



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 154 OF 2011

MENENGAI OIL REFINERIES LTD ::: APPELLANT

VERSUS

PETER OCHIENG BOLO ::: RESPONDENT

(Appeal from the judgment of the Senior Principal Magistrate, W.K. Korir dated 16th day of August, 2011 in Nakuru Chief Magistrate's Court Civil Case NO. 1468 of 2009)

BETWEEN

PETER OCHIENG BOLO ::: PLAINTIFF

VERSUS

MENENGAI OIL REFINERIES LTD ::: DEFENDANT

JUDGMENT

1. The Appellant Menengai Oil Refineries Ltd was the employer of the Respondent Peter Ochieng Bolo as a refinery Operator in its refinery at Nakuru. Under him were several casual workers also employees of the company.

On the 15/12/2008, one such casual employee was Reuben Ombenyi who failed to take up his assignment upon which the respondent went to report to the supervisor. While the respondent and the supervisor were walking to the building where Reuben Ombenyi was standing on the 1st floor, the said Reuben Ombenyi poured acid on their heads causing them to sustain serious injuries. The respondent Peter Ochieng Bolo lost the right eyeball and sight and poor vision in the left eye. Doctor Wellington K. Kiamba assessed permanent incapacitation at 30%. He sued the appellant for compensation and averred that the accident was due to the appellant's negligence and breach of contract and stated particulars of the negligence and breach of contract in the body of the plaint.

2. In its statement of defence the appellant denied all particulars of negligence and breach of contract and pleaded contributory negligence against the Respondent.

After a full hearing, the trial Court found in favour of the respondent, held the appellant liable for breach of contract by failing to provide a safe working environment and awarded a sum of Sh.s 600,000/= in general damages for pain and suffering to the respondent and costs of the suit.

3. Being dissatisfied with the trial court's judgment, the appellant filed this appeal and preferred eight grounds of appeal, that may be summarized into three, re framed as follows:

(1) That the learned Magistrate erred in law and fact to give a concise statement of the case, the evidence viz-aviz- the pleadings, points of determination, and the decision and reasons for the decision.

(2) That the learned magistrate erred in law and fact in shifting the burden of proof from the plaintiff to the defendant and thus arrived at a wrong decision.

(3) The learned magistrate erred in law and fact in holding the appellant liable in both negligence and in breach of contract upon insufficient evidence to support the finding.

(4) The learned Magistrate erred in law and fact in disregarding and dismissing the Defendants claim for contributory negligence and awarding general damage that are excessive in view of the injuries sustained.

4. This court has been urged to set aside the judgment and in the alternative find that the respondent contributed to the injury and review the general damages awarded by the trial court. Parties filed written submissions.

5. **The appellants' case and submissions.**

It is not in dispute that the respondent was an employee of the appellant and that he was injured in the course of his duties which injury was caused by a fellow employee who poured acid on his head. In his evidence the appellants witness one Peter Karage, a Human Resource clerk stated that the company did not know what happened and that it was not negligent as it could not have stopped the employee from pouring acid on the respondent because he, the respondent, was in charge of the employee. He stated that the labour office had assessed compensation at Shs. 280,800/= and urged the court to award the same amount as compensation; and that it was another employee who was responsible for safekeeping of the acid and other chemicals.

6. In his submissions before the trial court, counsel for the appellant stated that the respondents claim was based on negligence yet in his evidence, the respondent did not state the danger and/or injury that the appellant exposed him to nor did he prove unsafe working conditions or systems of work that may have caused imminent danger as claimed in his plaint hence the claim ought to have been dismissed as the onus of proof was on the Respondent. The respondent having not filed a reply to the defence, he was deemed to have admitted the defendant's claim on contributory negligence.

7. **The appellants submission before** this court is that the incident was not an industrial accident but a deliberate criminal act that could not have been foreseen by the employer nor could the employer prevent it or provide against it.

