REPUBLIC OF KENYA

High Court at Kisumu

Civil Appeal 199 of 2010

EZEKIEL MIGIRO.....APPELLANT

VERSUS

JUBILEE JUMBO HARDWARE LTD ….....RESPONDENT

JUDGMENT

The appellant herein has challenged the findings of the lower Court which dismissed his suit on six (6) grounds. The same can be summarized as follows:-

1. **The trial Court misapprehended the evidence on record thus arriving at a wrong decision.**

2. **The trial court raised a burden of proof to that of beyond reasonable doubt.**

3. **The trial court failed to take into account the doctrine of *res ipsa loquitur*.**

The appellant testified that he was an employee of the respondent carrying out manual jobs. On 22nd June 2002 while carrying some iron bars he tripped and felled while carrying the said bars.

He suffered injuries including fractures to the distal end of the right radius and traumata to the body. He was rushed to J**alaram Nursing and Maternity Home** where he was operated on by one **Dr. Raburu.** The appellant produced the treatment notes as well as the **LD 104/1 form.**

In his evidence the appellant blamed the accident on the respondent. He did not call any witness.

The respondent on its part called one **Fredrick Moindi Agevi** who claimed to be a general labourer working for the respondent. He told the court that the appellant was indeed injured while loading some iron bar materials onto a vehicle when he slipped and fell. He denied that there were metal rods on the floor.

That was the summary of both the appellant and the respondents case. This court is enjoined to re-evaluate the evidence and reach its own independent determination. **(See Selle =vs= Associated Motor Boat Co Ltd & Another (1968) E. A. 123 at page 126 paragraph H).**

There is no dispute that the appellant was an employee of the respondent. It is equally not disputed that the accident occurred at the respondents premises and that the appellant was on duty.

The point for determination however is who was to blame for the accident?. The appellant on cross examination said:-

"I blame defendant company because I got injured while on duty and injuries I suffered were severe and I could not continue working. The high bars stood on floor caused me to stumble. The bundles of iron rods are usually placed on floor and we walk on top of them. I could not refuse to walk over the iron rods. I did not expect I would stumble".

My understanding of the appellants testimony is that what caused the accident was the presence of the iron bars on the floor. The respondents witnesses however denied this.

The appellant however confirms that the said iron rods **"are usually placed on floor and we walk on top of them".**

It would therefore appear that these iron rods are known by the appellant to be on the floor always and therefore while walking one ought to be careful.

If this is the case therefore how come he never raised any complaint to the respondent? Although he did not lead any evidence to such complaint he should have raised the same.

Further if one knows that there are objects on the floor as he admitted then extra caution ought to be taken. I do not agree with the appellant's contention that he did not expect to stumble. Surely this is naturally expected when things are on the floor as was the case herein.

How then can the respondent be responsible? Granted, if there were iron bars on the floor one can accuse the respondent for placing them dangerously there. But in the instant case if the metal rods were on the floor then it was well within the appellant's knowledge for he usually sees them.

The holding of metal bars and walking is within the appellant's control and not the respondent. The physical walking in particular is within the ability of an individual and not the company. He was in total control of his faculties and I do not find how the respondent was negligent.

Mr. Onsongo submitted that the respondent breached **Section 76 (4) of Act No. 15 of 2007 Chapter 514** Laws of Kenya namely the Occupational Safety and Health Act which provides:-

"An employer shall not require or permit any of his employees to engage in the manual handling or transportation of a load which by reason of its weight is likely to cause the employee to suffer bodily injury".

And further he relied on Section 77 (3) thereof which states:-

"There shall so far as is practicable, be provided and maintained safe means of access to every place at which any person has at any time to work".

Whereas this is the legal position the appellant did not however tell the court that the load was too heavy that it caused him to stumble. Neither did he say that the iron rods on the ground were placed there without his knowledge. My observation is that the working environment and conditions were so normal to the appellant as he usually worked there.

The upshot of my finding on this element of liability is that I do not find any iota of negligence on the part of the respondent. In fact he has not been accused of failing to provide the required working tools and materials. As such the appellant in my finding was the author of his own misfortune.

On quantum, I need not differ with the trial court's finding. The primary document namely the medical legal report was not produced. The discharge summary as well as the treatment notes are technical documents which can only be interpreted by the medical world and not the legal profession. It was thus imperative that the medical report ought to have been produced.

Consequently, I do dismiss this appeal for the single reason that negligence was not established

against the respondent. The respondent shall have the costs of this appeal.

Dated, signed and delivered at Kisumu this 25th day of March 2013

H. K. CHEMITEI
JUDGE

In the presence of:
….....Plaintiff

…..... Defendant

HKC/aao