



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL APPEAL NO. 206 OF 2007**

*(Appeal from the judgment of the Senior Resident Magistrate dated 26th October, 2007 in Nakuru Chief Magistrate's Court Civil Case No. 2943 of 2003)*

**COMPLY INDUSTRIES LIMITED.....APPELLANT**

**VERSUS**

**FRANCIS MWAURA.....RESPONDENT**

**JUDGMENT**

The Respondent sued the Appellant for general and special damages arising out of an accident which occurred in the course of the Respondent's employment with the Appellant. The Appellant was on the evidence and the evidence of the Respondent and his Doctor Omuyoma found liable for negligence. The Respondent was consequently awarded a total sum of Shs 142,500/= comprising shs 140,000/= (*general damages*) and shs 2,500 (*special damages*).

Aggrieved with the said Judgment and decree, the Appellant came to this court on appeal and raised ten (10) grounds of appeal -

1. ***The learned Magistrate erred in law and in fact that the Plaintiff had failed to prove that the Plaintiff was employed as a turn boy in motor vehicle registration number KAD 502J as alleged in the Plaint which was denied by the Defendant in its defence and erred in holding that the fact that he Plaintiff was employed was sufficient to prove the claim.***
2. ***The learned Magistrate erred in law and in fact in disregarding that the plaintiff had exceeded the terms/scope of his employment.***
3. ***The learned Magistrate erred in law and in fact in disregarding that the evidence adduced by the Plaintiff was at variance with his pleadings and that the plaintiff had failed to prove his claim as pleaded.***
4. ***The learned Magistrate erred in law and in fact in disregarding that the Plaintiff never pleaded that the tractor was defective, that it had no starter, that it was being jump started, that a tow bar was being used to pull the tractor etc. which evidence was extraneous and at variance to the pleadings.***
5. ***The learned Magistrate erred in law and in fact in disregarding that the burden of proof lay on the plaintiff to prove negligence and breach of contract of duty as well as to prove the particulars of negligence and breach of contract of duty which the Plaintiff had failed to prove.***

6. ***The learned Magistrate erred in law and in fact in his findings on the nature and extent of injuries viz-a-viz the particulars of injuries pleaded in the plaint and disregarded that the plaintiff was bound by his pleadings.***
7. ***The learned Magistrate erred in disregarding and or giving due regard to medical report of Dr. M. S. Malik.***
8. ***The learned Magistrate failed to appreciate the totality of the evidence before him and not considering the submissions on behalf of the Defendant.***
9. ***The learned Magistrate erred in law and in fact in disregarding the Defendant's claim for contributory negligence.***
10. ***The damages awarded by the learned Magistrate are excessive and unrealistic in particular in light of the Plaintiff's pleadings on particulars and nature of injuries claimed.***

Mr. Mahinda, learned counsel for the appellant argued the grounds of appeal in three segments grounds 1 – 5, grounds 6, 7 & 10 and the ground 8 alone.

In my view, ground 8, (*that the trial magistrate did not into the account the totality of the evidence*) is part of grounds 1 – 5, the Respondent's claim – that he was employed as a turnboy on a specific motor vehicle (KAD 5075), but that he was injured whilst repairing a tractor, that the Appellant did not provide a safe working environment, that he was injured by a tractor, that he undertook to jump start a tractor that he was instructed to do so by his employer was totally at variance with the pleading of employment as a casual worker and a turn boy on a motor vehicle.

Similarly on grounds 6, 7 & 10 the Respondent's evidence was totally at variance with his pleading that he had suffered two soft tissue injuries of the back, and right leg. The Respondent testified that he suffered injury of the hip, and no evidence on the injury on the leg.

In his submissions, Mboga maintained that there was a Reply to Defence, and that the evidence adduced was not variance with the pleadings, that the Respondent was acting within the scope of his employment, that he was assigned duties to jump start the tractor and finally the Appellant did not adduce any evidence against the Respondent and cannot now on appeal challenge the Respondent's evidence before the trial court.

On the question of injuries suffered, counsel for the Respondent acknowledged that the Respondent had back injuries prior to the accident, the subject of the suit; and maintained that the trial magistrate considered the totality of the evidence before court.

