REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 107 of 2007

UPAN WASANA (EPZ) LTD. ……..……..
…….APPELLANT

VERSUS

ZIPPORAH WANGUI MBUCHI..……...
……...RESPONDENT

(Being an appeal from the judgment and decree of the Hon. Mr. Cherono (SRM) dated 17th January, 2007 in Milimini Civil Case No. 1406 of 2005)

J U D G M E N T

1. This appeal arises from a suit which was filed in the Chief Magistrate's Court at Nairobi by Zipporah Wangui Mbuchi, (hereinafter referred to as the respondent). She had sued Upan Wasana (EPZ) Ltd (hereinafter referred to as the appellant). The respondent, who claimed to have been an employee of the appellant, sought general and special damages for personal injuries suffered by her during the course of her employment. The respondent contended that the accident resulted from the appellant's negligence, and or breach of common law duty, and or contractual duty.

2. The appellant filed a defence in which it denied the respondent's claim. The appellant specifically denied that there was any contract of employment between the respondent and the appellant, or that the respondent was injured during the course of her employment, or that the appellant was negligence or in breach of common law duty or contractual duty. In the alternative the appellant contended that if the accident occurred, then the same was substantially contributed to by the negligence of the respondent. The appellant further contended that the respondent's claim if any, should be made under the Workman's Compensation Act.

3. During the hearing of the suit the respondent and Dr. Kiama Wangai testified in support of the respondent's claim, while Nicodemus Mutinda Mutala (Mutala), Evanson Nthambiri Munyi (Munyi) and Ruth Achieng Okwaro (Okwaro) testified in support of the defence.

4. The respondent's evidence was that she was employed by the appellant as a machine operator. On 4th March, 2002, the respondent was on duty when a needle came off the machine and hurt her on her left small finger. The respondent blamed the appellant for failing to keep the machine in good condition, and also for failing to provide her with protective gear. Dr. Kiama Wangai testified that he examined the respondent on 13th October, 2004. He noted that the respondent had suffered a cut wound on the left little finger. At the time of the examination, the respondent had a healed scar at the side of the cut wound. He formed the opinion that the respondent had suffered harm from which she had fully recovered.

5. Mutala who was an employee of the appellant at the material time, testified that the respondent was

employed by the appellant as a machine operator. The respondent's work was to knit using a machine. Mutala explained that the respondent was on duty on the material day and that he i.e. Mutala was present when the respondent was injured. Munyi, who was at the material time employed by the appellant as a supervisor, testified that the respondent was working in his section. Munyi maintained that the respondent was not injured on the alleged date, nor was she injured on any other day. Munyi maintained that it was the work of the machine operator to ensure that the needle was held firmly in the machine. Okwaro was employed by the appellant as a nurse sometime in March, 2003. She produced a register of injury maintained by the appellant for the year 2002. She stated that the respondent's name was not reflected in the register as one of the employees injured during the year 2002.

6. Each party's counsel filed written submissions, each urging the trial magistrate to find in favour of his client. In his judgment, the trial magistrate found that the respondent was employed by the appellant as a machine operator, and that, that position required skilled training material such as a thimble. The work also required supervision and repair of the machine. The trial magistrate found that there was no evidence that the respondent was trained in the work she was employed to do, nor was there evidence to show that the machine on which the respondent was working was properly serviced. The trial magistrate found that the appellant exposed the respondent to a risk of danger which it knew or ought to have known. The trial magistrate found that the medical report produced by Dr. Kiama showed that the respondent sustained a cut wound on the little finger. He assessed the general damages for pain and suffering as Kshs.40,000/= and special damages as Kshs.1,500/= and gave judgment in favour of the respondent.

7. Being aggrieved by that judgment, the appellant has lodged this appeal raising 9 grounds as follows:

(i) The learned Magistrate erred in law and in fact in relying on a medical report that was drafted without the help of treatment notes to show the history of the injury and or proof that the plaintiff was indeed injured.

(ii) The learned Magistrate erred in law and in fact by failing to consider the fact that the plaintiff never produced any initial treatment notes in court neither did she lead any evidence to proof that she was injured on this date and at the defendant's premises.

(iii) The learned Magistrate erred in law and in fact by ignoring the evidence given by the defendant's witnesses.

