REPUBLIC OF KENYA

High Court at Kisumu

Civil Appeal 180 of 2011

JECTON ONYANGO OGENDO ….....APPELLANT

V

VYATU LIMITED ….....RESPONDENT

J U D G E M E N T

On 20/8/07 the appellant was working for the respondent as a palatizing machine operator. The machine cut and traumatically amputated his left 5th finger. He blamed the accident and injury on the respondent's negligence/breach of contract/breach of statutory duty/breach of common duty of care and sued it for general and special damages. The trial court received evidence following which it dismissed the suit with costs. It found that the appellant had been injured in an accident at his place of work; that he had not proved that the injury was as a result of the respondent not providing a safe working environment; and that he had not proved the machine was faulty at the time of the accident. This appeal challenged these findings.

This appellate court has jurisdiction to review all the evidence tendered before the trial court to determine whether the conclusions of the court should stand (PETERS .V. SUNDAY POST LIMITED [1958] E.A. 424). The court will interfere if there is no evidence to support a particular conclusion, or if it is shown that the trial court failed to appreciate the weight or bearing of the evidence admitted or proved, or has plainly gone wrong. In exercising this power, the court will bear in mind that the trial court had the advantage of seeing and hearing the witnesses who testified before it.

Looking at the plaint, the appellant set out to prove that the respondent had

a) failed to provide, and take adequate precaution, forhis safety while engaged in work;

b) exposed him to risk of damage or injury, which he knew or ought to have known;

c) failed to take measures to prevent the accident;

d) caused and/or permitted the accident to occur;

e) failed to provide him protective gear;

f) provided poor working conditions and environment;

g) failed to provide him basic training;

h) failed to discharge the common law duty of carein breach of the Occupiers Liability Act; and

i) failed to provide a safe working system of work.

The appellant's case was that when the accident occurred on 26/8/07 he had worked as a general worker for 9 years and a machine operator for 3 days. He was a permanent employee. The machine he was operating was for making plastics. What happened was that a plastic got stuck in the machine. He switched off the machine to remove the plastic. That was the standard procedure. When removing the plastic the machine inexplicably switched on and that was how its blade cut his finger. Earlier that day the same thing had happened but he had had successfully switched off the machine and removed the plastic. When he got cut he was wearing protective leather gloves which the machine cut through to reach the finger. It was clear that he not blaming the lack of gloves for the accident. His testimony was that the machine was faulty.

In his evidence-in-chief he did not allege that he did not know how to operate the machine. He testified that he knew that when a plastic got stuck in the machine he had to switch off to remove it. The issue of training did not therefore arise. From the evidence of the appellant and the respondent's supervisor LUKAS OKUMU OUKO, it did not appear that a plastic getting stuck in the machine was an issue as all that was required was to switch off and remove it. The issue was that the machine was switched off and it switched itself on and cut the appellant.

LUKAS witnessed the accident. He saw the appellant switch off the machine. The appellant then got cut and yet he had not switched on the machine. It is therefore true that the machine switched itself on. There

was a fault on the part of the machine. The machine was therefore risky to operate. However, the plaint alleged that the appellant was exposed to risk which the respondent knew, or ought to have known. But, there was no evidence that the machine had previously been switched off and had on its own switched on. There was no evidence that any such fault was known to the respondent. It was the duty of the appellant to prove the particulars he had put forth in the plaint. The trial court found that the appellant has not proved that the respondent knew that the machine was faulty; or that the respondent was aware that the machine was faulty and did not repair it; or that knowing that the machine was faulty it got the appellant to use it. On the evidence, I agree with the court. This was an injury in a factory accident in respect of which the respondent was not to blame.

These are the reasons why I dismiss the appeal with costs.

Dated, signed and delivered this 27th day of May 2012.

A. O. MUCHELULE

J U D G E