I have considered the rival arguments. I have also examined the pleadings, the plaint, the Statement of Defence, and the Reply to Defence. More importantly I have considered the Respondent's evidence, and that of his Doctor, as well as the Report of Dr. Malik, the Appellant's Consultant Doctor on the Respondent's claim of injuries.

It is quite correct as Mr. Mahida learned counsel for the Appellant that the evidence led by the Respondent both as to his position (*turnboy to a particular vehicle*), and the cause of the accident were at a total variance with the pleading. The law provides that whenever this happens, counsel for the plaintiff or as in this case, the Respondent ought to have sought an amendment to the pleadings to reflect the actual cause of the accident, in place of the attachment to a vehicle. If this were the sole evidence the Appellant's appeal would of course succeed.

The Appellant's appeal is weakened by the totality of the evidence which the Appellant contends was not taken into account by the trial magistrate.

Looking at the evidence as a whole, it is clear to me that an accident does seem to have occurred at

the Appellant's premises. This is why I hold that finding.

Pexh. 1, Discharge Summary from Provincial General Hospital – Nakuru by a Dr. Ngetich, shows that the Respondent was admitted to that hospital on 1.04.2003, and was discharged on 2.04.2003, and returned to that hospital on 15/04/2003 and 22.04.2003 and again on 12/05/2003, 3/09/2003, 18/07/2003, 18/07/2003 and in a letter dated 18/09/2003, the (Pexh 3), by Dr. Mokua M. K. an Orthopedic Specialist, the Respondent is described to have suffered soft tissue injuries and had made remarkable improvement.

**Secondly** in a Report given by Dr. Omuyoma dated 17.11.2003. The Respondent is reported to have suffered soft tissue of the back and right leg both of which had healed.

Thirdly, the Respondent gave Notice of the occurrence of the accident and described the Respondent as “a Mechanic”, and stated the cause of the accident in paragraph 3 (iii) -

***“He was hit by a tractor as he was removing the hook from the clamp used for towing it.”***

***and***

***3(iv)(c) – State exactly what the injured person was doing at the time of the accident -***

***..He was helping to start the Tractor as it had ignition problems while removing the hook from the clamp. The tractor knocked him.”***

***and in para. 4 (ii) – particulars of injuries – soft tissue injuries on upper back and he was taken P.G.H. Nakuru .***

**Fourthly** in his Report (PEx. 8) Dr. Malik M J. reviewed the Respondents injuries in quite some....., no doubt for the benefit of both the Appellant (*his client*), and no doubt the court (*to which the report would eventually be submitted*), and concluded that the back injury caused the Respondent total incapacity for one week, followed by partial incapacity for another week but attributed deformed and painful back to “*what looks like bone tuberculosis ....* and thus should be treated.

**Fifth** with that comprehensive evidence, the Appellant's representatives were unwilling to come and testify for having reported the accident to the Ministry of Labour, and Report having been produced by consent of counsel for the Appellant, there was no denying the occurrence of the accident and the cause of it the tractor “*bad problems with starting*”.

**Sixth** though I have found that the pleadings should have been amended to be in consonance with the actual occurrence of the accident the evidence from both the Appellant's and Respondent's perspectives is clear. The Appellant was employed as a mechanic – on a casual basis. The occasion when the sustained the injuries were accepted by the Appellant. The Appellant cannot, and is estopped from denying what it reported to the Ministry of Labour. The Appellant cannot rely on the technicalities of the law with regard to pleading.

**Seventh** the pleading as to attachment to a particular vehicle does not detract from the clear evidence as to occurrence of the accident.

**Eighth** and finally, on the question of which point of the body suffered injury even the doctors are not agreed. Dr. Malik refers to “*pain in the back, pain the right buttock*”. Would not be correct to say that the right buttock is somewhere near “*the right hip*”. The Respondent is not a Doctor trained in human anatomy. The substantial point is that he suffered injury arising from what the Appellant reported to the Ministry of Labour as “*Industrial Accident*”.

**Nineth** on the question of damages the trial court awarded the sum of Ksh 140,000/= as general damages. Special damages were proved at shs 2,500/=. I think that was a fair assessment, of general damages at the time. I do not propose to interfere with it. I confirm it.

For those reasons, I find no merit in the Appellant's appeal and I dismiss it.

It is so ordered.

**Dated, signed and delivered at Nakuru this 21<sup>st</sup> day of June, 2013**

**M. J. ANYARA EMUKULE**

**JUDGE**