Editorial Summary

1. *Civil Appeal*

2. *Subject of subordinate court case*

TORT/CONTRACT

2.1 *Workplace injury*

2.2 *Industrial accident*

2.3 *Male adult 27 years old in 2005*

2.4 *Lid of machine fell on him. Held his arm up to protect head. Left arm sustained deep cut on 5th June 2005.*

2.5 *Treatment at Thelmo medical clinic*

2.6 *Sued employer*

2.7 *Employer denied injury occurred.*

2.8 *Employee worked 2nd June 2005*

i) Brought papers that he had sustained injuries and given five days off with effect from 2nd June 2005.

ii) Produced medical report

iii) 5th June 2005 was a Sunday.

iv) Employee was never on duty.

2.9 Judgment by Hon. Magistrate:

i) Plaintiff employee proved his case.
ii) Record register not relied upon.
iii) Quantum – Ksh. 120,000/-

liability 100% against employer.

2.10 Employer appeals.

3. Appeal 3rd July 2009

Hon. Magistrate erred in law and fact:

3.1 … in finding the defendant liable 100% when evidence in court did not support such a finding.

3.2 … when the evidence adduced … that the plaintiff was not on duty at the time of alleged injury.

3.3 … when the evidence adduced … the defendant [read plaintiff] was injured without the defendant's premises.

3.4 … taking into account hearsay evidence.

3.5 … in awarding damages manifestly high and excessive …

3.6 … failing to take submissions filed on behalf of the appellant.

i) Prayed judgment be varied and or set aside.

ii) General damages be varied and or set aside.

4. Submissions by Appellant/employer

i) Liability

4.1 Plaintiff/respondent was never on duty.

4.2 Injured on 3rd June 2005 but in examination in chief failed to disclose 5 days leave granted.

4.3 Supervisor told him to be back on duty. Appellant called supervisor who denied recalling the plaintiff.

4.4 One Alex never summoned to be on duty.

4.5 Appellant exhibit 2 was a register of attendance and vital to case and should not be disqualified.

4.6 Appellant's witness gave evidence, machine was never in use on a Sunday.

4.7 No treatment notes from Thelmo Medical Clinic

4.8 Burden of proof not established.

ii) Quantum:

4.9 Award excessive

Possible award range of 12,000/- to 40,000/-

5. In reply by respondent/employee

i) Liability:

5.1 employee established he was employed by employer as a machine operator.

5.2 Recalled to work on 5th June 2005.

5.3 Lid of machine – grinding came off.

5.4 No records of those injured kept.

5.5 Company records of register reflect two names Friendly Polymer Ltd and Rainbow Plastic ltd

5.6 Failed to call employee Alex.

5.7 Liability be upheld.

5.8 Safe working condition was not there.

5.9 Space congested.

5.10 Machine not maintained.

ii) Quantum:

5.11 Quantum Ksh. 120,000/- not inordinately high.

6. Held:

6.1 Appeal allowed.

6.2 Judgment set aside and substituted with orders of dismissed suit with costs to respondent.

7. Obiter Dictum:

Procedure:

i) Plaint discloses the cause.

ii) Defendant – further and better particulars

iii) Opening address

8. Case Law:

By Appellant:

a) ***Ol Njorowa Ltd***

Vs

Godfrey Maina Kamau

Kimaru Ag J (Uncertified)

b) ***Socfinaf Co. Ltd***

Vs

Joshua Ngugi mwana

Nairobi CA 742/03

Visram J (Uncertified)

c) ***Classic Engineering Services Ltd***

Vs

Tom Owiti Dunga
Kisumu CA 702/06
Tanui J

By Respondent:

a) ***Mumias Sugar Co. Ltd***

Vs

Charles Manatiti
CA 151/87

Gahuhi, Masime JJA, Gicheru AgJ

b) ***Mghosi – Vs – Gayatri Engineering Works***
Mombasa HCCC 214/78
Kneller J

c) ***Esther Kimathi Ikunyua & Another***

Vs

Rael Gakii
Meru CA 74/05
Kassanga J

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9. Advocates :

i) N.A. Owino instructed by N.A. Owino & Co Advocates for appellant/employer

ii) O J Mituga instructed by Singh Gitau & Co Advocates for respondent/employee

REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL 347 OF 2009

RAINBOW PLASTIC INDUSTRIES LTD.....APPELLANT/ ORIGINAL DEFENDANT

VERSUS

GEOPHRY MUGASIA OMUSOTSI.....RESPONDENT/ORIGINAL PLAINTIFF

(Being an appeal from the Judgment of Hon. P. Gichohi (Principal Magistrate) in Case No. 8220 of 2007 dated 23rd June 2009 dated at Nairobi)

J U D G M E N T

I. BACKGROUND

1. This is a workplace injury claim, what is commonly known as an industrial accident suit.

2. Geoffrey Mugasia Omusotsi was employed and worked for

M/s Rainbow Plastic Industries Ltd. For ease of reference, the parties would be referred to as employee/employer respectively.

