REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 161 OF 2011

C & P SHOE INDUSTRIES.…………....………APPELLANT

VERSUS

ALBERT MAINA KALII…………..….……….RESPONDENT

(Appeal from the original judgment and decree in Milimani CMCC No. 13817 of 2005 delivered on 28thMarch, 2011 by Hon. Ms. S. Mokaya (PM))

JUDGMENT

1. The respondent sued the appellant seeking compensation following an industrial accident which occurred on 10th May, 2000. The trial court heard the matter and found the appellant 100% liable and awarded the plaintiff KShs. 80,000/= as general damages.

2. Being dissatisfied with the trial court's judgment, the appellant filed this appeal on the following grounds:

   a. ***The learned magistrate erred in law and in fact in finding the appellant 100% liable when no reply to the defence was ever filed by the respondent.***
   b. ***The learned magistrate erred in law and in fact in failing to appreciate the totality of evidence before her and the submission made on behalf of the appellant and thereby came to erroneous conclusion in finding the appellant 100% liable.***
   c. ***The learned magistrateerred in law and in fact in considering issues which she ought not to be have considered, in finding the appellant wholly liable or at all.***

3. This being the first appeal, it is my duty to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of hearing the witnesses. (See: ***Peter v. Sunday Post (1958) at pg. 429***).

4. The respondent's case was that he was working with the appellant as a general labourer. He stated that on the material day he and other employees were applying methylene acid on shoes. The shoes are normally dipped in a basin containing the acid. As one of the colleagues was dipping a shoe intothe basin, the acid splashed into his eyes occasioning him eye injury. The respondent attributed the injury to the appellant's failure to provide goggles.

5. PW1, Dr. Okere produced a medical report, receipts for medical report for KShs. 1,500/= and court attendance fees for KShs. 5,000/= (P. Exhibit 1 (a) (b) and (c). He testified that the respondent suffered a chemical burn of 5% permanent incapacity to the eye leaving. His prognosis was that the respondent's eyes are very sensitive to light.

6. DW1, Joseph James Kibera gave evidence to the effect that the respondent was not injured since his name did not appear in the accident register.

7. The appeal was canvassed by way of written submissions. The appellant submitted that there was no evidence from the respondent that the injuries were sustained in the course of employment with the appellant. It was argued that in the event the appellant is found liable, then the liability should not be more than 30%. The appellant relied on the case of ***Stephen Odhiambo Ondu v. HayerBishan Singh & Sons Kisumu HCCA No. 201 of 2002*** where the appellant was found 30% liable for appellant's co-worker's action of slashing the respondent.

8. The respondent on the other hand contend that the appellant never raised the issue of failure to file reply to defence during trial for trial court's consideration and that failure to file a reply to defence does not amount to admission of negligence and he relied on ***Data Center Ltd v. High Peak Enterprises Ltd (2004)e KLR*** and ***Jubilee Insurance Company Ltd v. Njuguna (2004) e KLR.*** He contended that the appellant never controverted the plaintiff's evidence on negligence. The respondent relied on ***Laban BuyoleMamboleo v. Rift Valley Textiles (1998)e KLR***where the defendant was found 100% and ***Mitchel Cotts Freight (K) Ltd v. Stephen Otieno Ouma (2010) e KLR***where trial court's finding on liability at 90% against the appellant was upheld.

9. It is clear from the evidence on record that the respondent produced an appointment letter and a termination letter to prove that he was an employee of the appellant. The appellant did not furnish any evidence to controvert this fact rather it brought DW1 who denied that the respondent was injured on the material day. The respondent's witness confirmed that the injury was as a result of chemical burns which chemical is normally used in the appellant's premises. It is noteworthy that the accident register is a document under custody of the appellant that is capable of being altered to favour its case. I am satisfied that the respondent proved on a balance of probability that he was injured while at his place of work.

10. On liability, the appellant did not controvert the respondent's evidence that he was not provided with goggles to protect his eyes. It was the appellant's statutory duty under the Factories Act (Cap 514 Laws of Kenya) to provide the respondent with goggles considering that he was at the risk of being exposed to lethal chemicals. The court in ***African Highlands & Produce Co. Ltd v. Collins Moseti Ontekwa Kericho HCCA No. 38 of 2002(UR)*** while dealing with similar facts held as follows to which I am fortified:

> ***"I do hold that the appellant was solely liable for the injuries sustained by the respondent due to the fact that under the Factories Act the failure of an employer to provide protective gear to an employee, especially when he is working in a dangerous environment means that, in the event such an employee is injured, then an employer shall be guilty of breach of a statutory duty. Liability in such event is strict."***

11. Winfield and Jolowicz on Tort by WVH Rogers 14th Edition, London Sweet and Maxwell at page 213 states:

> ***"If a worker is injured just because no one has taken the trouble to provide him an obviously necessary safety devise, it is sufficient and in general satisfactory to say that the employer has not fulfilled its duty."***

12. In my considered opinion in measuring the duty care, one must balance the risk against the measures necessary to eliminate the risks. The respondent knowing that he was using a lethal chemical was also under duty to be cautious while working. He too has to shoulder liability. In the circumstances I apportion liability between the appellant and respondent at the ratio of 70:30. I have considered the trial court's decision on damages and I find it to be reasonable.

13. In final analysis this appeal partially succeeds in that the order on liability is set aside and is substituted with an order directing the appellant to shoulder 70% liability while the Respondent meets 30% contribution.

14. The award of damages should therefore be adjusted taking into account the above mentioned apportionment of liability. Each party to meet its own costs of the appeal. The appellant should however meet the costs of the suit based on the award adjusted on appeal.

Dated, Signed and Delivered in open court this 28th day of November, 2014.

J. K. SERGON

JUDGE

In the presence of:

…………………………………………………………………………………………………….for the Appellant

……………………………………………………………………………..…………………………for the Respondent