REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL 30 OF 2007

BENSON AWINO JURA.....APPELLANT

VERSUS

FOAM MATTRESS LIMITED ….....RESPONDENT

J U D G E M E N T

The appellant (cross respondent hereinafter reffered to as the appellant)in this appeal JASON AWINO JURA filed a claim against the respondent/appellant Foam Mattress Limited claiming Breach of Contract and Statutory Duty. It was his case that on the 17th of September 2009 while working for the appellant at a construction site he was assigned the duty of breaking rocks, when a broken piece of stone hit and pierced his right eye. On its part the respondent (cross appellant hereinafter referred to as the respondent) denied all the allegation of breach of contract and/or statutory duties, it denied that the appellant was its employee and that it had assigned him duties as alleged. The trial magistrate found as a matter of fact that the appellant was an employee of the respondent but that he failed to file a reply to the defence thus failing to rebut the particulars of negligence attributed to him and went ahead to dismiss the suit.

The above judgment elicited two appeals each by the parties.

The appellant filed memorandum of appeal on the 7th of May,2007 based on the grounds that:
That the trial magistrate erred in law and in fact by finding that the appellant admitted the issues of negligence attributed to him in the respondent\'s statement of defence by failing to reply to the statement of defence;
That the trial magistrate erred as there was a statement of defence filed;
The trial count relied on a case whose facts and circumstances were different thus arriving at a wrong conclusion;
The trial court failed to consider the injury sustained and to make an award;
The trial court failed to award costs of the suit to the appellant.

On the 14th of May, 2007. The respondent filed a cross-appeal based on two grounds as follows:
That the learned magistrate erred in law and fact in disregarding the appellant\'s evidence on record and in doing so making a finding that the respondent was its employee.
That the trial magistrate erred in law and fact in importing facts and standards in the proceeding and relying on those facts or purported standards to find that the respondent was its employee.

Although Mr. Ragot for the respondent indicated that the two appeals were consolidated I see no such request or order in the court file. However it is evident that the two appeals emanate from one single judgment and the most reasonable thing is to have the same consolidated and heard together. I will therefore deem the same consolidated as counsel for both parties appear to be in agreement in this regard.

Mr. Ragot for the respondent conceded to the appellant\'s appeal in that indeed there was a reply to defence on record and the court failed to make an assessment of the likely award.

Coming to the second appeal by the respondent Mr. Ragot submitted at length to the effect that the magistrate made a wrong finding in holding that the appellant was an employee of the respondent. He argued that there was evidence that a third party John Rapenda had been contracted by the respondent to carry out the work and the said third party was in charge of his labour force and the trial court ought not to have relied on form LD 104/1 as a basis of evidence that the appellant was an employee of the respondent.

He also submitted that an award of Kshs.100,000/= with an element of contributory negligence would have been a good assessment in terms of an award.

On his part counsel for the appellant submitted that the appellant was an employee of the respondent and that being such an employee when he sustained injuries he was supplied with form LD 104/1 in accordance with Section 4 chapter 236 of the Laws of Kenya; that the respondent\'s witness who purportedly signed the contract with one John Rapenda had no such authority, the said contract did not

bear any seal or stamp of the respondent.

In response Mr. Ragot argued that Cap 236 is not applicable in the circumstances of this case.

This being the first appellant court it has to re-consider the evidence afresh, examine and analyze the same in order to arrive at an independent opinion.

At the trial the appellant was a sole witness for his case he produced 2 exhibits form L104/1 and a medical report that was produced by consent.. The respondent had 2 of its employees testify.

The appellant\'s case is that on the 17th of September, 2009 while in the course of duty at the respondent\'s premises as an employee and while breaking rocks to give room for construction of a building, a piece of stone hit his right eye and pierced his eye ball. He blamed the respondent for failing to provide him with protective gear. It was also his evidence that he was taken to Kisumu District Hosp[ital and later referred to New Nyanza General Hospital for further further treatment. He further testified that his employer gave him form LD104/1 duly filled.

The defence first witness John Juma Masinde DW1 informed the court that the appellant was an employee of a person contracted by the respondent. DW1 said that he is a supervisor of motor vehicles and contracts. He produced as Exhibit a contract between his employer and one John Rapenda who was contracted to break and excavate rocks on site and whom testified was in charge of his own labour force.

