REPUBLIC OF KENYA

High Court at Kisumu

Civil Appeal 42 of 2008

CHINA WUYI CO. LTD.....APPELLANT

VERSUS

JOTHAM MWANGI WERU.....RESPONDENT

J U D G M E N T

The respondent herein was an employee of the appellant performing the duties of a mechanic. On 24-3-2006 while on duty he was injured by a hot bitumen which splashed on his body. He sustained the following injuries:-

(a)Severe burns on the right arm.

(b)Severe burns on the right hand.

(c)Burns on the neck.

(d)Burns on the chin.

(e)Burns on both legs/feet.

The respondent was taken to Nandi Hills hospital and admitted for 10 days.

According to the respondent the severity of the injuries was caused by lack of proper working tools namely gloves and other working gadgets.

The respondent further blamed the appellant for the faulty of the machine since after the accident the appellant added another valve.

The appellant mounted four grounds of appeal according to the memorandum of Appeal dated 2-5-2008. The appellant attacked the trial court's findings on negligence, jurisdiction and the award. The appellant stated that under the provisions of the Work Benefits Injuries Act the trial court was not seized of the jurisdiction and that on this ground the appeal ought to be allowed.

The appellant also contended that the court's finding on negligence and thus apportioning liability of 80% and 20% in favour of the respondent was wrong It largely blamed the respondent for the said accident.

I have perused the pleadings and the submissions by both counsels as well as the authorities they relied upon.

There is no dispute that the respondent had been employed as a mechanic by the appellant. DW2 the supervisor confirms as much. It is not equally disputed that the appellant was injured while working for the appellant and the cause of the accident according to exhibit P2, the form of notice under the Workmens Compensation Act was:

"Bitumen Distributor Nozzles which unblocked itself discharging hot bitumen".

The first issue I need to determine is whether the trial court had jurisdiction to entertain the suit. My observation is that this was an issue raised at the appeal level and not at the initial trial. The issue of jurisdiction ordinarily ought to be raised as a matter of first instance and not to await the appeal stage. The fact that both parties subjected themselves to the full trial are estopped at this stage from mounting their attack on that ground. I do hold nevertheless that the trial court had jurisdiction to entertain the claim for damages and nothing absolutely barred it from such suits.

The next question to determine is whether the respondent proved negligence against the appellant. The respondent was a trained mechanic. He knew the risks of dealing with such dangerous machines carrying lethal substance. It is not explained by either parties what caused the valve to open. However, the fact the respondent was carrying out repairs showed that both parties were aware that the equipment was faulty.

Further, it is not in dispute that the respondent was not provided with tools such as gloves. In my mind, such gadget would have mitigated the severity of the burn. Was there therefore any negligence against the appellant? The case of **Kiema Mutuku -VS- Kenya Cargo Handling Services Ltd [1991] 2 KAR 258** is worth mentioning here where the court stated:

"There is a yet no liability without fault in the legal system in Kenya and plaintiff must prove some negligence against the defendant where the claim is based on negligence".

I do find that there was negligence on the part of the appellant who failed to ensure that the machine was well serviceable and further failed to provide working tools to the appellant.

Equally, the respondent who was a trained mechanic ought to shoulder some blame. The respondent failed to ask for the gloves and his arguments that he was working under instructions hold no water. He ought not to have endangered himself.

I find the aportionment of liability fair and reasonable and I shall not disturb the same.

On quantum this is a discretionary area granted by law to every judicial officer. The said discretion must however be exercised fairly and justly based sometimes on established judiciary precedents. In this regard I do not find the award of Kshs. 250,000/= unreasonable. The injuries sustained by the respondent were serious and the sub total of Kshs. 200,000/= awarded to the respondent on 2-4-2008 more that 4 years ago was fair and reasonable. I shall not disturb it.

In light of my above analysis and findings I shall not tamper with the judgment. The appeal is not meritorious and the same is dismissed with costs to the respondent.

Dated, signed and delivered at Kisumu this 15th day of October 2012

H.K. CHEMITEI
JUDGE

In the presence of:

Abande for Yogo for the appellant

Madialo for the respondent

HKC/va