REPUBLIC OF KENYA

High Court at Kitale

Civil Appeal 7 of 2009

KHETIA DRAPPERS LTD :: APPELLANT.

VERSUS

PETER WAINAINA NJOROGE :::::::::::::::::::::::::::::::::::::: RESPONDENT.

J U D G M E N T.

This appeal arises from the decision and judgment of the Chief Magistrate at Kitale in CMCC No. 493 of 2005 in which the appellant, **Khetia Drapers Ltd.,** was found liable and judgment entered against itself in favour of the respondent, **Peter Wainaina Njoroge,** in the total sum of Ksh. 1,980,000/= together with costs and interest.

The claim by the respondent against the appellant was for general and special damages arising from injuries suffered by the respondent while in the course of his employment with the appellant on the 22nd April, 2004.

In the amended plaint dated 17th August, 2006, it was averred that the respondent (plaintiff) was on the material date engaged in his duty as a metal fixer at the appellant's (defendant's) construction site when due to the negligence of the defendant and/or its employees, the plaintiff fell five (5) metres deep and sustained severe bodily injuries.

The plaintiff contended that the accident was caused by the negligence of the defendant and/or its employees or by breach of the employment contract on the part of the defendant, its agents and/or servants. The plaintiff therefore prayed for damages against the defendant.

In its statement of defence, the defendant denied the allegations of negligence and/or breach of contract of employment made against itself by the plaintiff and contended that at no time was the plaintiff, its employee nor was he on duty at the defendant's construction site as its employee.

Without prejudice to the foregoing, the defendant contended that if there was an accident as alleged, then the plaintiff was solely to blame for failing to take care of his own safety among other things.

Consequently, the defendant prayed for the dismissal of the plaintiff's suit with costs.

At the hearing of the suit, the plaintiff (herein, respondent) testified that he lived in Bungoma and that at the material time of the alleged accident he worked as a steel fixer with the defendant company (appellants) in Bungoma. On 22nd April, 2004 while on duty on a storied building, a machine bringing ballast (kokoto) broke a shutter thereby causing steel bars to fall down on the plaintiff who was fifteen (15) ft high. This resulted in the plaintiff being thrown onto the ground and injuring his head and right leg. He was taken and admitted to the Bungoma District Hospital for a period of six (6) months. He

continued treatment at Kitale District Hospital and was later examined by Dr. Alunda and Dr. Gaya, both based in Eldoret. The medical reports by Dr. Aluda and Dr. Gaya were produced in court by consent (i.e. P.Ex 3 & 4) the defendant did not lead evidence in support of its pleadings.

Be that as it may, both the plaintiff and the defendant filed written submissions which were to be considered by the trial court alongside the plaintiff's oral evidence. However, only the plaintiff's submissions were considered apparently due to the failure by the defendant to file its submission on or before 10th July, 2008 as ordered by the court. The said submissions were instead filed on 14th July, 2008.

In her judgment, the learned trial magistrate concluded that liability had been established against the defendant at 100%. Consequently, judgment was entered in favour of the plaintiff against the defendant for the sum of Ksh. 1,500,000/= being general damages for pain and suffering. Ksh. 180,000/= being future earnings at a monthly salary of Ksh. 3,000/= for a period of fi e (5) years and Ksh. 300,000/= being loss of future medical care. All in all, the plaintiff was awarded a sum of Ksh. 1,980,000/= plus costs of the suit and interest.

Being aggrieved with the decision of the trial court, the defendant preferred this present appeal on the basis of the fourteen (14) grounds contained in the memorandum of appeal dated 22nd May, 2009 filed by Messrs **Kiarie & Co. Advocates**. **Mr. Kiarie**, learned counsel, argued the appeal on behalf of the appellant while **Mr. Ombati,** learned counsel, opposed the same on behalf of the respondent.

This being a first appeal, the duty of the court was to re-consider the evidence adduced at the trial and draw its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witness. In that regard, the sole evidence of the respondent/plaintiff has already been considered herein above. Also considered, were the rival submissions by counsels for both the appellant and the respondent.

In the opinion of this court with regard to liability that he was injured while in the course of his employment with the appellant company in Bungoma. The respondent pleaded that the scene of the accident was at a construction site belonging to the defendant and that he fell five meters deep due to the appellant's negligence and/or breach of statutory duty.

In his evidence, the respondent stated that he was at a storey building working on steal when a ballast machine broke the shutter thereby causing steel bars to fall on him resulting in his falling on the ground and injuring his leg and head. There was no challenged to this evidence. The respondent was thus able to establish that he was injured while in the course of his employment and that the accident was as a result of failure by his employer to take adequate precautions for his safety and for failing to provide a machine which was in good working condition.

