



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO.565 OF 2007

ISAAC KATAMBO MUTUNGI.....PLAINTIFF

VERSUS

VALUE PAKFOODS LIMITED.....DEFENDANT

(Being an appeal from the Judgment and Decree of the Ag. Senior Principal Magistrate Hon. Miss E. N. Maina

delivered on 29th May 2007 in Milimani Commercial Courts Nairobi at CMCC No.3136 of 2004)

JUDGMENT

I. INTRODUCTION

1. Isaac Katambo Mutungi, the appellant, original plaintiff was employed as a casual labourer by the respondent M/s Value Pak Food Limited. His duties on 26 February, 2003 was to pack “French beans” in cans and bottles. He would remove bottles from the fire and put the same in panels. According to the evidence he gave before the trial magistrate, he had not been issued with gloves to do this work. In the process of this work, he was cut on his right pointing finger. He admitted that he never went to the staff clinic for treatment but reported to the Personnel Manager who asked that he proceeds to hospital. He did so by going to the “Grace Community Clinic” at the Pipeline, Industrial Area. A Doctor, K. Mwaura examined him thereafter and produced a report.
2. No other witness was called and the plaintiff closed his case.
3. The defendant/respondent in this appeal called its supervisor who admitted that the appellant was a casual worker at this warehouse where beans canned in tins and bottles are stored. On the material day of 26 February 2003, he confirmed that the appellant reported no injuries to management. There was a register kept for workers who sustain injuries in the course of their work that none was made by the appellant. He confirmed that workers are only given dust coats and not clothes. The bottles are brought to the warehouse already made and therefore removing the bottles from the “jiko when hot” did not arise.
4. The trial magistrate on reaching her decision held that the Original plaintiff did not adequately prove that he had been cut with any bottle. In the testimony given, no mention of a broken bottle had been

made. The case was duly dismissed as not proved. A probable award, if the case had been proved was made for Kshs.40,000/=. This decision was delivered on 29 May 2007.

5. Being dissatisfied with the decision of the Subordinate Court, the appellant filed an appeal on the 28 June 2007.

II. APPEAL

6. The appellant/Original Plaintiff, found that the trial magistrate erred in both facts and Law by:-

- i. *Finding that the plaintiff did not establish any injury caused.*
- ii. *Findings was not based on an accurate analysis of facts presented to court by the parties.*
- iii. *Not awarding the appellant any amount in the circumstances against the weight of the evidence adduced.*
- iv. *Holding that no case had been established despite there being uncontroverted evidence that the plaintiff was not provided with any protective devices to work with hand gloves.*
- v. *In finding the respondent was not liable.*
- vi. *In finding the appellant had not proved his case to the required standard.*
- vii. *That the entire judgment is not supported by the evidence before the court.*

7. The appellant argued that in Common Law, the employer has a duty to take care for the safety of its employees. He relied on the text book from **Winfield & Jelowis on Tort by W.V.H Rogers:-**

“If a worker is injured just because no one has taken the trouble to provide him with an obviously necessary safety device, it is sufficient and generally satisfactory to say the employer has not fulfilled his duty”

8. This point is supported by the Factories Act Cap 514 Laws of Kenya Section 53 whereby it states:-

“Where in any factory workers are employed in any process involving exposure to meet or any injurious or offensive substance, suitable protective clothing and appliances including where necessary, suitable gloves, footwear, goggles and head coverings shall be provided and maintained for the use of such workers”.

9. He further relied on the case law of **Dakawon Transporters v Paul Nzomo King’oo (CA 92 of 2003)**, whereby the respondent who was injured on his middle finger in the course of employment whilst changing a tyre of a motor vehicle belonging to the employee was owed a duty of care.

10. Therefore, there was sufficient evidence on record to find that the respondents are liable. The defendants witness conceded bottle jars “could break”

11. In reply, the respondent opposed this appeal stating that the trial court came to the correct decision.

12. The appellant was bound by his pleadings that stated :-

“On the 26 February 2003, whilst the plaintiff was at his place of work at the said factory, he sustained injuries when a broken bottle cut and wounded his unprotected right hand “

13. At no time did the appellant mention that bottle. He failed to demonstrate the circumstances of how the bottle broke and how he sustained the said injuries.

14. Replying on the case law of :

Kaboswa Tea Estate

versus

Alfred Juma Bilauni

CA 302 of 2000 Eldoret

(*Omolo, Githinji JJA and Deverell Ag. JA*).

The respondent in the above case was to explain how the accident occurred. Without doing this, there would be no liability “without fault”.

15.No negligence therefore has been established against the respondent. The trial magistrate’s findings was correct. The proposed award of Kshs.40,000/= was agreed to if appeal was found to be successful.

III. OPINION

16. The findings of the trial magistrate that the appellant had failed to establish proof of negligence and liability against the respondent (from the record of appeal and proceedings) is correct.

17. There was no evidence that any bottle broke. The circumstances of how the injuries was sustained. That the appellant was to be provided with protective gloves was an argument point found cannot stand on reasons that the work he was employed to do required a dust coat only.

18. From the foregoing, I would find that the appellant failed to establish the tort of negligence or any breach owed to him. He failed to adduce evidence as to what happened to come to the conclusion that he was injured and sustained a wound to warrant his being compensated.

19. I uphold the trial magistrate’s decision in the judgment dated the 29th May 2007.

20. This appeal stands dismissed with costs to the respondent/original defendant, in this appeal and in the Subordinate Court case.

RULING DATED THIS 18TH DAY OF MAY 2011 AT NAIROBI

M. A. ANG’AWA

JUDGE

Advocates:

- present* i. *M/S S. M. Muhia instructed by S. M. Muhia & Co. Advocates for the Appellant*
- present* ii. *M/S C. W. Ngala instructed C. W. Ngala & Co. Advocates for the Respondent*