(iv) The learned Magistrate erred in law and in fact in failing to consider the documentary evidence produced by the defendant to indicate that her name was not in the injury record book for this date and that the plaintiff worked for a whole day and signed out in the evening on the alleged day of accident.

(v) The learned Magistrate erred in law and fact in entering judgment in favour of the plaintiff and ignoring defence evidence indicating that the plaintiff had already filed strikingly similar suits against the defendant i.e. PMCC 1013 of 2005 and PMCC 1408 of 2005 on the same subject matter.

(vi) The learned Magistrate erred in finding that the plaintiff was working with the defendant and yet the plaintiff did not produced any employment letter, pay slips or call any witness to corroborate her allegation that she was working with the defendant.

(vii) The learned Magistrate erred in law and in fact by accepting uncorroborated evidence by the plaintiff that she was injured while she was in employment with the defendant and nor if she was ever injured at all.

(viii) The learned Magistrate erred in law and in fact in imputing negligence on the defendant for the injury allegedly suffered by the plaintiff without any sufficient evidence being led as to the defendant's negligence.

(ix) The learned Magistrate erred in law and in fact in awarding the plaintiff general damages of Kshs.40,000/= despite the fact that the plaintiff never proved her case and that the injuries allegedly sustained were very minor.

8. Following an agreement by the parties' counsel, written submissions were duly exchanged and filed. For the appellant, it was submitted that the trial magistrate erred in relying on a medical report which was produced without the treatment notes showing the history of respondent's injuries or the initial treatment. It was noted that Dr. Kiama Wangai's report was made two years and 8 months after the alleged injury. It was submitted that the failure to produce the maker of the treatment notes supported the appellant's position that there was no injury to the respondent.

9. Relying on ***Nairobi Criminal Appeal No.36 of 1994 Eunice Njoki Kimani vs Elizabeth Kamene Ndolo and Matata Ndolo***, counsel for the appellant maintained that the evidence of the expert witness should be considered along with all the other available witnesses. Counsel argued that the court would be entitled to reject the expert evidence if there was proper and cogent basis for rejecting it. Further, it was submitted that the respondent should have known whether or not the needle was properly fastened onto the machine. It was maintained that the trial magistrate erred in relying exclusively on the respondent's testimony and failing to consider that the defence witnesses stated that they were not aware of any injury to the respondent. It was pointed out that Munyi, the appellant's supervisor testified that the respondent worked for the full day and that no injury was reported to him. It was also submitted that the injury register for the material time did not reflect any injury suffered by the respondent.

10. It was submitted that under common law the liability of an employer for injuries sustained by its employee arose only where the employer had been negligent in some way. The court's attention was drawn to a summary of the employer's duty to his employee by Lord Wright, in ***Wilsons and Clyde Coal Company vs English [1938] AC 57,*** as follows:

> ***"The provision of a competent staff of men, adequate material, and a proper system and effective supervision."***

11. The court's attention was further drawn to the holding in the same case of ***Wilsons and Clyde Coal Company vs English [1938] AC 57***, which reduced that duty into one i.e. the duty to take reasonable care so as to carry on operations as not to subject the employees to unnecessary risks. It was submitted that although the law requires a high standard of care on the employer's part regarding the employer's duty to his employees, this duty is not an absolute duty and there was no legal duty on an employer to prevent an adult employee from doing work which she or he is willing to do. Reference was made to the case of ***Kiema Muthuku vs Cargo Handling Services Ltd***, for the proposition that there was no liability without fault in the legal system in Kenya, and that a plaintiff must prove some negligence against the defendant where the case is based on negligence.

12. It was maintained that the fact that the employee was injured at her place of work alone without proof of negligence was not enough to render the employer liable. It was contended that the respondent not only failed to prove any negligence on the part of the appellant, but also failed to prove that she was injured while working for the appellant. It was further submitted that the award of Kshs.40,000/= was not justified, firstly, because no injuries were proved and secondly, the award was inordinately high for the injuries allegedly suffered. The court was therefore urged to allow the appeal.