However, the respondent's evidence was challenged during cross-examination with regard to his employment with the appellant company. The challenge is also found in the appellant's statement of defence (see, paragraph 3 of the defence to amended plaint).

In his pleadings, the respondent averred that he was employed by the appellant as a steel fixer. In his evidence, he said that his duty at the accident scene was assigned to him by the appellants and that is why he held them liable for his injuries. He maintained in cross-examination that he was employed by the appellant but conceded that he had no documentary evidence to establish the fact. He however, indicated that there was contractor on side (i.e Konoike japan) and that it was the contractor directing on how the metals should be fixed. Most importantly, the respondent clearly indicated that the contractor was responsible for the accident. The respondent therefore absolved the appellant from blame and without any substantial evidence proving that he was indeed employed by the appellant at the time of the accident, this court would not hold the appellant liable for the injuries suffered by the respondent. It is most probable that the respondent instituted the suit against the wrong person. Herein, he did not prove, as required, that the appellant was his employer and that he suffered injury while in the course of his employment with the appellant. The burden of proof lay with him even in the absence of any evidence from the appellant at the

trial.

With respect, the learned trial magistrate erred by holding that employment was proved by the respondent's word of mouth since it was not challenged by any evidence from the appellant. Challenge or no challenge, the onus was on the respondent to prove his case and this never shifted to the appellant. The legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. He who asserts must prove.

Under section 109 of the Evidence Act, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person” and under section 112 of the Act, “in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him”. (see, **Ndiritu vs. Kapkoi & Anhother (2004) Eklr.)**

Grounds one, two, three and four of the appeal are hereby sustained.

With regard to grounds six and seven of the appeal, let it be made clear that court orders are not made in vain. Therefore, the appellant ought to have obeyed the order of the court to pay court adjournment fees. The first such order was made on 31st May, 2007 and was complied with by the appellant on 5th July, 2007 on the insistence of the respondent. A second such order was made by 5th July, 2007 after the appellant applied for the adjournment of the defence hearing. As at 5th June, 2008, the order had not been complied with but on 26th June, 2008, the appellant was given upto 10th July, 2008 to file its submissions.

The said submissions were filed on 14th July, 2008, outside the prescribed period. This explains why they may have been ignored by the learned trial magistrate while writing her judgment. Nevertheless, the appellant's submission were in the court record after the appellant was given indulgence by the court to file them by the 10th July, 2008. The delay in filing the submissions ought not have been visited on the appellant through the mistakes of its legal counsel. It would have been proper for the appellant's submissions to be considered by the trial court despite the delay in having them filed and the omission to pay court adjournment fees. However, the failure by the trial court to consider the appellant's submissions did not amount to denying the appellant the right to be heard as it readily participated, in the trial and was given adequate opportunity to put in all necessary materials in furtherance of its case. Consequently, whereas ground six of the appeal is sustainable, ground seven is not. With regard to grounds eight, nine, ten, eleven, twelve, thirteen and fourteen, having not proved his employment with the appellant and hence the appellant's liability for his injuries, the respondent was not entitled to any damages from the appellant. Had liability been established against the appellant, the respondent would have been entitled to general damages for pain, suffering and loss of amenities as well as proven special damages.

The medical report dated 21st June, 2005, by Dr. Alunda showed that the respondent suffered injuries mostly to the head and right leg which resulted in the shortening of the right leg by 2cm and partial loss of memory with likelihood of developing epilepsy in the future. The report by Dr. Z. Gaya dated 24th February, 2005 also noted the shortening of the leg and development of bipolar depression leading to confusion and violent occasions. Permanent disability was assessed at 25%.

Both reports showed that the respondents suffered very serious injuries indeed for which this court would have awarded a sum of Ks. 1.2 million general damages for pain, suffering and loss of amenities giving regard to the authorities relied on by both the respondent and the appellant and the rising trends of living. The trial court awarded additional amount of Ksh. 180,000/= being loss of future earning and Ksh. 300,000/= being costs of future medical care. These amounts were however wrongly awarded as they were not specifically pleaded and were in any event, not established by any evidence from the respondent.

Otherwise, grounds eight to fourteen of the appeal are sustainable.

In sum, this appeal is allowed to the extent that the judgment and decision of the lower court is hereby set aside and substituted with an order dismissing the respondent's case with costs.

Each party to bear their respective costs of appeal.

Ordered accordingly.

[Delivered and signed this 30th day of October, 2012.]

[In the presence of Mr. Kiarie for appellant and Mr. Barongo h/b for Ombati for respondent.]

J.R. KARANJA.

JUDGE.