REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 144 OF 2014

GODWINE EKESA OKELLO..APPELLANT

VERSUS

PARAMOUNT ENGINEERING (2005) LIMITED...........RESPONDENT

[Being an appeal arising from the Judgment of the Hon. Mr. Kasavuli (SRM)

delivered in Winam SRMCC No. 366 of 2010 on 17th November, 2014]

JUDGMENT

The Appellant, **GODWINE EKESA OKELLO**, had sued the Respondent, **PARAMOUNT ENGINEERING (2005) LIMITED**, seeking compensation for the injuries he had sustained whilst working at the Respondent's premises.

1. The trial magistrate had dismissed the case, after coming to the conclusion that the Appellant had failed to establish his case on a balance of probabilities.

2. As far as the learned trial magistrate was concerned, the evidence on record proved that the Respondent provided a safe working environment. Therefore, the trial court held that there had been no negligence on the part of the Respondent.

3. Being dissatisfied with the judgment the Appellant moved to the High Court to challenge it.

4. In his Memorandum of Appeal the Appellant asserted that the trial court had disregarded the evidence tendered by the Plaintiff.

5. In his view, the said evidence had, on a balance of probability, proved his case against the Defendant.

6. Finally, the trial court was faulted for failing to assess the quantum of damages awardable.

7. Being the first appellate court, I am obliged to re-evaluate all the evidence on record, and to draw my own conclusions. However, whilst drawing conclusions from my re-evaluation of the evidence, I am duty-bound to bear in mind the fact that, unlike the learned trial magistrate, I did not have the benefit of observing the witnesses when they were giving evidence.

8. At the trial each party called one witness.

9. The Plaintiff testified as **PW1**, whilst **ANDATI SAHARA** testified on behalf of the Defendant.

10. It is common ground that the Plaintiff was an employee of the Defendant at the material time. It is further common ground that by the time when the Plaintiff got injured at his place of work, he had been working there for a number of years.

11. The Plaintiff confirmed that on the material day, the Defendant had provided him with protective gear, for use whilst working.

12. However, his complaint was that the overalls which were provided to him, was short. He said that the length of the overalls reached past his knees.

13. On the material day, the Plaintiff was cutting the rim of a tractor, using an arc welder. In the process, some sparks jumped and entered into his boots, causing the Plaintiff to sustain burns on his foot.

14. It was the testimony of the Plaintiff that if the Defendant had provided him with long overalls, it could have prevented the fire.

15. Therefore, the Plaintiff blamed the Defendant for providing him with short overalls.

16. The *Patient Record Book"* which contains the treatment notes of the Plaintiff, together with the Claim Form issued under the **Workmen's Compensation Act**, were both produced in evidence, with the consent of the Defendant.

17. Thereafter, the Plaintiff closed his case.

18. DW1 testified that he was a Supervisor at the Defendant Company.

19. He confirmed having witnessed the incident in which the Plaintiff was injured.

20. DW1 testified that the Plaintiff was wearing the protective clothing which the Defendant had provided to him.

21. During cross-examination **DW1** confirmed that the overalls which the Plaintiff was wearing was short.

22. Therefore, when the learned trial magistrate said, in his judgment, that;

> ***"I also do not believe the evidence of***
>
> ***the Plaintiff that the issued overall***
>
> ***was short because as DW1 said, it was***
>
> ***the Plaintiff who had assumed the wrong***
>
> ***posture which led to the shortening of***
>
> ***the overall,"*** ;
>
> that was an error.

23. The witness did not say that it was the posture which the Plaintiff assumed that led to the shortening of the overall. He said;

> ***"He was standing in a bad position, so it was pulled up."***

24. The posture simply pulled up the overall; it did not shorten it.

25. Although the overall was short, the Plaintiff did not specify the length which was deemed appropriate.

26. I find no evidence that the overalls which the Plaintiff was wearing on the material day was shorter than others. Therefore, considering that the Plaintiff had worked at the same job for a couple of years, it would have been useful for him to provide the court with more information concerning why, in this instance, the overalls was deemed short.

27. The trial magistrate said that;

> ***"….. in order for the Plaintiff to***
>
> ***successfully prove his claim against the***
>
> ***Defendant, he must have proved on a***
>
> ***balance of probabilities that the failure***
>
> ***by the defendant to have provided safety***
>
> ***against the possibility of him being injured***
>
> ***in the manner the accident occurred, it***
>
> ***was foreseen by the Defendant, who***

nevertheless failed to act as required of it."

