



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CIVIL APPEAL NO. 33 OF 2011**

**BETWEEN**

**KEVIN ORARO DIDA .....APPELLANT**

**AND**

**VYATU LIMITED .....RESPONDENT**

***(Being an appeal from the Judgment and Decree of Hon. B. Olao, CM dated 9<sup>th</sup> February 2011 at the Chief Magistrates Court at Kisumu in Civil Case No. 256 of 2010)***

**JUDGMENT**

1. George Malachi Ounga (“deceased”) filed the original suit in the subordinate court. He died on 13<sup>th</sup> February 2005 before the suit could be heard. Thereafter James Obongo Arwa obtained letters of administration ad litem for his estate and was substituted as the new plaintiff but he too died before the suit could be heard. Kevin Oraro Dida was appointed administrator ad litem for the estate of James Obongo Arwa and was substituted as the plaintiff.
2. The deceased’s claim was that, *“On or about 17/07/2004 the Plaintiff and in the course of his employment as a general worker, was engaged in his work as a machine operator at the Defendant Company premises at Kisumu. On the aforesaid date while in the course of his assigned duties ... the Plaintiffs’ left hand was completely severed by a machine which he was operating thereby occasioning to himself severe bodily injuries as a result of which he suffered great pain and hence claimed damages.”*
3. In its defence, the respondent denied that the deceased was its employee and that it was negligent as claimed. It pleaded, in the alternative, that in the event the deceased was its employee then he was wholly or substantially to blame for the accident.
4. While the appellant called two witnesses, the respondent did not call any. After hearing the case, the trial magistrate dismissed the suit because the appellant did not prove the case on a balance of probabilities. The appellant now appeals against the judgment and decree on the grounds set out in the memorandum of appeal dated 2<sup>nd</sup> March 2011. He contended that the learned trial magistrate erred in dismissing the suit against the weight of evidence, that trial magistrate failed to appreciate that the plaintiff had proved his case on the balance of probabilities, that the trial magistrate failed to appreciate the circumstances of the plaintiff’s case and the burden of proof placed upon him given the circumstances of the case and that the trial magistrate reached an unjust decision.

5. This being a first appeal, this court is required in law to re-evaluate the evidence adduced before the trial magistrate before reaching its own independent determination whether to uphold the decision of the trial magistrate. The court must bear in mind that it neither saw nor heard the witnesses testify (see *Peters v Sunday Post Ltd* [1958] E.A 424).

6. At the hearing, Kevin Oraro Dida (PW 1) testified that he knew the deceased who was an employee of the respondent company. He did not witness the accident but recalled that when he was informed of the accident, he visited the deceased who had been admitted at New Nyanza General Hospital for two days. He told the court that the deceased's first two left hand fingers had been cut. The deceased was later amputated and died.

7. Jared Odhiambo Owiti (PW 2) testified that he worked with the deceased at the respondent company where they were both machine operators. They operated a machine called an Extrudor 2 which recycles plastic. He explained that the machine was fed with plastic which is melted and extruded on the other end. He testified that the plastic material was pushed through the machine using a stick and that it was possible for one's hands to be trapped when feeding the machine. He told the court that there was a switch to control the machine but it is not near the machine and that they were not given any protective gear. He stated, "*I did not witness the accident that cut Malachi('s) fingers but I went to see him in hospital and found that his first fingers of the left hand had been cut and later the hand was cut.*"

8. Under **sections 107 and 108** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*, the person who alleges is under a duty to prove the particulars of negligence contained in the plaint on a balance of probability. As the Court of Appeal held in *Kirugi & Another v Kabiya & 3 Others* [1987] KLR 347, "*The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof.*"

9. The proof that an accident took place is not enough. The plaintiff must establish a causal link between the negligence and injury. As Visram J., held in *Statpack Industries v James Mbithi Munyao* NBI HCCA No. 152 of 2003 [2005]eKLR,

*Coming now to the more important issue of "causation", it is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily a result of someone's negligence. An injury per se is not sufficient to hold someone liable for the same.*

10. Although the appellant's evidence was not controverted, he had to prove negligence on the balance of probabilities. Both PW 1 and PW 2 did not witness the accident. They could not explain how the deceased was injured. Although PW 2 stated that he filed a case against the respondent in somewhat similar circumstances and was awarded damages when the same machine cut his left hand, that case was in relation to him and not the deceased. In short, there was no evidence upon which the trial magistrate could find that the deceased injury was caused by the negligence of the respondent.

11. Finally, I doubt that Kevin Oraro Dida could maintain this suit on behalf of George Malachi Ounga as he was appointed administrator of James Obondo Arwa and not George Malachi Ounga who had the right to sue in the first place.

12. For all the reasons, I have set out, the appeal is dismissed with costs to the respondent.

**DATED and DELIVERED at KISUMU this 20<sup>th</sup> day of December 2016.**

**D.S. MAJANJA**

**JUDGE**

Ms Nannungi instructed by Odero Okoyo and Company Advocates for the appellant.