



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 102 of 2010

HARUN KEGONDI. APPELLANT

VERSUS

MINI BAKERS (NAIROBI) LIMITED. RESPONDENT

(From the Judgment and Decree of E M Maina Chief Magistrate in Milimani CMCC NO. 6352 OF 2005)

J U D G M E N T

The Appellant who was the Plaintiff at the lower court, filed a claim for general and special damages in a plaint dated 8th June, 2005. He was an employee of the Respondent in a bakery where he was a dough maker. He mixed baking flour into dough, lifted same into the baking machine and lifting baked bread back to the table.

He was on such duty on 31st December, 2002 when he sensed some chest pain as he lifted dough from a sufuria to the baking machine. He many months later saw a doctor who prepared a medical report in which the doctor stated that the Appellant was suffering from (a) Pneumonitis (defect caused by strong heat and foreign bodies like baking flour), (b) a chest injury caused by heat and flour (c) pain and soft tissue injuries.

In his evidence during the hearing before the trial court, the Appellant had testified that he was injured when he was lifting dough from the baking machine to the table. He said that he had felt a stretch and some pain and was as a result, given permission to go home. Ten days later he collapsed while at home and was taken to hospital where he got medical treatment after which he was discharged. He continued working until September, 2003, 9 months down the line when he got dismissed. He further testified that he got injured as claimed because of personally lifting the dough instead of him using a machine to lift the dough. He also testified that his work exposed him to a high amount of heat. He said that his claim arose from the physical injury caused by a stretch of chest muscle. He also said that he had freedom to choose what amount of dough he would lift at any one time. He finally stated that the medical evidence report was prepared three years after the injury occurred.

The Respondent, who cross-examined the Plaintiff/Appellant, did not testify in defence.

In her judgment, the trial magistrate found that if the evidence of the Appellant was to be accepted to the effect that he got injured as he lifted dough, then the injury was self inflicted. The court also found that the Appellant had freedom to lift only the quantity of dough that he chose to lift and no one forced him to carry any extra or heavier dough. The court further found that the evidence from the Appellant concerning the injury caused by the heat, was inadequate. The court accordingly concluded that the

Appellant had failed to prove his claim on the balance of probabilities. She proceeded to dismiss the same. That is what aggrieved the Appellant who then filed this appeal.

In his Memorandum of Appeal the Appellant raised several grounds of appeal which can be summarized into the following one ground: -

a) That the honorable trial magistrate decided against the weight of evidence in failing to properly take into account the medical evidence adduced, the failure by the defendant to adduce evidence to controvert the plaintiff's evidence and the failure to properly consider the proper standard of proof in civil cases.

I have carefully perused the pleadings and the evidence of the Appellant at the lower court, as well as the Judgment of the trial magistrate. I observe that the Appellant in the performance of his duties of mixing flour and lifting dough, was not under orders from his employer to carry any fixed quantity. He was accordingly free to lift only what he would consider reasonable to avoid injuring himself. If he chose to lift what was much too heavy which led to his incurring the injury then he had no one but himself, to blame. He cannot blame his employer who had not imposed any specific amount to be lifted.

I have also examined the medical report showing that the Appellant had suffered chest injury. The report at the same time showed that the chest injury was due to a stretch of the chest muscle which must have been caused by a heavy weight at the time it occurred. Having already concluded that the Appellant himself and on his own chose to carry a heavy amount of dough without being forced to do so, there is no evidence which connects the injury to the employer even when the Appellant was performing the duties given by the employer to perform.

It is not denied that the employer did not adduce evidence in rebuttal to the allegations made by the Appellant. However, this court is in agreement that the evidence of the Appellant even if un rebutted, failed to prove his claim that the employer was responsible for the injuries sustained by the Appellant. The negligence or lack of care and attention alleged to have been committed by employer was also not only vague but was not shown to exist. For example, it was not proven that the mixing and lifting of dough was supposed to be done by machines as pleaded and testified by Appellant. Nor was there evidence, other than mere allusions, that the Appellant indeed suffered from the effects of extreme heat found at the baking room. And finally, the medical examination and the medical reports were done three years done the line after the Appellant was retired. Who can say what may have happened with the Appellant's health in between?

All in all, the trial magistrate who recorded the evidence and had opportunity to observe the demeanor of the Appellant, was not impressed by his evidence. This court is not in a better position to see more in the said evidence than she saw. This court cannot, therefore, easily differ with the conclusions reached by the trial court as there are no adequate reasons to do so.

In the circumstances, this appeal has no merit in facts and law and must fail. It is dismissed with costs to the Respondent. Orders accordingly.

Dated and delivered at Nairobi this 16th day of November, 2012.

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D A ONYANCHA

JUDGE