3. The employee alleged in his plaint that whilst in employment he was "provided with unsafe and dangerous system of work. That while he was in the cause of [his] duties he sustained severe injuries." Namely,

"a deep cut on left arm, pain and similarly on left arm and loss of blood from left arm."

4. The employee also asked he be paid Ksh. 1,500/- as special damages for a medical report.

5. In evidence, the employee disclosed he was in fact a machine operator. He was first employed on 10th October 2003 without any written contract, no any training he was assigned to operate a machine that grinds plastic papers.

6. On 3rd June 2005, he had been indisposed and was given off duty for five days. He was recalled back to duty on 5th June 2005, a Sunday. He began his duty of grinding machine. The place was congested with the papers on the floor. He went to move some of the plastic papers when the machine lid fell on him. To protect his head, he shielded his head with his forearm. He sustained a deep cut. He was given money and he went to a hospital called Thelmo Medical Clinic (as per evidence of his witness a medical doctor.)

7. The doctor confirmed that there was a scar well healed on injury to this forearm.

8. He admitted that he gave his employer a sick sheet showing that he had been injured on 3rd June 2005 and given 5 days off.

9. In the defence the employer stated that the sick sheet given to them by the employee gave him 5 days off. He at no time was he recalled back to work. On the material day in question of 5th June 2005, he was never at work as per employer's register. The employer would require the workers to leave their identification cards at the gate. DW1, the supervisor/framer would collect their identification cards and hand them to the in-charge who would record on his register. According to this register stamped Rainbow

Plastic Industries Limited, the employee did not report to work. It was a Sunday. The machine in question did not require to be used on a Sunday. The said machine was maintained by the witness DW1.

10. On hearing the evidence of both parties, the Hon. Trial Magistrate found the employer liable for the accident at 100%.

11. As to the quantum an award for general damages

Pain and suffering	Ksh. 120,000/- and
Special damages	
Medical report	Ksh. 1,500/-
Total	Ksh. 121,500/-

12. Being dissatisfied, the employer filed appeal on the 3rd July 2009.

II APPEAL

13. The employer/original defendant appellant stated that the

Hon. Magistrate erred in law and fact:

13.1 … in finding the defendant liable 100% when evidence in court did not support such a finding.

13.2 … when the evidence adduced … that the plaintiff was not on duty at the time of alleged injury.

13.3 … when the evidence adduced … the defendant [read plaintiff] was injured without the defendant's premises.

13.4 … taking into account hearsay evidence.

13.5 … in awarding damages manifestly high and excessive …

13.6 … failing to take submissions filed on behalf of the appellant.

14. The appellant/employer prayed that the judgment be vacated and or set aside. That the general damages awarded be also named or set aside.

SUBMISSION BY APPELLANT

i) Liability

15. The employer's argument is that the employer was never on duty on the material day. This was because on 3rd June 2005 he had reported off for five days due to injuries sustained on him. This fact was supported by medical papers given to the employer by the employee from the Kayole Modern Medical Clinic. The employer accepted this medical report and accordingly permitted the 5 days off.

16. It was therefore correct to note that during cross examination the employee hid this material fact until confronted with the information in court.

17. The employer stated through their witness that whereas the employee had been given 5 days off, he never was on duty. His explanation on cross examination was that one Alex asked he return to duty was inaccurate. It was not correct to say that "Alex" could not be summoned as a witness though court summons but that he feared to attend court in case the employer would victimize him and sack him.

18. The evidence on one Alex was hearsay. It should never have been taken into account by the original trial court.

19. There was a company register of all the employees who worked for the day. This register was stamped with the company name

Rainbow Plastic Industries Ltd. The company later changed its name to Friendly Polymers Ltd. The documents reflected this. The Hon. Trial Magistrate rejected this register on the discrepancy of the names and its reliability as evidence by the employer.

20. The employer argued that this document should not have been rejected.

21. As to the machine in question, DW1 was the one who maintained the machine and did the training. The machine in question was never used on the Sunday.

22. As to the quantum, this was in excessive for a cut deep wound. That an award between Ksh. 12,000/- to Ksh. 40,000/- according to case law would have been sufficient if per chance liability had been established, which is denied.

23. The employer asked that the appeal be dismissed and judgment varied/set aside.

ii) Submission by Employees

24. The employee stated that the submission of the employee must fail. The employee had established that he was employed by the employer as a machine operator. He was at work on 5th June 2005. The lid of the grinding machine came off and as a subsequent, the employee sustained injuries.

