REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

APPEAL NO. 9 OF 2015

GEORGE ODHIAMBO

JANE ODHIAMBO T/A RAYOLA WORKSHOP……...…APPELANTS

VS

ISAAC MUYOMBA TUNGULULU……...RESPONDENT

JUDGMENT

[*Being an Appeal from the Judgment and Decree of the Honourable M.K. Mwangi (PM) at Mombasa in RMCC No.3551 of 2009 delivered on 2nd March, 2012*]

Introduction

1. The appellants were dissatisfied with the said judgment of the trial court dated 2.3.2012 and brought this appeal on 23.3.2012. The appeal is founded on the 7 grounds outlined in the Memorandum of Appeal herein. The 7 grounds can be summarized into 3 grounds namely: whether the trial court erred in Law and fact: when he held that the appellants were liable for the 65% for the injuries suffered by the respondent, fail to consider defence and submissions, and awarded excess quantum of damages. The appeal was disposed of by written submissions by both parties.

Background

2. This being a first appeal, the evidence on record must be re-evaluated.

Summary of plaintiff's case

3. Dr. Ajoni Adede (Pw1) produced a medical report that confirmed that the plaintiff suffered permanent partial disability due to amputation of the 2nd and 3rd figure and cut on the left thumb and which led to defective power grip and 16% disability. That he prepared the report after examining the plaintiff and also referred to treatment notes and x-rays.

4. The plaintiff (Pw2) testified that he is a carpenter but he was employed by defendants on 12.5.2008 as a Machine Operator for a monthly salary of kshs.6,000. That the employment contract was retained by the defendants. That he had 16 years experience in that job. That on 22.5.2008 while on duty at the defendant's workshop sawing timber, the saw he was using started falling and the metal grid protecting the saw collapsed and exposed his hands to the saw and as a result the saw cut his 2 left fingers and the

left thumb. He was then rushed to the Coast Provincial General Hospital for treatment. That the 2 fingers were amputated after one week of treatment.

5. Pw1 blamed the defendants for the accident because they never provided him with protective gloves and the machine he was assigned to operate was not properly serviced. He contended that his employment was a deal agreed between him and the second defendant and that he had worked for 10 days before the accident on 22.5.2008. That he also used to work with a Mr. Daniel who was his junior and had no work experience.

Summary of Defence case

6. Mr. George Peter Odhiambo (Dw1) is a soldier based in Nairobi. He confirmed that Pw2 was a carpenter who was introduced to him by his wife (second defendant) when he allegedly requested for space to erect a shade for carpentry work next to his workshop and he accepted because Pw2 posed as a potential customer for timber from his workshop. Dw1 however never met Pw2 and he never employed him. That he never signed any employment agreement with him and he never authorized him to enter his workshop where he had only one Operator called Daniel.

7. Dw1 denied that the machine had defect and explained that his machine was new and it had been installed only in April the same year. He denied that he had any obligation to provide Pw2 with protective gear and contended that, if he needed to smoothen his timber in the workshop he had to pay Daniel to offer that service. As regards the injuries, Dw1 maintained that Pw2 sustained only slight injury and he continued working upto August when Dw1 closed his workshop.

8. On cross examination he confirmed that he was in Nairobi when Pw2 was injured. That his 2 fingers were chopped off and his wife (second defendant) contributed payment towards the treatment for the Pw2. He however maintained that Pw2 was injured while doing his own work and that he had no authority to enter the workshop.

Submissions by counsel

9. The counsel for the plaintiff submitted before the trial court that the plaintiff had proved that he sustained the injuries pleaded while in the course of employment by the defendants. That the said accident was caused by the defendants negligence or breach of their contractual and/or statutory duty to provide the plaintiff with safe working environment and in particular safe system of work and protective gear, as a result of which they exposed him to risk of damage that they knew or ought to have known. The counsel therefore blamed the defendants 100% for the accident and quantified the claim for General damages at kshs.650,000 based on the authorities cited.

10. The defence counsel on the other hand, submitted that the plaintiff had failed to prove that he was employed by the defendants. That the pleadings and the evidence by the plaintiff were at variance and as such the employment relationship had not been proved on a balance of probability. That without prove of employment, the plaintiff's case had crumbled down because there was no other basis upon which to hold the defendants liable. In addition the counsel submitted that the machine was new at the time of the accident and as such it was in good working condition. He therefore submitted that the plaintiff had not proved negligence against the defendants and prayed for the suit to be dismissed. The counsel however, quantified the claim for General damages at kshs.200,000 based on cited authorities.

Appellants' case

11. The appellants argued ground 1, 2 and 3 of the appeal together, followed by ground 4, 5 and 7 together and then ground 6 alone. The first limb of the appeal is on liability, followed by failure to consider defence and their submissions and the last limb is on the issue of quantum.

