



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NAKURU

Civil Appeal 61 of 2009

UMAR SHIBACHI OMURUNGA.....APPELLANT

VERSUS

WILDFIRE FLOWERS LIMITED.....RESPONDENT

**(An Appeal from the Judgment of Hon. N. N. Njagi, Principal Magistrate, in Nakuru
P.M.C.C.No.189 of 2007 dated 24th March, 2009)**

JUDGMENT

The appellant brought a claim in the court below against the respondent in negligence and breach of contract of employment alleging that he sustained chemical burns when engaged by the latter as a sprayer operator.

It was the appellant's evidence that due to high pressure, the hosepipe did burst and spilled chemical on his legs. He reported to his supervisor, Kariuki and his assistant Oscar. First aid was administered at work and the next day he went to Naivasha District Hospital for treatment.

Medical evidence in the form of reports prepared by Dr. Omuyoma and Dr. Otara were produced by consent. Dr. Omuyoma who was the first to examine the appellant on 12th February, 2007, a month after the alleged accident noted that the appellant suffered chemical burns on both legs causing soft tissue injuries on them. He assessed the degree of injury as harm. Dr. Otara also made similar assessment of injury and observed that the appellant must have suffered contact dermatitis as a result of an accident arising from a pesticide.

On behalf of the respondent, Oscar Ngeti Wachenje, stated in his evidence that on the day of the alleged accident (i.e. 8th January, 2003), the appellant was on duty and worked 8 normal hours and 2 hours overtime and was only absent for unknown reasons on 13th January, 2003. He further explained that the appellant worked in the maintenance department and not in the spraying department; that spraying is never done during the day; that the hosepipes were new, had a guarantee of 3 years and were replaced as soon as they were worn out; that the respondent provided protective gear.

D.W. 3, Nore Anne Naira's evidence was to support the respondent's position that the appellant was not attended at the respondent's clinic for the injuries complained of.

In a rather mixed up judgment, the learned trial magistrate after finding that the appellant had not proved his claim strangely concluded that he should shoulder 80% of the blame. No reason for the apportionment was given. The court awarded to the appellant kshs.50,000/= for pain and suffering, subject to 80% contribution.

That finding aggrieved the appellant who promptly preferred this appeal on the grounds that:

- i) there was no evidence to warrant the apportionment of liability;
- ii) the award of damages was inordinately low;
- iii) the learned magistrate failed to appreciate the nature of duty owed to the appellant by the respondent;
- iv) the learned magistrate failed to consider the appellant's submissions.

Learned counsel for the respondent opposed the appeal and argued that there was evidence that the appellant was not working in the spraying department; that the respondent was not in breach of any statutory duty as it had provided the appellant with safe system of work.

I have duly considered these submissions and authorities cited by both counsel. It is common ground that the appellant was employed by the respondent. The dispute is whether he was injured while so engaged, whether the respondent was to blame for the injuries or whether the respondent was in breach of statutory duty owed to the appellant.

Relying on the muster roll, the defendant argued that it was not possible for the appellant to be injured while he worked in the maintenance department.

D.W.1 admitted that he did not prepare the muster roll that he produced at the trial. He further conceded that the muster roll showing that he was a supervisor was not before that court.

Secondly, whereas against the name of the 17 employees listed in the muster roll, their designations are provided for, against the appellant's is blank. Thirdly, the purpose of a muster roll, as I understand its use in the context of this case is to record the attendance of workers and the hours worked for purposes of calculating wages or salaries. According to the muster roll produced, the employee is not given an opportunity to confirm the details recorded in the muster roll by appending his/her signature on the muster roll. It is a record kept by and in the exclusive control of the employer – the respondent.

In view of these gaps, the credibility of the entries in the muster roll is suspect. That position also applies to the accident register. The alleged accident took place before D.W. 3, Nore Ann Ngaira who produced the accident register was employed by the respondent after the alleged accident and could not as a result confirm its accuracy or authenticity.

On the other hand, the appellant was categorical that when he got injured, he was on duty with his supervisor, Kariuki and assistant supervisor, Oscar, I suppose, D.W. 1. He told the trial court that it was the assistant supervisor (Oscar) who controlled and regulated the pressure. In view of the fact that Oscar was not the supervisor, no explanation was offered why Kariuki was not called.

From the totality of the evidence presented before the court below, I come to the conclusion on this point that the appellant was on duty on the day in question and that as a matter of fact, he sustained chemical injury. The next question is, was the respondent negligent or in violation of statutory duty?

D.W.1 – Oscar denied that the hosepipe was worn out arguing that both the farm and the hosepipe were new. He however, did not provide any idea as to how old (or new) they were.

The doctors found that the appellant suffered injuries as a result of contact with chemical. The appellant gave a plausible account of how high pressure caused the hosepipe to burst; that the hosepipe was old and that he had made a report that the pipes were weak.

The respondent was under a statutory duty to ensure that the appellant worked in a safe and secure environment. The respondent failed in this duty and as a result the appellant suffered injuries to the leg,

which I have set out earlier. I have also noted that the finding of the learned magistrate is not easy to comprehend. But the bottom line is that he awarded Kshs.50,000 /= less 80% liability.

The law is settled that an appellate court will not disturb the quantum of damages awarded by a trial court unless the trial court in assessing the damages, took into account an irrelevant factor, or left out a relevant one or that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See **Ilago V. Manyoka** (1961) ERA 705.

Apart from not applying any known principle of assessment of damages, the trial magistrate's award of damages was too inordinately low, hence erroneous. The appellant's counsel proposed Kshs.350,000/= relying on **Kanderbox Janmohammed V. Bamburi Portland Cement Company Limited** HCCC No.32 of 1993 and **Ngala Shedi V. Jackson Nyambu**, HCCC No.152 of 1992.

Without citing any authority in support, counsel for the respondent proposed an award of Kshs.50,000/=. Considering the injuries suffered by the appellant alongside the injuries suffered in the cited cases, which injuries were clearly more severe than those suffered by the appellant, I award in general damages Kshs.150,000/= and Kshs.3,000/= in special damages.

With that, the appeal is allowed and the award of Kshs.50,000/= subject to Kshs.80% liability is set aside. Costs of the appeal and in the lower court awarded to the appellant.

Dated, Signed and Delivered at Nakuru this 3rd day of August, 2012.

W. OUKO
JUDGE