



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
MILIMANI LAW COURTS
CIVIL APPEAL NO. 407 OF 2013 (Consolidated with)
CIVIL APPEAL NO. 411 OF 2013

DENIS ARAMA MASESE APPELLANT

VERSUS

SUPERFOAM LIMITED RESPONDENT

AND

SUPER FOAM LIMITED APPELLANT

VERSUS

DENIS ARAMA MASESERESPONDENT

**(Being appeal from the judgment of the Chief Magistrate's court at Thika Commercial Court,
delivered on 28th June, 2013 by Hon. Ndenda PM in CMCC No. 59 of 2011)**

JUDGMENT

The appellant in Civil Appeal No. 407 of 2013 Denis Arama Masese was the plaintiff (hereinafter referred to as the plaintiff) in the lower court while the respondent Superfoam Limited was the defendant (hereinafter referred to as the defendant). In Civil Appeal No. 411 of 2013 Super foam limited is the appellant while Denis Arama Masese is the respondent.

The action in the lower court arose following injuries sustained by the plaintiff wherein he blamed the defendant for the same. After a full trial the lower court found in his favour and awarded him Kshs. 600,000/= general damages, Kshs 1700/= special damages plus Kshs. 10,000/= being the doctor's attendance fee. He was also awarded costs of the suit.

Aggrieved by the said award he lodged an appeal claiming among other things that the trial court erred in apportioning liability at 80% against the defendant and 20% on his part. He also complained that the award made in general damages was inordinately low in the circumstances of the case, and that the trial court erred in law when it failed to make on loss of earnings and loss of earning capacity, despite evidence tendered relating to serious disabling injuries. The court was also faulted to failing to award 7,000/= for doctor's attendance despite evidence submitted.

The defendant filed a cross appeal in which it stated that the learned magistrate erred in-law and in fact in finding that the plaintiff was employed by the defendant while there was overwhelming evidence to the contrary. The learned trial magistrate was also faulted in his finding on liability which was said to have no basis in law and fact. The defendant also complained that the court erred in law and fact in not taking into account the submissions on quantum particularly on the award of general damages. That award is said to have been excessive and not commensurate with the injuries suffered.

As the appellate court it is my duty to go through the entire record of the trial court with a view to arriving at independent conclusions. This I have done. In his plaint dated 22nd February, 2011 the plaintiff pleaded that he was employed by the defendant. He further pleaded that it was the duty of the defendant to take all reasonable precautions for his safety while he was engaged in his work, and ensure that the place where he was employed was safe and provide a proper system of working.

It was his case that he was in the lawful cause of his employment when he was injured by a falling concrete slab leaving him with serious injuries. He pleaded that the defendant was in breach of the contract of employment and or terms thereof extending the blame to the defendant's servants and or agents. Particulars of negligence were set out in the plaint.

In the defence filed by the defendant, it was expressly denied that the plaintiff was its employee. It was also denied that there was any accident or any contract of employment or that the defendant was in breach of duty of care or statutory duty and any negligence was also denied. The jurisdiction of the court was also denied.

The record shows that the plaintiff gave evidence in support of his pleadings. One Doctor Monicah Cherotich also gave evidence in support of the plaintiff's injuries and produced the medical report.

On the other hand, the defendant called one witness in support of the defence. When the defendant filed the statement of defence some documents to be relied upon in the trial were annexed. One of those documents is dated 22nd April 2010 addressed to Thika Nursing Home with reference to the plaintiff Denis Arama Maseke. It is important to quote the contents thereof as they have a direct implication to these appeals. The note reads as follows,

“22.04.10

ATT: THIKA NURSING HOME,

REF: DENIS ARAMA MASESE,

ID NO. 27432314

THE BEARER IS IN OUR EMPLOYMENT. HE HAS BEEN INJURED TO HIS RIGHT LEG BY SLAB WHICH FELL ON HIM. PLEASE ATTEND TO HIM AND DEBIT OUR ACCOUNT.

THANKS

SIGNED

DINESH RAMJI KERAI

TEL NO.

RAMSHAYAN CONSTRUCTION

P.O. BOX 12816 -00400

NAIROBI-KENYA”

The defence must have been served upon the learned counsel for the plaintiff because in the reply to defence filed on 12th April, 2011, the plaintiff through counsel stated that he was a stranger to the allegations that he was employed by the defendant's sub contractor, and that it was the duty of the defendant to join the alleged 3rd party and seek indemnity. It should have occurred to the said counsel that the defendant herein was the wrong party to the pleadings and therefore an amendment was necessary.

The evidence on record adduced by the plaintiff did not establish any working relationship with the defendant. He clearly said that he did not have any employment card. He used to sign for payment and the payments records were written by Ramshayam Construction Company yet he did not know that that company had employed him.

The defendant clearly denied in the pleadings and in evidence that it did not know the plaintiff who never worked for it. He was employed by a company which was renovating the go-down and referred specifically to the note I have cited above. The defendant is engaged in making mattresses while the plaintiff is a mason. Liability was therefore denied.

Proof of any civil claim is on a balance of probability. The plaintiff was bound by his pleadings. He did not establish any employment relationship with the defendant. He had the best opportunity to amend his plaint when the defence was filed showing that another party was responsible for his claim. He did not take advantage of that opportunity. This cannot be blamed on the defendant. His claim against the defendant was not proved and must therefore fail.

If I were to find in his favour the award in damages made by the learned trial magistrate was within the cited authorities and comparable injuries. Subject to apportionment of liability, I would not have disturbed the same. That notwithstanding, his appeal must fail. Accordingly Civil Appeal No. 407 of 2013 is hereby dismissed. Civil Appeal No. 411 of 2013 is hereby allowed by setting aside the judgment of the lower court in its entirety.

The circumstances of this case call for an order that each party bears their own costs.

Orders accordingly.

Dated, signed and delivered at Nairobi this 30th day of March, 2016.

A. MBOGHOLI MSAGHA

JUDGE