



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 79 OF 2013

(Being an appeal arising from Judgment and Decree of the Hon. T. Nzyoki Principal Magistrate In Eldoret CMCC No. 563 of 2011 delivered on 30/05/2013)

KIBUKO ROBERT MAGAIWA.....APPELLANT

VERSUS

RAIPLY WOODS (KENYA) LTD.....RESPONDENT

J U D G M E N T

1. The facts in this appeal are clear and straightforward. The appellant had been employed by the Respondent in the year 2005 at its Loom machine Section. In the cause of time he became sick and one Dr. Sikobe diagnosed him with the following illness;

- a) Pulmonary tuberculosis between 2003 and 2005
- b) Other chronic bacterial viral chest infections
- c) Chronic allergic broncho spasms
- d) Chronic bronchitis
- e) Hypertension.

2. In his plaint dated 25/8/2011 the appellant attributed negligence to the Respondent namely that he did not provide him with the necessary working apparels considering the environment he worked under.

3. The appellant, when the matter proceeded to full trial called 3 witnesses who were basically from the medical field.

4. The Respondent on its part called one witness who refuted the appellant's claim especially on the issue of negligence.

5. The trial court then proceeded to dismiss the appellant's suit claiming inter alia that the Appellant did not proof industrial negligence on the part of the Respondent. The same has prompted this appeal.

6. The parties agreed to dispose this appeal by way of written submissions. The court has perused the same as well as the proceedings at the trial court.

7. The substantive issue raised by the Appellant in his appeal is whether given the circumstances surrounding the working environment of the appellant, can it be said that that was the cause of his illness. Can it be said that the Respondent was negligent in not providing the appellant with the necessary working equipments and for that matter a good environment .

8. The above issues shall only be answered at least by the medical evidence produced. What is not disputed is the fact that throughout the proceedings it was established that the appellant was unwell and according to him he contracted his sickness while working for the Respondent. He went on to blame the Company for failing to provide him with a dust mask and that the room was not well ventilated. He said the machine he was working on emitted smoke from the diesel applied to the rollers.

9. There was no other evidence produced to support his contention. There was no scientific evidence produced to suggest that indeed the environment he worked in emitted such diesel fumes.

10. DW1 alluded that they were issued with an overall and ear plug and not dust masks. On cross-examination he said that they do not require the same.

11. The doctor who testified essentially confirmed the appellant illness. **Dr Joseph Lockar Sikobe (PW1)** essentially narrated the history given to him by the plaintiff. He stated on cross-examination that;

“ The plaintiff suffered T.B. of the lungs and was put on treatment. The T.B is contracted by breathing on infected persons droplets. All drugs cause allergic reactions. There is a possibility that the plaintiff allergic reaction was caused by use of the drugs. The medical report Pexhibit 9(a) does not include the outcome of the test.”

12. **Dr. Joseph Imbenzi (PW3)** narrated the appellant illness too and during cross-examination he stated that:

“ ----- The plaintiff was tested and found to be suffering from T.B. in 2005. T.B. is caused by bocithis, i.e. the T.B bug. I do not know the conditions the plaintiff was working under. The direction for T.B. infection varies. It is difficult to ascertain where one caught the T.B. -----”

13. **PW4 Dr Joseph Chesawa** on his part equally narrated the appellant ailment although they referred the appellant to Moi Teaching and Referral Hospital for treatment. On cross-examination he said that;

“ ----- the causes of his condition is difficult to define. The diseases the plaintiff initially suffered from was “P.T.B..”

13. The evidence from the 3 doctors can clearly be discerned. They all concluded that it was uncertain to know where the appellant contracted the disease. If that was the case then, it became incumbent upon the appellant to prove his case.

14. The appellant on his part simply narrated his working environment. He said that there was dust and diesel emissions from the machine he was operating.

15. Whereas that could have been the case, none of the doctors stated that the dust or any emission for that matter as explained by the doctors could cause the disease. More importantly, there was no independent evidence from the Occupational Safety and Healthy Officer to indicate the nature and environment the appellant worked under.

16. In my view the appellant's situation would have been mitigated had the 3 doctors concluded with certainty that the cause of the illness was the appellant's working environment. In short and as rightfully found by the trial court, it was not possible to conclude the cause of the illness.

17. Section 107 and 108 of the Evidence Act demands that he who alleges must prove. The appellant failed to do so. Infact, and according to the doctors there are other means by which T.B. can be contracted including “breathing on infected person droplets.” as per PW2.

18. In the absence of the empirical evidence that the environment in which the appellant worked was hazardous and therefore the cause of his sickness, this court is left with no other option but to disallow the appeal.

19. Needless to say the decision of ***Afro Spin Limited vs Peter Wagumo Obiero (2005) eKLR*** by Justice Musinga is in all fours with this matter.

20. For the above reasons, it would not be necessary to consider the other grounds raised in the appeal. The same is hereby dismissed but with no orders as to costs.

Delivered, signed and dated at Eldoret in open court on this 19th day of October, 2018.

H.K. CHEMITEI

JUDGE

19/10/18