Liability

12. The appellants repeated the submissions they made before the trial court. They submitted that the trial court erred by finding that the respondent was employed by them and that he was injured while in course of his employment. They faulted the failure by the trial court to find and hold that there was variance between the plaintiff's pleadings and his evidence in which case the plaintiff could not have proved his case on a balance of probability against them. That an example of such variation was the pleading that the plaintiff was employed as a carpenter on casual basis, and that on 22.5.2008 his left had slid while cutting timer with a machine and his fingers were cut. In his testimony however he stated that he was employed as Machine Operator on 12th May for monthly pay of kshs.6,000 and his employment confirmation was kept by the defendant. That on 22.5.2008 while working as a Machine Operator, the saw he was using started falling, and the metal grid protecting the saw collapsed and exposed his hands to the saw which cut his fingers.

13. According to the appellants, the said variation between the pleadings and evidence was enough for the trial court to find that there was never any employment relationship between the respondent and the appellant's. Consequently, in their view the trial court fell into error by finding that the respondent was injured while in the course of his employment by the appellants. They relied on **Galaxy Paints Co.Ltd vs Falcon Guards Ltd [2000]2EA 385 (CAK)** where it was held that:

> "***the issues for determination in a suit flowed from the pleadings and a trial court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the court's determination. Unless pleadings were amended, parties were confined to their pleadings…".***

The appellants therefore submits that the trial court erred in holding that they were 65% liable for the accident without any evidence in support.

Failure to consider Appellants' defence and submissions

14. The appellants submitted that the trial court disregarded and or failed to consider their defence to the suit and also their submissions plus the cited authorities. That as a result of the said default, the trial court arrived at a judgment that was against the Law. That the said judgment was in breach of Order 21 rule 4 of the Civil Procedure Rules in that it did not raise the issues for determination and the reasons for the decision made by the trial Magistrate.

Quantum of Damages

15. The appellants submits that the award of kshs.425,000 to the Respondent was excessive and should be reviewed to kshs.200,000 as submitted by them in the Primary suit. According to the appellants, the respondents' ability to work as a carpenter was not affected by the injuries suffered because he is right handed and the injuries suffered were on his left hand.

Respondents' case

16. The respondent submitted that he proved to the trial court on a balance of probability that he was employed by the appellants as a Machine Operator for a monthly salary of kshs.6,000. That the appellants exercised control over him and therefore he could only operate the machine upon instruction by the appellants. He therefore denied having been an independent contract. The respondent therefore submitted that he got injured while operating timber sawing machine while as an employee of the appellants. He relied on **Kennedy Mutinda vs Basco Production (Kenya) Limited [2013]e KLR** where the court found in favour of the claimant in a similar injuries and blamed the employer 100% for failure to provide safe working environment and failure to comply with the statutory obligation to provide protective gear to the claimant.

17. The respondent further submitted that under Section 6 (1) of the Occupational Safety and Health Act, every Occupier (Employer) has an obligation to ensure the safety, health and welfare at work for all persons working in his workplace. That the employer is liable for any injury or loss that occurs to his

employees while at the workplace if the employer fails to ensure their safety while performing duties. He therefore maintained that there was a link between pleadings and evidence.

18. Finally the respondent submitted that the trial court considered the appellants' defence and written submissions and apportioned the liability to both parties at the ration of 65:35% in his favour. He therefore submitted that the impugned judgment was proper and prayed for the appeal to be dismissed with costs for lack of merits.

Analysis and Determination

19. There is no dispute that on the material date, the respondent was injured in an industrial accident at the appellants' workshop while sawing timber using the appellants' machine. There is also no dispute that while the respondent was sawing timber using the said machine, the saw started falling and the metal protection collapsed and exposed his hand to the saw and he was cut on his left hand. There is further no dispute that his 2nd and 3rd fingers were amputed and the left thumb seriously cut as a result of the said accident. The issues for determination summarized from the grounds of appeal

(a) Whether trial court erred by apportioning negligence between the parties herein at the ration of 65:35% in favour of the respondent.

(b) Whether the trial court failed to consider the appellants' defence and submissions and thereby arrived at a wrong decision.

(c) Whether the quantum of damages awarded to the respondent was excessive and should therefore be reduced to kshs. 200,000.

Liability

20. Liability for the industrial accident herein is materially dependent on the employment relationship between the parties herein and the conduct of the parties. According to the appellants, the respondent was a private independent contractor operating his carpentry business next to his and therefore denied that he was his employee. That if the respondent was indeed of smothering his timber using his machines, he was supposed to pay for the service and the work be done by the appellants' Machine Operator Mr. Daniel. That the first appellant never met the respondent before the accident but his wife (second appellant) had talked to him about the respondent who allegedly requested to erect his carpentry workshop next to theirs.

21. The respondent has however maintained that he was employed by the appellants through the second Appellant and the wife of the first Appellant at a monthly salary of kshs.6,000. That he acted under the instruction and authority from the appellants when he operated the machine on the fateful day. That he was employed there with Mr. Daniel but the latter had no experience and he was his junior.

