

18. The net effect being that the Court finds no merit in the Appeal and orders that it be dismissed with costs to the Respondent.

Delivered, dated and signed in Nakuru on this 8th day of December 2017.

Radido Stephen

Judge

Appearances

For Appellant

Gekonga & Co. Advocates

For Respondent Mukite Musangi & Co. Advocates

Court Assistants Nixon/Martin