

REPUBLIC OF KENYA

High Court at Kakamega

Civil Appeal 26 of 2011

(Appeal arising from the judgment of [MR. P. N. ARERI, R.M.] dated 4th March 2011 in the Chief Magistrate's Court at Kakamega in Civil Case No. 93 of 2008)

WEST KENYA SUGAR CO. LTD. APPELLANT

V E R S U S

ZEBEDAYO KIVATI SALAMBA RESPONDENT

J U D G M E N T

The respondent was awarded Kshs.150,000/= as general damages arising from an industrial accident that occurred on the 20.11.2005. The appellant preferred this appeal. The grounds of appeal are that the trial court did not evaluate the evidence properly, the judgment is against the weight of the evidence, there was no evidence that the respondent was employed by the appellant, that the trial court declined to hear the appellant's witnesses, the burden of proof was shifted and that the respondent's evidence was not corroborated.

Counsels for both parties agreed to file written submissions. The appellant contends that the respondent did not prove his case on a balance probability. There was no evidence that he was employed by the appellant. His evidence related to a jiggery while the appellant deals with white sugar. Further, the trial court did not deliberate on the issue of negligence. The respondent only blamed the appellant for not having been provided with gloves yet there was no evidence that other staff had gloves. The appellant further contends that the amount awarded as damages was excessive.

The respondent maintains that the case was proved as required. The respondent was on duty on the material day. He mentioned two officers who were his bosses that day. The accident was caused by the negligence of the respondent and that the trial court evaluated the evidence correctly.

The record of the trial court shows that three witnesses testified for the respondent and one for the appellant. The respondent testified that on the 20.11.2005 he was working with the appellant as a jaggery boiler. He had poured boiled sugar juice and as he was pouring it into the cups it spilled and burnt his hand. He was treated at Kakunga medical clinic and a medical report was prepared by Dr. Charles Andayi (PW2). The doctor (Charles Andayi) testified as PW2. He produced a medical report prepared on the 21.10.2006. According to the report the appellant had superficial burnsthat had healed leaving a 3 x 4 cm scar. **PW3, SUSSY AYUMA INYANGALA** treated the respondent on the 20.11.2005 at Kakunga medical clinic. Her evidence was that the respondent sustained second degree burns.

The appellant called one **JOHN MZEE AINEA** who described himself as an employee of the appellant and his duty is described as charge hand. He also employs casuals. His evidence was that whenever a worker is injured a report is made to the immediate supervisor. The injured are taken to Kabras clinic, Nala Hospital or Mukumu Hospital. Normally a casual worker is issued with a gate pass contract. He denied that the respondent was employed by the appellant. According to his evidence there are many charge hand officers. Each shift has about four charge hand officers and there are three shifts in a day of eight hours each.

The trial court framed five issues for determination and held in favour of the respondent. I do find that from the grounds of appeal the main issues for determination are whether the respondent was employed by the appellant and whether the appellant was negligent. With regard to the issue of

employment the respondent's evidence was that he was working with the appellant company as a jaggery operator and was supervised by a charge hand. On that date of 20.11.2005 the supervisor was **Peter Makokha** and the charge hand was **Eliud Ebu**. He was a casual employee and had no contract letter. He produced a copy of his pay card although the same did not show that he was on duty on that date. He mentioned Alex Malongo and David Shibilitari as two colleagues whom he was working with that date. On the other hand DW1 denied that the respondent was employed by the appellant. From the evidence on record, I am satisfied that the appellant was employed by the appellant as a casual worker. The evidence of DW1 is that there are so many charge hand officers and there was a possibility that the respondent was recruited by a different charge hand officer. Since there are three shifts in a day as per the evidence of DW1 and there are about twenty four employees presumably in each shift if the work is too much the possibility that a charge hand officer may not know all the casual workers is high. No document was produced to show the list of all casual employees for that month. I do find that the respondent did prove that he was a casual worker with the appellant.

The next issue is whether the appellant was negligent. The plaint dated 13.9.2007 provided particulars of negligence alluded to the appellant. The appellant's defence pleaded that the respondent was also negligent and contributed to the occurrence of the accident. In his evidence before the court the respondent stated that he had boiled sugar juice and was pouring it into the cups when it spilt and burnt his hand. He blamed the company because he was not given hand gloves. The appellant contends that no negligence can be attributed to the company. Further that there was no evidence that the co-workers were provided with gloves but he was not or that the injury was caused due to the lack of gloves. It appears that the appellant was working on his own and his responsibility was to pour the boiled sugar juice into separate cups. That work did not require any other person other than the respondent himself. Had he been careful enough the juice would not have spilled. It seems the cups were filled to the top and the juice did overflow. The question would be can the appellant be blamed for the spilling of the hot sugar juice. It was incumbent upon the respondent to exercise due care and skill while working. It is not clear how long he had worked in that capacity. The appellant also decided to take a short cut and contend that the respondent was not its employee without describing how the process of filling hot sugar juice into the cups was being done. The appellant merely contended that it is a sugar miller and does not deal with jaggery. The totality of the plaintiff's evidence does not show that he was working at a jaggery but that within the process of making sugar there is hot sugar juice which is normally poured into cups. I do find that there was need for the respondent to have been provided with some gloves so as to protect him from the hot sugar juice. There is no evidence that the gloves were provided. However, the respondent also should have been careful with his work as it appears that he was doing that duty daily and therefore knew that he had to be careful.

Given the evidence on record I do find that both parties contributed to the occurrence of the accident. I do apportion liability at 5:50. The appellant shall be held 50% liable for not having provided the respondent with gloves while the respondent shall similarly be held 50% liable for not having been careful. The next issue is the amount of quantum to be awarded to the respondent. The appellant contends that the amount was excessive and proposed an amount of KShs.10,000/=. The appellant further contends that the authority relied by the trial court being the case of **LILIAN OTIENO VS. JOSEPH KIMANA Nairobi HCC No. 2670 of 1986** gave severe injuries compared to those suffered by the respondent. The counsel for the respondent is the one who provided that authority before the trial court and urged the court to award the respondent KShs.150,000/=. The injuries suffered by the plaintiff in the Lilian Otieno case was burns involving both left and right leg. The authority indicates that the total body surface that was involved was about 30%. The plaintiff was left with scars on both legs from the thigh to the foot. According to the medical report dated 21.10.2006 by Dr. Charles Andayi the respondent had a 3 x 4 cm scar on his right forearm. The report indicates that the respondent suffered a superficial 3rd degree burns to his right forearm but the hand had already healed and there was no accompanying complications. Although the appellant contends that the trial court created the issue of the 3rd degree burns, I do find that it is stated in the medical report and DW3 categorized the burns as 2nd degree. I do find that the respondent's injuries were quite minor compared to those suffered by Lilian Otieno. I will assess general damages at KShs.60,000/=. The respondent shall have the special damages as awarded by the trial court. Having found that each party was 50% to blame I do order that each party shall meet his/its own costs for both the lower court case and this appeal. The above amount shall only attract interest after

the expiry of 30 days from the date of delivery of this judgment.

Delivered, dated and signed at Kakamega this 13th day of February, 2013

SAID J. CHITEMBWE
J U D G E