25. The employer admitted through their witness that the company kept no record of register of those injured in the workplace. The register that they alleged kept was questionable due to two different names used Friendly Polymers Ltd and Rainbow Plastic Ltd.

26. The employer failed to call Alex, the witness crucial to the case.

27. The employee prayed that the liability be upheld as there was no safe working condition. The area of work was congested and the machine was not maintained.

28. As to quantum, this was not excessive. That the sum of Ksh. 120,000/- be upheld.

29. The appeal be not allowed but dismissed.

30. In this appeal, the employee did not establish his case.

31. The Hon. Trial Magistrate erred in not looking at what was pleaded on the plaint. The employee was described as a casual worker, not a machine operator. This case would have been of great assistance to the Hon. Magistrate if the employer had asked for “better and further particulars.”

32. The employer stated the employee was never at work on the material day Sunday. The machine in question was never used.

33. There was indeed non disclosure on the part of the employee of another injury (something to eyes and mouth) of a medical report giving him 5 days off from work. This indeed was proof that the employee was indisposed from injuries not connected with his workplace.

34. The medical doctors report speaks of a clinic that the employer reported to being Thelmo Medical Clinic. The documentation of this clinic was never submitted to the employer, nor to court to prove its existence. This casts doubt to the employee’s case.

35. In the past, the High Court has held that without the initial report being tabled to court of the injury such claims should be rejected.

36. In this case the liability had not been established against the employer or at all. The Hon. Trial magistrate erred in not believing the employer’s evidence.

37. The primary document of the register was presented to court as evidence. The reason it was rejected is that it had two names. If this discrepancy of names by Rainbow Plastic Industry Ltd was changed

Friendly Polymer Ltd then the employee may have sued the wrong entity. The defendant would have been Friendly Polymer Limited.

38. The evidence was not sufficient to find the employer 100% liable for the injuries allegedly sustained by the employee on an accident that was not established.

39. As to quantum, the award for a deep cut that had completely healed with no broken bones or deformity, an award of Ksh. 120,000/- was in excessive.

40. I have considered to this court’s opinion that a possible award ought to have been awarded of Ksh. 10,000/- if liability had been proved.

III OBITER DICTUM

41. In a trial under Order XVII Civil Procedure Rules now Order 18

Civil Procedure Rules, the party beginning, in this case the employee plaintiff should start his case on opening address that includes case law. The plaintiff is the first witness to be called to establish that there is a complainant. The medical doctor is called as a second witness to consolidate the plaintiff’s evidence not the first witness. If the doctor is called as a first witness, the plaintiff is stated in court and would repeat the evidence heard by the medical doctor. This is not corroboration.

42. The parties plaintiff on their case being closed, the defendant would opt to give evidence or not. If the defendant does not opt to give evidence, then the plaintiff would give closing submission, the defendant would reply but if the defendant quotes case law then the plaintiff would have a right of reply on the case law.

43. If the defendant employer in this case gives and or announces he will give evidence then an opening address is given together with the case law. The defendant calls his witness to give evidence upon cross examination and re-examination, the defendant closes his case. It is the defendant employee who then

submits in evidence. The plaintiff reply – there is no right of reply to the case by the defendant.

44. As stated earlier, if pre-trials had been done adequately in this matter, the case before the trial magistrate would have been clearer. As it stands, the new 2010 rules have gone a long way to clarify these procedures and the full access to justice.

IV IN CONCLUSION

45. The appeal is hereby allowed. the judgment of the Hon. Magistrate delivered on 23rd June 2009 is set aside and orders substituted to read that the suit is dismissed with costs.

46. There will be costs to the appellant n this appeal to be paid by the respondent original plaintiff employee.

47. There will be costs to the appellant/original defendant employer to be paid by the respondent original plaintiff employee in the subordinate courts.

48. If the employee respondent original plaintiff had been successful, the possible award would have been:

48.1 General damages

Pain and suffering Ksh. 10,000/-

48.2 Special damages

Medical report Ksh. 1,500/-

Total Ksh. 11,500/-

48.3 Interest on general damages
From the date of judgment 23rd June 2009
Interest on special damages from the date.

49. The suit otherwise stands dismissed in the subordinate court – the appeal in this High Court being allowed.

DATED THIS 26TH DAY OF MARCH 2012 AT NAIROBI

M.A. ANG'AWA

JUDGE

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Advocates :

i) N.A. Owino instructed by N.A. Owino & Co Advocates for

appellant/employer

ii) O J Mituga instructed by Singh Gitau & Co Advocates for respondent/employee