REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI(LAW COURTS)

CIVIL APPEAL 55 OF 2011

DANIEL MWENDA MURIUKI. ..... PLAINTIFF

VERSUS

STEEL PLUS LIMITED. ..... DEFENDANT

(From the judgment and decree of C A OTIENO, RM in PMCC No. 197 of 2010)

J U D G M E N T

The Appellant, by a plaint dated 16th June 2010 filed against the Defendant at Kikuyu, sought general damages, special damages, costs and interests. He pleaded that in the course of his employment with the Respondent, as a general worker, he was on 2nd March, 2010, burnt on his left ear by a hot slug of metal which had come off the hot steel metals being pound in a boiler. The Appellant had also pleaded that the accident which caused an injury on him had occurred because, the Respondent had failed to keep and maintain an adequate and safe work system and environment at the working place, thus exposing workers like the Appellant to danger and risk of injury and damage.

The Respondent had filed a defence denying the employee-employer relationship and denying any other contractual or social relationship with the Appellant at the material time. It also denied the occurrence of the alleged injury on the Appellant or existence of any legal duty or breach of any such duty. The Respondent put the Appellant to strict proof.

During the trial before the lower court, the Appellant testified that he was a casual worker of the Respondent since the year 2006 and used to sign a register everyday he attended work. That he was on duty on 2nd March, 2010. That he was assigned work near a boiler melting metals as that was his usual place of work. That the said date there was an explosion of the boiler from which a piece of metal flew and landed on his left ear, causing a burn injury. That he reported to the Human Resource Manager, Mr. Onunde who in writing referred him to St. Joseph Medical Clinic where he got medical treatment.

The appellant later also got a medical report from Dr. Kayo whom he paid Ksh.5,000/-. Both the treatment card and medical report were introduced into evidence as exhibits (1) and (2).

The Appellant testified that had the Respondent provided him with protective equipment like a helmet, the injury could not have occurred. He called Dr. Kayo who testified for him and confirmed the left ear injury probably caused by a metal slug. But the doctor found that the burn injury was minor and superficial and soft-tissue. He relied on the St. Joseph Medical Clinic to write his report. The doctor also confirmed that the Appellant had complained of reduced hearing capacity on the injured left ear. He recommended proper tests by ENT expert.

The Respondent/Defendant did not cross examine the Appellant's evidence nor did it call any witness to prove its defences.

In a short judgment, the honourable trial magistrate accepted that the Appellant was an employee of the Respondent at the material time. He rejected the medical treatment card of St Joseph's Medical clinic on the ground that it was dated 4th June, 2010 and did not indicate the date of treatment although the Appellant alleged that he was injured on 2nd March 2010. Noting that Dr. Kayo's report came three months after the date of the accident, the Honourable Magistrate found no corroboration of injury on 2nd March, 2010.

The trial court further saw no evidence for proof of negligence on the part of the Respondent. In the circumstances, the trial magistrate dismissed the suit for lack of proof on the balance of probabilities.

I have carefully perused the evidence and the trial court's judgment. The complaints raised by the Appellant in his Memorandum of Appeal are mainly touching on the standard of proof used by the court to arrive at the conclusions he did.

There is no dispute that the Appellant was at the material time near the boiler used by the Appellant to melt scrap metal. He was there in the course of his day to day employment although the work was casual. The boiler for some unexplained reason exploded and either a metal or melted metal liquid flew and landed on the appellant's ear, inflicting injury. He reported to Human Resource Manager who referred him to St Joseph Medical Clinic for medical treatment. The treatment was later transmitted into a medical report and both documents were put in evidence.

The Appellant's evidence above which is straight-forward, is not controverted by any evidence since the Defendant did not call evidence. It is not cross-examined on. Clearly the evidence stands as it was given and makes a believable or credible story. If the medical treatment card was stamped 4th June, 2010, three months down the period, was the Appellant asked by court to clarify why?, Did the Respondent challenge that evidence or any other evidence on the record?

Furthermore, the lower court should not have merely assumed that the Appellant was injured! There is actually his credible and uncontroverted evidence to prove that fact and it indeed did so.

The Respondent did not credibly deny employing the Appellant. It did not deny placing him near the boiler for his work. It did not deny that the boiler exploded. In the circumstances, the Appellant's story stood as the uncontroverted truth.

What about the lack of the helmet as a protective equipment? If the Respondent had provided one and the appellant was wearing it as required under the relevant Industrial Acts of Parliament, definitely, the slug that fell on the Appellant bare ear would have fallen on the helmet and the helmet would have prevented the injury incurring upon the Appellant. Otherwise why are helmets required to be availed to factory workers who perform such work as was being performed by the Appellant? In failing to supply the Appellant with a helmet, the Respondent was negligent and in breach of its common law and statutory duty. It must bear the liability arising therefrom.

The evidence of the Appellant before the lower court was clearly not at variance but was in conformity with his pleadings. It supported his case in material particulars. It clearly proved his case on the balance of probabilities.

Clearly, therefore, the trial court applied a standard of proof totally above the laid down one for and in civil case. In doing so, he glaringly misdirected himself to appoint which this court should interfere with it. In the view of this court, Appellant proved his case on the balance of probability and was entitled to a judgment in his favour.

Touching damages, the lower court accepted Ksh.4000/- as special damages plus Ksh.5000/- as witness

expenses. The court thought that Ksh.30,000/- would be sufficient as general damages. The shilling has lost value since however, and Ksh.50,000/- would be more appropriate.

In the circumstances, this appeal has merit and is hereby allowed. The court awards the appellant Ksh.9,000/- as earlier stated as special damages and Ksh.50,000/- as general damages for pain and suffering and loss of amenities. Special damages will attract court interest from the date of filing of lower court suit and general damages from the lower court judgment date. Orders accordingly.

Dated and delivered at Nairobi on the 5th day of October, 2012.

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D A ONYANCHA

JUDGE