28. In the absence of specification about the required length of the overalls, I ask whether or not the Defendant can be said to have been negligent.

29. To my mind, the answer was provided by **DW1**, when he said;

"I have once been injured as he was injured."

30. That implies that the Defendant was already aware that notwithstanding the fact that an employee was wearing the overalls provided, there was still a possibility that the employee could be injured in the same way that the Plaintiff was injured.

31. Being aware of that possibility, I find that it was incumbent upon the Defendant to demonstrate the steps they had taken to try and address it.

32. As the Defendant did not demonstrate that it had taken any particular steps to try and address the possibility of the kind of accident which the Plaintiff suffered, I find that that constituted negligence.

33. But as the Plaintiff had also worked in the same job for a couple of years, without any accident, I find that on the material day, the Plaintiff must have done something differently, so as to trigger the accident.

34. In that regard, I find reasonable and plausible, the Defendant's explanation, that the Plaintiff stood in a bad position, which caused the overalls to be pulled up. It is in those circumstances that the sparks fell from above the head of the Plaintiff, into his boots.

35. My said finding is informed by the following evidence of the Plaintiff;

"I had experience for the work. I was

used to the environment. I had been

given protective gear. I was used to

the fire particles."

36. Being an experienced hand at the job, who was used to the environment, and who was wearing protective gear, I can only conclude that on the occasion when he suffered injury, the Plaintiff did something differently.

37. In the result, I find that the Plaintiff was 70% blameworthy for the incident giving rise to his injury.

38. According to **Dr. P. W. Oketch**, the Plaintiff sustained superficial burns on his right foot.

39. The Plaintiff had submitted that he should be awarded damages in the sum of Kshs 500,000/=. To support that claim, the Plaintiff cited the case of **CATHERINE WANJIRU KINGORI V GIBSON THEURI GICHUBI (NYERI) HCCC NO. 320 OF 1998**.

40. There were four Plaintiffs in that case, which arose from a motor vehicle accident.

41. The 1st Plaintiff suffered injury to the left ankle, injuries to the chest and to the legs.

42. The 2nd Plaintiff sustained an injury on the back.

43. The 3rd Plaintiff suffered multiple soft-tissue injuries; an injury on both ankles and an injury on the left elbow joint.

44. The 4th Plaintiff suffered injury on the neck, and had headaches.

45. The 1st Plaintiff was awarded Kshs 300,000/=, whilst the 2nd Plaintiff and the 4th Plaintiff were awarded Kshs 100,000/= each. The 3rd Plaintiff was awarded Kshs 350,000/=.

46. In my considered opinion, the authority which was cited by the Plaintiff, is wholly distinguishable from the case before me. I so hold because the injuries sustained by the Plaintiffs in that case are not at all comparable to those sustained by the Plaintiff in this case.

47. In the case of **ELDORET STEEL MILLS LIMITED Vs MAURICE OCHIENG HCCA NO. 180B OF 2009**, the appellate court awarded Kshs 150,000/= as compensation for superficial burns. The said sum was awarded on 3rd October 2019.

48. In the case of **ELDORET STEEL MILLS LIMITED Vs MOENGA OBINO JOSEPHAT HCCA NO. 3 OF 2011**, the Respondent

sustained burns on the left forearm. On 4th August 2014, the appellate court reduced the compensation from Kshs 150,000/=, to Kshs 75,000/=.

49. In the case of **WEST KENYA SUGAR CO. LTD. Vs ZEBEDAYO KIVATI SALAMBA HCCA NO. 26 OF 2011**, the High Court (at Kakamega) awarded Kshs 60,000/= as compensation for superficial burns, which had healed leaving a 3 x 4cm scar. That sum was awarded on 13th February 2013.

50. Having given due consideration to those 3 comparable cases, I find that an award of Kshs 100,000/= is reasonable compensation; and I therefore award the said sum.

51. However, after taking into account the contributory negligence attributable to the Plaintiff, the sum payable to the Appellant herein is Kshs 30,000/=.

52. I also award to the Appellant the costs of the suit as well as the costs of the appeal.

53. The General Damages awarded shall attract interest at Court rates from the date when the trial court delivered its judgment.

DATED, SIGNED and DELIVERED at KISUMU This 15th day of December 2020

FRED A. OCHIENG

JUDGE