



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 527 OF 2010**

**ISAAC KATAMBANI IMINYA.....APPELLANT**

**VERSUS**

**FIRESTONE EAST AFRICA (1969) LIMITED.....RESPONDENT**

*(Appeal from the original judgment and decree of Hon. Mrs. R. A. Oganyo (P.M.) in Milimani CMCC No. 13894 of 2006 delivered on 10<sup>th</sup> November, 2010)*

**JUDGMENT**

1. The Appellant's claim before the trial court was that he was an employee of the Respondent as a driver based at the Respondent's tyre factory along Mombasa road, Nairobi. He alleged that it was an agreed term of contract of employment that the Respondent shall provide safe working conditions and systems of work and ensure his safety. He alleged that on 15<sup>th</sup> May, 2002 while he was in the course of employment, he was involved in an accident owing to the Respondent's negligence whereupon he sustained a fracture of the 5<sup>th</sup> metacarpal for which he sought compensation under the Workmen's Compensation Act and Common Law Negligence.
2. The Respondent filed a statement of defence in which it denied the claim the Appellant's claim in its entirety and expressed its intention to raise a preliminary objection for the suit to be struck out.
3. On trial the Appellant testified that he was employed in the year 1993 to be driving the Respondent's buses or small vans. On the material day while on duty, he went to the parking lot to change the tyre of one of the vehicles that had a puncture. He stated that while doing so the jerk gave way and a tyre lever hit him. He was taken to Avenue Hospital in Parklands 1<sup>st</sup> Avenue for treatment. He produced treatment notes (P. Exhibit 1), medical report (P. Exhibit 4a) and a receipt for the medical report (P. Exhibit 4b). He also stated that the Respondent referred him to their Doctor by the name P. M. Wambugu whose report dated 7<sup>th</sup> September, 2010 he produced as P. Exhibit. He alleged that he lost other treatment documents when his house in Kibera, Nairobi was broken into. The Appellant blamed the Respondent stating that the jerk was old and had no hydraulic fluids, that the parking lot where he was changing the tyre was dark and he was not supplied with protective gloves. The Appellant stated that he could no longer lift heavy things and that with sufficient lighting he could have seen the jerk lever giving way.
4. The Respondent closed its case without adducing any evidence.
5. The trial court heard the matter and dismissed it on the basis that the Appellant failed to furnish documentary evidence to prove his allegations as to employment with the Respondent and injury at the Respondent's premises and in the course of duty.
6. Being dissatisfied with the decision of the trial court, the Appellant filed this appeal on the following grounds:-
  - i. ***That the magistrate erred in law and fact by finding that the Appellant had not established the***

- relationship between the Respondent and the Appellant.*
- ii. *That the magistrate erred in law and in fact by finding that the Appellant required and should have produced a police abstract to prove loss of original medical treatment notes.*
  - iii. *That the magistrate erred in law and in fact by finding that the Appellant's injuries were not proved and by further ignoring and failing to consider cogent evidence adduced.*
  - iv. *That the magistrate erred in law and in fact by ignoring and failing to consider the Appellant's evidence in entirety.*
  - v. *That the learned magistrate erred in law and fact by dismissing the suit with costs.*
7. This being a first appeal I am guided by the principle laid in **Selle v. Associated Motor Boat Co. Ltd 1968 E.A 123.** I therefore am required to re-evaluate the evidence, assess it and make my own findings and conclusions though remembering always that un-like the trial Court, I did not have the benefit of observing or hearing the witnesses during the trial.
8. In his submissions, the Appellant submitted that the documents produced in evidence were sufficient proof that the injury was sustained while in employment with the Respondent. The Appellant cited the case of **Susan Nyachi Ebeteti v. Kijabe Limited (2008) eKLR** where the trial court's decision to dismiss the Plaintiff's case for failure to produce a letter of employment or payslip was set aside. He further relied on **Claphas Wanire Makin v. Excellent Security Services Limited (2002) eKLR** where the trial court's decision dismissing an uncontroverted claim was set aside. On the issue of quantum, it was the Appellant proposed an award of KShs. 300,000/= and placed reliance in **Silphanus Kumba Murondo v. Lamek Mbaka Motegi & Another (2013) e KLR** where the award of an Appellant who suffered a fracture of the 5th metacarpal bone of the right hand and soft tissue injuries to the chest, right thigh and blunt injury to the right hip joint was increased from KShs. 60,000/= to KShs. 220,000/=.
9. The Respondent on the other hand contended that there was no evidence on record to support the Appellant's claim. Citing **Nderitu v. Ropkoi & Another (2004) eKLR** where it was held that the burden of proof is on a party who invokes the aid of the law, the Respondent argued that it was upon the Appellant to prove on a balance of probability that he sustained the injury while in the course of duty under the employment of the Respondent and that the treatment documents were stolen from his house in Kibera. The Respondent further quoted **Eastern Produce (K) Ltd v. James Kipketer Ngetich (2005) eKLR** where the court found that without initial treatment notes there cannot be conclusive proof of any injury. It was the Respondent's submissions that the cases of **Susan Nyachi** and **Clapus Wanire** (supra) relied on by the Appellant were distinguishable for the reason that interlocutory judgment in default of appearance and defence had been entered and the question of employer-employee relationship did not arise in the former case and that there was evidence of employee-employer relationship that was adduced in the latter case.
10. I have considered the deposition of the parties, the evidence on record and the submissions tendered together with the authorities cited therein. The issues falling for determination are as follows:-
- a. *Whether or not the Appellant proved on a balance of probability:-*
    - i. *that he was an employee of the Respondent.*
    - ii. *that he sustained the injury alleged.*
    - iii. *If (ii) above is answered in the affirmative, that he got injured in the course of his duty with the Respondent.*
  - b. *If i, ii and iii are in the affirmative whether the Respondent would be held liable and in what extent.*
11. The Respondent herein did not adduce any evidence to controvert the Appellant's case. The consequence of such failure has been vastly discussed for instance in **Karuru Munyoro v. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988** Makhandia J held:-

