



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 56 OF 2010

RAIPLYWOODS (K) LTD. APPLICANT

VERSUS

JOSEPH SIMIYU SEMEI RESPONDENT

(Being Appeal against Judgment from Eldoret Chief Magistrate's Court Civil Case No. 733 of 2009 delivered on 28th March, 2010 by Hon. Mr. I. Maisiba – Resident Magistrate)

J U D G M E N T

This application arises from the judgment of the Senior Resident Magistrate delivered on the 26th March 2010 in Eldoret SPMCC No. 733 of 2006 in which the appellant **Raiplywoods (K) Ltd.**, was sued by the respondent, **Joseph Simiyu Semei**, for damages arising from injuries suffered by the respondent while in the course of his employment with the appellant.

It was pleaded by the respondent that it was a term of his employment that the appellant shall take reasonable measures to ensure his safety while engaged in his employment and not to expose him to a risk of injury and that he would be supplied with protective apparel/gears and be ensured of a secure and safe working environment and not be exposed to injuries or harm. However, on or about the 25th September 2004 while diligently discharging his lawful duties as a general worker and due to the appellant's negligence and/or breach of statutory duty, the respondents was cut with a power saw on his right thigh and occasioned severe badly injuries. Consequently, he suffered loss and damages for which he prayed for general and special damages against the appellant.

The appellant denied the occurrence of the accident and that the respondent was its employee. It contended that if the accident occurred, then the same was caused solely and/or substantially contributed to by the respondents.

The appellant relied on the doctrine of "**Volenti von fit injuria**" and contended that the accident was incidental to the respondent's employment.

Therefore the appellant prayed for the dismissal of the respondent's case.

The evidence setting out the respondent's case was that the respondent (**PW1**) had been employed by the appellant as a general worker from the year 2001 upto the year 2008. He produced a certificate of service and an employee's card issued by the appellant to confirm his employment. He was on duty on the material date of the accident and had been assigned the duty of arranging short logs being split with the

use of a power saw and operated by a fellow worker called Chemule who was behind him and a co-worker called Timona. In the process, the respondent was cut on the right thigh by the power saw such that his flesh was exposed as the light textured garment and trouser he was wearing were also cut. He was taken for treatment at Huruma sub-district hospital and then the Uasin Gishu District Hospital. He blamed the appellant for his injuries and said that he could no longer perform manual jobs nor ride a bicycle. He contended that the appellant exposed him to the risk of injury and said that he was injured by a fellow employee due to the appellant's omission to provide a proper system of work. He therefore prayed for damages against the appellant.

Richard Chemule (DW1) testified for the appellant and confirmed that he was operating the power saw on the material date. He contended that he was not to blame for the accident. He said that the respondent was cut by the power-saw as he (respondent) approached him (DW1) from the front. Chemule (DW1) confirmed that protective gear and apron were normally provided for use by the appellant's workers.

After considering the foregoing evidence by both the appellant and the respondent, the learned trial magistrate concluded that the appellant exposed the respondent to risk and did not provide him with protective gear. Consequently, the learned trial magistrate awarded the respondent general damages in the sum of Kshs.150,000/- for pain, suffering and loss of amenities. Also awarded was special damages in the sum of Kshs.1,500/-. The appellant felt aggrieved by the decision and lodged the present appeal on the basis of the five grounds enumerated in the memorandum of appeal filed herein on 9th April 2010.

Learned counsel, **Mr. Nabasenge** argued the said grounds on behalf of the appellant and submitted that the respondent was negligent in the manner that he approached DW1 while DW1 was operating the power saw. The respondent had four years experience and knew the risk of his job but did not take care. Therefore, the appellant should not have been found 100% liable. On quantum, Mr. Nabasenge, submitted that a sum of Kshs.150,000/- general damages was excessive as the injury suffered by the respondent was not serious. Learned counsel contended that the learned trial magistrate applied wrong principles and passed judgment against the appellant.

In response to the foregoing, learned counsel **Mr. Wafula**, submitted on behalf of the respondent that the appellant did not provide proper protective gear to the respondent who was only wearing a light textured overall. Further, DW1 was allowed to work so close to the respondent thereby causing the accident when he approached the respondents position.

On quantum, Mr. Wafula, submitted that the same was not excessive considering the seriousness of the injury and the terrible pain experienced by the respondent.

Having considered the grounds of appeal in the light of the submissions by both the appellant and the respondent and also having revisited the evidence adduced before the trial court, bearing in mind that the trial court had the advantage of seeing and hearing all the witnesses, this court is of the view that the accident was as a result of the appellant's failure to provide adequate protective gear and a safe system of work. However, the respondent was also to blame by failing to exercise caution knowing too well that he was working in close proximity to a fellow employee operating an electric power saw. In that regard this court would place the respondent's culpability at 40% and the appellant's culpability at 60%.

On quantum, the medical reports by Dr. Aluda and Dr. Gaya showed that the respondent suffered a cut wound on the right thigh which healed without any significant permanent disability. Considering that injury in the light of the authorities cited in the trial court by both sides and in view of the passage of time, the award of Kshs.150,000/- general damages made by the learned trial magistrate was not excessive in the circumstances. The same is hereby confirmed but there shall be necessary modification factoring the culpability ratio. In the end result, this appeal succeeds in part to the extent that the appellant's liability is now reduced to 60% with the respondent taking the remaining 40%. Therefore, judgment is now entered for the respondent in the sum of Kshs.150,000/- general damages for pain, suffering and loss of amenities less 40% contribution negligence plus costs and interest of the suit (i.e Kshs.90,000/-). Each party shall bear own costs of appeal.

Ordered accordingly.

J. R. KARANJA
JUDGE

(Delivered and signed this 10th of June, 2011).