DW2 was Samson Tabu Ochanda a General Supervisor with the respondent. He testified that his work entails recruitment of employees and recording any injuries. He further testified that his records do not show the appellant to have been an employee of the respondent on the material day and further that his record of the day does not have the appellant as one of those who were injured. He informed the court also that the respondent ordinarily takes its injured employees either to Jalaram Hospital or the Aga-Khan Hospital.

Having considered the pleadings evidence and submission the issues arising in the matter are

(a) whether or not the appellant sustained injuries as alleged?

(b) whether or not the appellant was an employee of the respondent? (c) was the appellant owed duty of care if so by whom?

(d) was there any contributory negligence?

(e) what is the quantum of damages payable?

The issue whether or not the appellant sustained injuries is really not an issue. I therefore find as a fact that on the 17th of September, 2004 while working at a construction site a stone pierced the appellant\'s right eye. The medical report and cards were admitted by consent and I find also a fact that as a result of the accident he sustained perforation on the right eyeball which resulted to complete blindness of the same.

The next question is whether or not the appellant was an employee of the respondent which was vehemently denied. In support of his assertion the appellant produced form LD 104/1 “notice by EMPLOYER OF ACCIDENT CAUSING INJURY TO OR DEATH TO WORKMAN. The said form gives the name of the employer as M/S Foam Mattress Limited of Box 230, Kisumu. Workman as Benson Awino June a male of 30 years description of occupation as a general worker, date of accident as 17th April, 2004 and place of work as a construction site and the cause of accident is given as “hit by a stone broken from the rock.” The document is signed and is affixed with the respondent\'s stamp.

In denying the employment of the appellant the respondent produced a contract between the respondent and one John Rapenda a sub-contractor who was assigned the work of escavation and breaking of road. The said contract is dated 13th September 2004, the site or plot is however not indicated. The agreement provides that the contractor would hire his own labour force and will be liable to any injury on site. It was signed by the contractor and one John Masinde for Foam Mattress Limited. It does not have a stamp of the respondent.

In assessing the appellant\'s evidence and the document produced by the respondent it is quite evident that the details in form LD 104/1 confirm the appellant\'s assertion that he worked for the respondent\'s and sustained injuries while at work. The form is signed for and stamped by the respondents. The document has not been challenged. Indeed in my view the contract produced ostensible to controvert the appellant\'s evidence has failed miserably. It does not give details of the site, the duration of the contract so as to see whether it covers the date in question. It has no stamp of the company and was not produced by a person in authority to confirm its authenticity. As for Exh.2 record of employees from 13th September 2004 to 12th September 2004 in cross-examination DW2 admitted that the book had had a badge of a different company Tuffoam thus casting doubt on the genuineness of the said document, therefore I do concur with the trial magistrate that on a balance of probabilities the appellant proved that

he was an employee of the respondent.

As an employer the respondent had a duty of care to provide a safe environment and protective gear to its employees. The appellant states in evidence that he was neither provided with goggles nor a helmet. As the respondent\'s witness denied the appellant they did not address this issue. I therefore find as a matter of fact that the respondent owed a statutory duty of care to the appellant and by failing to provide the protective gear it was in breach of the same.

The appellant in my view was not blameless in the circumstances he owed himself a duty to ensure that he worked in a safe environment, he ought to have foreseen the likely danger in failing to wear the necessary protective gear. He was not blameless at all and I therefore do find that this is a case of contributory negligence.

Both parties quantified, the appellant sought for Kshs.450,000/= while the respondent assessed damages at Kshs.100,000/=. The comparable by the respondent were very old. The appellant on his part relied on authorities at least dating 5 years back and with similar injuries in WAINAINA MWANGI VRS ATTORNEY-GENERAL HCCC No.3473 of 1991 decided on 31st July, 1997 the Court in a case where the appellant sustained loss of vision awarded Kshs.450,000/=. I find the sum in the circumstances of this case and the cost of the shilling to be a fair amount.

Having found:

(a) that the appellant was an employee of the respondent;
(b) that a reply to the defence was dully on record;
(c) that the appellant did sustain injuries;
(d) that this is a case of contributory negligence;
(e) that the appellant deserves to be awarded damages;

I find the appellant contributed to the accident and attribute 30% contribution. I award damages at Kshs.450,000/= and costs less 30% contribution thus setting aside the judgment of the lower court.

DATED AND DELIVERED THIS 20TH DAY OF JULY, 2012

ALI-ARONI
JUDGE

In the presence of:
….....counsel for the appellant\'s
….....counsel for the respondent