8. It is further stated that the respondent having been a supervisor needed not to be provided with goggles or other protective gear as his duties were merely allocating work and supervising the casuals and other employees. It is urged that the respondent did not prove any negligence or breach of contract against the appellant and the trial court on its own motion erred in filling up gaps by adding evidence that was not tendered in court, and thus arrived at a wrong decision unsupported by the evidence on record the trial court has been faulted for not considering the issue of contributory negligence attributed to the respondent when evidence adduced pointed to a deliberate criminal act by the appellants employee resulting from a possible conflict and insults between the respondent and the said employee. Given the circumstances, it is urged, that, contributory negligence ought to have been considered to a larger extent against the respondent.

9. **The Respondent's case and submissions.**

The following facts are not disputed, that another employee after a possible insult or abuse poured acid on

the respondent together with the company supervisor, that at the time, the respondent was in the course of his duties with the appellant, that the acid and other chemicals were kept under key and lock by the store keeper and that it was not clear how the appellants' employee accessed the acid, and that the store was sometimes left open.

10. It was the respondents evidence in chief that the company never provided the workers with glasses, gumboots & helmets or other safely gadgets.

11. In his submissions before the trial court the Respondents advocate faulted the appellant for failing to provide the respondent with goggles and by leaving unattended the acid that was was a dangerous material that was used to injure the respondent. It was further submitted that the respondent had no control on the safekeeping of the acid as this lay with the company which was to blame for negligence and breach of contract of employment for failing to provide a safe working system, and environment, and failed to keep safe and away from un authorised persons dangerous materials that could be used by or against other employees as that is the core duty of care, towards employees by the employer. By not doing so, the appellant was in breach of contract and thus liable in damages arising from the injury to the respondent that was caused by the intentional and negligent act of the appellants rogue employee who accessed the acid that was not securely and safely kept away by the company that amounted to a breach of its duty of care to the respondent. I have been urged to uphold the trial courts finding that the appellant was negligent and in breach of contract and uphold the quantum of damages as assessed by the lower court.

12. Evaluation of evidence and findings

The evidence before the trial court by both the respondent and the appellant was short and clear. This court is under a duty to re evaluate the said evidence and come up with its own findings and conclusions. See **Selle-vs-Associated Motor Boat Co. ltd (1968) EA 123.**

I have considered the evidence on record and the judgment of the trial magistrate. I have no doubt that the trial magistrate analysed the evidence tendered correctly, and arrived at the conclusion that the respondent was injured while working for the appellant by another employee of the company, after considering the issues and questions he framed for determination.

13. I agree with the appellant that the trial magistrate delved into issues that were not pleaded by the respondent when he stated that the defendant (appellant) was under a duty as an employer to ensure the workers it employed to work with the plaintiff (respondent) were competent and mentally stable, and that by employing plaintiff's attacker the by failing to provide a safe working environment. No such evidence was tendered by the respondent nor was any evidence tendered on the working conditions and environment being unsafe, save that the store where chemicals were kept was not properly secured as it was sometimes kept open.

14. What comes up clearly from the evidence is that the respondent and the appellants employee Reuben Ombenyi had a disagreement as evidenced in the respondents' evidence that when the Respondent found the said Reuben not working and hiding in a toilet he insulted him following which he went to report to the supervisor. How the said Reuben got hold of the acid is not clear but the respondent stated that the store where acid and other chemicals were being kept may have been left open by the store keeper. Indeed he stated that the store was sometimes left open.

15. The appellants' witness did not controvert this evidence. It is therefore safe to conclude that this dangerous substance was not securely kept thus exposing the workers and in particular the respondent to foreseable danger and injury.

16. In his pleadings, the respondent pleaded in Par.6 of the plaint filed on the 17/12/2009 that the appellant exposed him to danger which it knew or ought to have known, and failed to provide a safe and proper system of work.

17. In the case of **Kiema Mutuku -vs-Kenya Cargo Handling Services Ltd(1991) 2 KAR 258** it was held that a plaintiff must prove some negligence against the defendant where the claim is based on negligence and breach of contract against the defendant.

By the above evidence, leaving the store open where dangerous materials like acid and other chemicals are kept is prove that the appellant was not up to date with its safety systems for the employees. The appellant owed a duty of care to all the employees including the respondent and this duty was not discharged. It allowed its unauthorised employee to accesses the acid and poured the same on the respondent causing him injury. In the case **Modern Security Systems & products Ltd -vs- Boniface Oduor Lubale (2010) e KLR** It was held that an employee is owed duty of care by the employer but it must be such act that the defendant could foresee, or such acts that are reasonable and incidental to the employees work.