22. After careful consideration of the rival submissions and the whole record of appeal presented before the court, I find that the plaintiff's evidence during trial was never rebutted by the evidence from the first appellant. The reason for the foregoing view is that the first appellant merely gave hearsay evidence. He was not present when the respondent was hired by the second appellant on 12.5.2008 and as such he could not competently therefore challenge the oral testimony by the respondent. Without any evidence from the second appellant denying the allegation by the respondent, I agree with the trial court in finding that the respondent had proved on a balance of probability that he was employed by the appellants to operate the Timber Sawing Machine on 22.5.2008 when he was involved in the industrial accident while sawing timber. It is obvious that, as a soldier, the first appellant was never present to manage the workshop on a day to day basis and as such he had left that duty to his wife (second Appellant). The defence also never adduced any evidence to prove that the respondent was a trespasser into the appellants' workshop on the fateful day and no legal action was ever taken against him for the alleged trespass into the appellants' workshop.

23. As regards the variance between the pleadings and evidence by the respondent, I entirely agree with

the appellants' submissions that a party is bound by his pleadings. In this case however, the bottom line is whether or not that on 22.5.2008, the respondent was employed by the appellants to operate the Timber Sawing Machine. In my view it is immaterial whether he was serving on permanent or casual basis. All what is material to me is the respondent's undisputed evidence that he was hired by the second appellant (wife and business partner of the first appellant) to operate the timber sawing machine.

24. The other important evidence which is also undisputed by any eye or expert witness is that the respondent was not provided with any protective gear while on duty and further that the saw fell off and the metal grid protecting his hands collapsed and thereby his left hand was cut by the saw. In view of the foregoing observations, I agree with the trial court that the respondent had proved on a balance of probability that he had been employed by the appellant to operate the timber sawing machine on 22.5.2008 and that he was injured in the industrial accident majorly due to the negligence of the appellants when they failed to provide safe working environment, to wit, exposing him to operate a poorly fixed and dangerous machine which had a weak metal protective grid and without providing any protective gear. I further agree with the trial court in apportioning the blame on the respondent at 35% because, with the experience of 16 years on the kind of job, the respondent ought to have acted more carefully than he did to avoid the accident. The grounds of appeal number 1, 2 and 3 and which relate to liability must therefore fail.

Failure to consider Defence and Submissions

25. The appellants have submitted that the trial court never considered their defence to the suit and their submissions. The respondent has submitted that the trial court considered both the defence and the defendants submissions before entering the judgment. I have every reason to agree with the submissions by the respondent that indeed the trial court considered the defence and the submissions before entering the impugned judgment. On page 1 of the judgment the trial court stated the following in part:

> **"The defendant denied the claim or any part thereof…Dw1 George P. Odhiambo said that on the material day and time, the plaintiff was an independent contractor working outside my workshop…"**

In page 2 of the judgment the court went on to state as follows:

> **"Considering these injuries, authorities cited…"**

26. The foregoing excerpts from the impugned judgment shows clearly that the trial court perused and considered the defence filed by the appellants, the evidence adduced by the first appellant (Dw1) and the authorities cited by both parties in their submissions. It is therefore in correct for the appellants to submit here that their defence and submissions were never considered by the trial court when he entered the impugned judgment in favour of the respondent. Consequently, ground of number 4, 5 and 7 must also fail.

Excessive Quantum Damages

27. The appellants have submitted that the award of kshs.425,000 as general damages was excessive in the circumstances of this case. That the claimant only suffered partial computation of the 2nd and 3rd left fingers, which did not reduce his ability to continue working as a right handed carpenter. They therefore urged that a quantum of damages be reduced to kshs.200,000. On his part, the respondent submitted that the trial court considered the nature of the injuries sustained, the residue effect of the injuries and the incidence of inflation in assessing the quantum of general damages at kshs.425,000.

28. It is trite that the appellate court should not interfere with the discretionary award of damages by the trial court unless it is demonstrated by the appellant that the quantum under review was reached after considering an irrelevant factor, or after failing to consider a relevant one or that the award is in ordinately excessive in the circumstances of the case. In this case, the appellants have failed to prove on a balance of probability, that the trial court failed to consider a relevant factor, or that he considered an

irrelevant factor in assessing the general damages at kshs.425,000. As currently submitted by the respondent the trial court considered the nature of injuries sustained, the residue effect (incapacitation) and the incidence of inflation before awarding him kshs.425,000. The court stated as follows in page 2 of the judgment:

> **"On quantum, the plaintiff suffered amputation of 2 fingers and a cut of the left thumb. He healed with 16% of disability. Considering these injuries, authorities cited and the incidence of inflation…"**

In view of the foregoing observation, I find that the damages awarded was reasonable and the factors considered by the trial court were all relevant in deciding that quantum of the damages, and that the appellants have not proved otherwise. Consequently, Ground 6 of the appeal must fail.

Disposition

29. For the reasons stated above the appeal is dismissed with costs.

Signed, dated and delivered at Mombasa this 11th day of November, 2016

ONESMUS MAKAU

JUDGE