



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 456 OF 2007**

**STEEL PLUS LIMITED.....APPELLANT**

**VERSUS**

**JOSEPH OMINA.....RESPONDENT**

***(Being an Appeal from the judgement of Honourable L. M. Wachira delivered on 27<sup>th</sup> day of April, 2007 in the CMCC No. 254 of 2006 at Kikuyu)***

**JUDGEMENT**

1. This judgement is the outcome of the appeal against the judgment of Hon. Wachira (Mrs) Resident Magistrate vide C.M.C.C. no 254 of 2006 at Kikuyu. Joseph Omina, the Respondent herein, had sued Steel Plus Limited vide the plaint dated 30<sup>th</sup> October 2006 whereof he prayed for judgement against the Appellant in the following terms
  - a. ***General damages for pain, suffering and loss of amenities***
  - b. ***Interest at court rates***
  - c. ***Costs of this suit***
  - d. ***Any relief that this Honourable court may deem fit to grant.***
2. The Respondent had pleaded in the plaint that on 21.4.2006 while lawfully working for the appellant, at its Kikuyu premises a hot substance fell on is heel seriously injuring him. The appellant filed a defence denying the Respondent's claim. The Appellant and the Respondent each tendered the evidence at the trial. In the end, Hon. L. Wachira (Mrs) entered judgment in favour of the Respondent and against the Appellant in the sum of kshs.45,000/- as general damages. The Appellant was aggrieved on the finding on liability hence this appeal.
3. On appeal, the Appellant put forward the following grounds in its memorandum of appeal.
  1. ***THAT the Honourable Magistrate erred in law and in fact in finding that the waiver agreement between the Appellant and the Respondent was ultra vires.***
  2. ***THAT the honourable Magistrate erred in law and fact in finding the Appellant 100% liable without setting a basis for the finding and further in total disregard of the evidence adduced at the hearing and the submissions relied on by the Appellant.***
  3. ***THAT the learned Magistrate erred in law and in fact in failing to analyze the evidence and submissions relied on by the appellant in a keen and judicial manner hence exercising his discretion erroneously in failing to dismiss the respondent's case with costs.***
  4. ***THAT the Appellant will upon receipt of the typed and certified proceedings and judgement in PMCC No. 254 of 2006 seek leave if necessary to file a supplementary memorandum of Appeal***

**so as to include other grounds that may become apparent therein.**

4. When the appeal came up for hearing, learned counsels appearing in this appeal recorded a consent order to have the appeal determined by written submissions. I have considered the rival submissions. It is the argument of the Appellant that the learned Resident Magistrate erred when she found the appellant wholly liable without any basis. The Appellant further accused the learned Resident Magistrate for failing to analyse the evidence tendered before her. The Appellant submitted that there was credible evidence to show that the Respondent had entered into a contract of employment with the Appellant on 3.1.2006 containing a legal waiver. It is said that the Respondent appended his signature on the contract to waive his right to any claims arising from minor injuries taking place in the steel factory.
5. The Respondent vehemently opposed the Appellant's arguments by stating that the learned Resident Magistrate analysed the evidence and came to the correct conclusion.
6. This being the first appellate court, this court is enjoined to re-evaluate the case that was before the trial court. Let me start with the assertion that the Respondent had waived his right to claim for damages arising from injuries he sustained in the steel factory. It is admitted by the Respondent that he signed a standard contract of employment with the Appellant, thus binding himself not to pursue claims arising from minor injuries. I think the learned Resident Magistrate captured the correct position in law when dealing with such contracts. There is no doubt that the Appellant gave the Respondent a standard form contract of employment to sign. The contract contained a legal waiver clause. With respect, I agree with the findings of the learned Resident Magistrate that the provisions of the Factories Act enjoins the employer to provide employees with a safe system of work. The waiver clause cannot oust the provision of the statute and the rules or regulations embodied in the statute. I therefore find this ground unmerited.
7. The other ground argued, is whether or not the Appellant was wholly to blame for the accident which befell the Respondent? The Respondent was candid in his testimony that he sustained an injury while removing steel from a machine while molten. He stated that he was in the furnace area and the machine burnt and molten steel was splashed falling on the overall thus burning the overall and had his left leg burnt. It is said the furnace was not covered. The Respondent stated in cross-examination that the protective gear he was given was worn out and that he had raised a complaint with the factory manager, Moses. The witness summoned by the Appellant i.e. Onesmus Owinde, confirmed that the Respondent was injured while on duty. He also confirmed that the injuries were caused by some sparks which landed on him and had his leg burnt. This witness alleged that the Respondent had not reported of any worn out protective gear. The Respondent does not deny that he was given a protective gear but his contention is that the one he was given was worn out. The Appellant witness merely gave evidence showing that the Respondent was supplied with a protective gear. He did not confirm whether the same was worn out. It would appear from the evidence tendered that the Appellant knew very well that the work environment of the Respondent was a risk one and that is why he supplied the Respondent with protective gear.
8. The Appellant in my view failed to controvert the Respondent's assertion that he was supplied with a worn out protective gear. The other issue which arose from the evidence is the question as to whether the Respondent complained to the relevant person who was in charge of issuance of protective gears. He stated he complained to one Moses, but nevertheless he still proceeded to work. The Respondent knowing his working environment was very risky without the appropriate protective gear took a heavy risk. He owed duty to himself to avoid taking such risks.
9. I find that liability should have been apportioned to him.
10. On this score, I am convinced that the learned Resident Magistrate erred when she found the Appellant wholly responsible. The decision on liability therefore must be interfered with on

appeal. In my estimation I am convinced that the Respondent is liable for 20% contribution.

In the end the appeal is allowed to the extent that 20% liability is apportioned to the Respondent. Consequently the award plus cost and interest given by the trial court should be adjusted downwards by 20%. Each party to meet its cost of the appeal.

Dated and delivered in open court this 19<sup>th</sup> day of June, 2015

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

.....for the Defendant