18. The acid being a dangerous chemical ought to have been kept under key and lock, only accessible to by authorised and trained personnel. I must hold that the company (appellant) foresaw the danger of exposing the said chemical to the employees, as evidenced by its employee that the chemicals were kept under key and lock by one of its employees.

19. In his pleadings the respondent pleaded vicarious liability against the appellant for the acts of its employee who poured the acid on him. Supporting evidence towards that end was tendered. The appellants witnesses statement that the company was not to blame is thus far fetched. The appellant, to absorb itself from blame and liability ought to have proved negligence on its employee. In my mind, this does not shift blame or the onus of proof from the plaintiff(respondent) to the defendant (appellant) as claimed.

20. In the case **Ndungu -VS- Coast Bus Company Limited (2000) 2 E.A 462**, the Court held that

“Liability against the employer largely depends on the pleadings and the evidence in support of the claim. Vicarious liability of the employer is not pegged to the employee's liability but to his negligence.”

Having analysed the evidence and submissions on record, together with all authorities tendered, I come to the conclusion that the appeal must fail. Though the trial magistrate may not have given clear concise and clear reasons of this determination, his analysis of the evidence lead to the conclusion the arrived at.

21. As stated in the case of **Mwona Ndoos t/a Ngomeni Bus Services Ltd -vs- Kakuzi Ltd (1982-88) 1 KAR 523**,

“It is the responsibility of an employer to prove that this servant was acting outside his authority to absolve the employer from being liable for the negligent acts of the employee committed by the employee in the cause of his employment.”this the appellant did not do.

22. I therefore find that the trial magistrate did not err when he shifted the burden of proof from the plaintiff to the defendant as this is the correct and proper legal position when faced with matters of vicarious liability of employers for wrongful acts committed by their employees.

23. I have carefully considered the issue of contributory negligence raised as a ground of appeal by the appellant. For the respondent to have been assaulted by the appellants employee to the extent of him making a report to the said employee Reuben Ombeyi resulted to pouring acid on the respondent, there must have been an altercation of sorts. But this is speculative. The appellant did not tender evidence in support of its pleading of contributory negligence. Though no reply to defence was filed, I hold the view that where there is no reply to defence, there is a joinder of issue with the defence with the effect that all the allegations and particulars of negligence labelled against the respondent (plaintiff) were denied. To my mind, this is in conformity with the provisions of **Order 2 Rule 11 and 12 of the Civil Procedure Rules**. It is therefore my finding that the trial court acted correctly when it dismissed the claim for

contributory negligence as no evidence was tendered in support.

24. I have considered the injuries sustained by the respondent. There is no dispute that these are serious injuries. Both Doctor Wellington K. Kiamba and Doctor M.S. Malik in their medical reports dated 16th March, 2009 and 3rd June, 2010 respectfully agree that the respondent sustained chemical burns on both eyes resulting to loss of the right eyeball and sight and poor vision on the left eye.

The trial court awarded a sum of Kshs.600,000/= in general damages for pain and suffering and loss of amenities after considering all relevant authorities and proposals put forth by both parties.

As held in the case **Kemfro Africa t/a Meru Express Services and Another -vs- Lobia (1982-88) KAR 727** an appellate court will not interfere with the trial courts discretion on the award of damages unless it is satisfied that either the trial court in assessing damages took into account an irrelevant factor, or left out a relevant factor, or that the amount awarded is so inordinately low or high or wholly erroneous estimate of the damages. The appellant has not shown this court in what manner the trial court applied wrong principles of law in awarding Shs.600,000/=. No attempt was made to justify interference by this court.

I am satisfied that the award is reasonable and in tandem with comparable cases. I shall uphold the said award of Shs. 600,000/=.

25. The upshot of the above is that the appeal is dismissed with costs to the respondent.

Dated, signed and delivered at Nakuru this 21st day of May, 2015

JANET MULWA

JUDGE

In the presence of:

Malonza holding brief for Mahinda - for appellant

No appearance - for Respondent

Lina - Court clerk