***“The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-***

*examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon."*

12. In **Janet Kaphiphe Ouma & Another v. Marie Stopes International (Kenya) HCCC No. 68 of 2007**, Ali-Aroni J, stated:-

*"In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1<sup>st</sup> plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence."*

13. In the absence of evidence in rebuttal from the Respondent, it follows that the Appellant proved his case on a balance of probability against both Appellants. Even if I were to be found wrong on my disposition on lack of rebuttal, I am still of the view that the Appellant proved his case on a balance of probability for reasons I move on to discuss hereunder. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:-

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

This provision provides for the legal burden of proof. However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:-

*"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."*

The position was re-affirmed by the Court of Appeal in **Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited Civil Appeal No. 101 of 2000 [2005] 1 EA 280** where it was held that:-

*"Whereas under section 107 of the Evidence Act, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognises that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."*

14. The Appellant produced in evidence P. Exhibit 1 emanating from the Respondent and signed by Avenue Health Care, Nairobi whose contents the Respondent did not challenge in any manner and its production was not objected to. The said document reveals that the Appellant was the Respondent's staff. It was incumbent on the Respondent who is the custodian of its records to supply court with a record of its employees to disapprove the Appellant's claim as to employment relationship. I in the circumstances find that the Respondent proved on a balance of probability that he was an employee of the Respondent and sustained the injury in the course of duty.

15. In **Winfield and Jolowicz on Tort by WVH Rogers 14<sup>th</sup> Edition, London Sweet and Maxwell at page 213** it is stated that:-

*"If a worker is injured just because no one has taken the trouble to provide him an obviously necessary safety device, it is sufficient and in general satisfactory to say that the employer has not fulfilled its duty."*

16. This position was affirmed in **Mumende -v- Nyali Golf & County Club (1991) KLR 13** in which the court was of the opinion that it is the employer's responsibility to ensure a safe working place. I therefore find and hold the Respondent liable for the accident occasioned to the Appellant.

However, it is my considered opinion in measuring the duty care, one must balance the risk against the measures necessary to eliminate the risks. The Appellant should have been keen while working knowing that he was performing that duty in darkness, using an old jerk and without protective gear. He too has to shoulder liability. I apportion liability between the Appellant and Respondent at the ratio of 30:70.

17. I have also considered the medical reports on record which reports include that prepared by the Respondent's doctor, they both reveal that the doctors relied on the primary treatment documents in preparing the reports and I find and hold that they are conclusive evidence as to the injury sustained. The injury sustained by the Appellant occasioned him temporary incapacity which Dr. Kinuthia put at six (6) months. I must say that the claimant in **Silphanus Kumbe** (supra) relied on by the Appellant suffered injuries which were slightly severe than his. However, considering the date of the accident and the rate of inflation on the Kenya Shilling and the fact that he was incapacitated for six (6) months, I find that an award of KShs. 100,000/= as estimated by the trial court would be too low in the circumstances. I increased the award to KShs. 250,000/=. In the end I set aside the trial court's decision and award the Appellant KShs. 250,000/= as general damages for pain and suffering, KShs. 3,000/= as special damages pleaded and proved all subject to liability as apportioned. The Appellant is also awarded costs and interest. Orders accordingly.

Dated, Signed and Delivered in open court this 13<sup>th</sup> day of March, 2015.

J. K. SERGON

**JUDGE**

In the presence of:

Jaoko for the Appellant.

M/s Nyaga h/b for Michuki for the Respondent.