13. For the respondent, it was submitted that the primary source of information about the injuries sustained by the respondent, was the information by the victim. In this regard, a case book on Measurement of Damages for Bodily Injuries by Richard Kuloba was cited. It was noted that the history in the treatment notes was based on the information from the victim herself. It was therefore maintained that the absence of the treatment notes was not crucial. It was maintained that Dr. Kiama Wangai having relied on the information given to him by the respondent, his report was reliable. The court's attention was drawn to the evidence of Mutala, the defence witnesses who conceded that the respondent was injured on the material day. It was further submitted that the register of injury produced by the appellant

did not provide conclusive evidence of the persons who were injured as the register did not contain any signatures of the employees nor were the employees required to sign the attendance register to confirm their attendance.

14. It was submitted that the respondent who was the victim and primary source of information, narrated how she was injured and that her evidence was corroborated by Mutala who was present when the respondent was injured. It was contended that Mutala also admitted that the respondent was not accorded the proper training to carry out her duties and she was not provided with masks and dustcoats or a thimble which would have protected her from being injured. It was maintained that the award of Kshs.40,000/= was not so inordinately high as to justify the intervention of this court.

15. I have carefully reconsidered and evaluated all the evidence which was adduced before the trial court. I have also given due consideration to the submissions which were made before the trial court and before me. It is evident that although the appellant pleaded in its defence that the respondent was not employed by it, and that there was no contract of employment between the appellant and the respondent, the appellant's witnesses Mutala and Munyi both confirmed that the respondent was employed by the appellant as a machine operator. As regards the respondent's alleged injury, the respondent maintained that she was injured during the course of her employment. The respondent's evidence was supported by the evidence of Mutala the appellant's witness, who swore that he was present at the time the respondent was injured during the course of her employment.

16. Mutala contradicted the evidence of Munyi, another defence witness who denied that the respondent was injured during the course of her employment. I find that the evidence of Mutala was more reliable as Munyi, being a senior officer of the appellant, would have wanted to protect the appellant. Munyi was also a supervisor who was partly being blamed for failing to take adequate precaution for the safety of the respondent. Therefore it was natural that he would try to absolve the appellant from blame. As for the evidence regarding the injury register, this was a document which was being kept by the appellant. It was therefore not beyond manipulation and cannot be relied upon. Moreover, the register was not produced by the person who made the entries at the material time and was to that extent hearsay evidence.

17. The appellant took issue with the failure of the respondent to produce the initial treatment notes, so as to confirm that the respondent was indeed injured and treated. The initial treatment notes were useful in providing consistency and corroboration to the respondent's evidence. They were also useful in showing the extent of the respondent's injury. Nevertheless, the absence of the treatment notes was not fatal. The trial magistrate, who saw and assessed the demeanour of the witnesses, was entitled to believe and accept the evidence of the respondent and Mutala. I have no reason to fault the trial magistrate's finding in that regard. I find that the evidence before the trial magistrate was sufficient to prove on a balance of probability that the respondent was injured during the course of her employment.

18. The next issue for determination is whether the respondent suffered injuries as a result of the appellant's negligence and or breach of common law duty or contractual duty. The respondent explained that she was injured when the needle to the machine she was using suddenly came out and injured her on the left little finger. She denied having fitted the needle into the machine on that particular day. Mutala, the appellant's witness stated that needles were fitted by a mechanic. I find that it was the responsibility of the appellant as the employer to take reasonable care, so as to ensure that the respondent was not exposed to unnecessary risk. In this case, the respondent was not provided with a thimble which would have protected her from being injured by the needle. It is also apparent that the appellant's employee, who fitted the machine with the needle, did not do it properly. Nevertheless, the respondent was also under a responsibility to take care of her own safety. It is apparent that the respondent did not check the machine to ensure that the needle was properly fitted before using the machine. Thus the trial magistrate ought to have held the respondent contributorily negligent to the extent of 25%.

19. As regards the issue of quantum, although Dr. Wangai examined the respondent more than 2½ years

after the accident, he noted that the respondent had a scar on the little finger which was injured. In my view, the amount of Kshs.40,000/= which was awarded for the injuries suffered by the respondent although on the higher side, was not excessive so as to warrant the intervention of this court. The upshot of the above is that I allow this appeal to the limited extent of finding the respondent contributorily negligent to the extent of 25%. I confirm judgment for the respondent subject to that contribution. Each party shall bear its own costs in this appeal. Those shall be the orders of this court.

Dated and delivered this 3rd day of May, 2010

H. M. OKWENGU

JUDGE