REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL APPEAL NO.33 OF 2006

(Appeal from the Judgment and Decree of Hon. Senior Resident Magistrate Mr. A.G.Kibiru

in Kericho PMCC No.473 of 2003 dated and delivered on 14th February 2006)

CHESUMOT LIMITED.....APPELLANT

VERSUS

RICHARD KIPKURUI MARITIM.....RESPONDENT

JUDGMENT

Richard Kipkurui Maritim, the Respondent herein, sued Chesumot Company Limited the Appellant herein, before the Principal Magistrate's Court, Kericho in which he prayed to be paid damages for the injuries he allegedly suffered while performing his duties within the scope of the employment of the Appellant. It is alleged that the Respondent was injured as a result of the Appellant's negligence, breach of contract and statutory duties towards its workers. The Appellant filed a defense to deny the Respondent's claim. The suit was heard and on 14th February 2006 Hon. A. G. Kibiru, Learned Senior Resident Magistrate entered judgment in favour of the Respondent in the sum of Ksh.204,000/= for damages. The Appellant was aggrieved hence this appeal.

On appeal, the Appellant put forward the following grounds in its Memorandum of Appeal:

1. THAT the learned Trial Magistrate erred in fact and in law in entering judgment on liability against the Appellant when there was no evidence to sustain the said finding.

2. THAT the learned Trial Magistrate erred in fact and in law in holding that negligence had been proved against the Appellant when there was no ground to sustain such a finding.

3. THAT the learned Trial Magistrate erred in fact and in law in that he gave undue weight to the Respondent's case and least consideration to the Appellant's case.

4. THAT the award of damages was inordinately high in the entire circumstances of the case. And which amount of damages is an erroneous estimate as to the amount of compensation attracted by the nature of the injuries sustained by the Respondent.

When the appeal came up for hearing, learned counsels made oral submissions. Though the Appellant put forward five grounds on appeal, those grounds may be summarized to vizly:

i. Whether or not the Respondent proved his case to the required standards.
ii. Whether or not the award was excessive.
iii. Whether or not the Appellant's defence was considered!

I will determine this appeal while re-evaluating the case that was before the trial court. In the first ground of appeal, it is the submission of Mr. Mutai learned advocate for the Appellant that there was completely no nexus between injuries suffered by the Respondent and his employment. It is argued the Respondent did not prove that he was on duty on the material date when he was allegedly injured. Mr. Moturi learned advocate for the Respondent on his part was of the view that the Respondent presented sufficient evidence that proved his case on a balance of probabilities. He argued that there were oral and documentary evidence creating the nexus between the injury the Respondent\s employment. In his book entitled Employer's Liability of Common Law 9th Ed. At P.74, John Munkman stated as follows:

> "General Nature of duty
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> It is the duty of an employer acting personally or through his servants or agents, to take reasonable care for the safety of workmen and other employees in the course of their employment. This duty extends in particular to the safety of the place of work, the plant and machinery, and the method or work. But it is not restricted to these matters."

In the case before this court, it is important to examine the evidence that was presented before this court, it is important to examine the evidence that was presented before the trial court by the Respondent to prove his case. Richard Kipkurui Maritim (PW2) told the trial court that on 15th April 2000 he was splitting firewood when a piece hit his left eye. He said he went to Kiprop Health Centre for treatment where he was given first aid and told to go home. PW2 was later admitted to Kericho District Hospital for further treatment. The Respondent was later operated at Kericho Nursing Home. He said he was not given any protective gear when he was assigned the duty to split firewood despite requesting to be given. He said he no longer sees with the left eye. In cross-examination the Respondent stated that he had worked with the Appellant for three (3) years at the time he was injured. The Respondent disputed the check roll of casual workers which the Appellant's advocate had shown to him. In the aforesaid check roll the Respondent is said to have been absent from duty on the date of the accident. The Respondent summoned the evidence of Dr. Ajuoga (PW1) who produced a medical report showing the Respondent had lost his left eye. He formed the opinion that the loss of the eye was permanent. The Appellant's case was ordered closed upon the court declining to adjourn the hearing of the case. The Appellant has not applied to challenge the order closing the Appellant's case. After a case consideration it is obvious to this court that there was cogent evidence presented by the Respondent which proved his case on a balance of probabilities. There was no evidence presented to controvert what the Respondent gave to court. I am satisfied that the Respondent was injured while splitting firewood meant for the Appellant. I am also satisfied that he was not supplied with protective gear during that time. I therefore see no merit on the first ground.

The second ground argued is that the trial court did not consider the Appellant's defence. With respect, the Appellant did not present evidence hence the question as to whether or not the trial court consider a defence does not arise.

The third and final ground argued is that the award given is excessive. There is no doubt that the Respondent lost his left eye. The trial court considered the authorities in respect of near similar cases and came to the conclusion that Ksh.200,000/= and Ksh.4,000/= was sufficient for general and special damages respectively. I have also reconsidered the same and I do not think the learned Senior Resident Magistrate can be faulted on quantum. The award cannot be said to be exorbitant.

In the end I see no merit in the appeal. It is dismissed in its entirety with costs to the Respondent.

Dated, signed and delivered in open court this 26th day of June 2014

J. K. SERGON

JUDGE

In the presence of:

- Mr. Mutai for Appellant
- N/A for Moturi for Respondent

Mr. Mutai:

I pray for a stay of execution for 30 days to enable the Appellant settle.

COURT: Order granted as prayed.

J. K. SERGON

JUDGE

26TH JUNE 2014