



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 651 of 2006

WINDSOR FLOWERS LTD.....APPELLANT

VERSUS

GEORGE KONDU WOCHUNA.....RESPONDENT

*(Appeal from the judgment of the Senior Resident Magistrate's Court at
Thika (Mrs. Wachira) dated 5th September, 2006 in SRMCC No.133 of 2005)*

J U D G M E N T

1. This appeal arises from a suit which was filed in the magistrate's court at Thika by George K. Wochuna (hereinafter referred to as the respondent). He had sued his employer Windsor Flowers Ltd (hereinafter referred to as the appellant). The respondent testified that on 1st October, 2004 he was working for the appellant, digging trenches and canals. The respondent was using a twiddel and a mallet. During the course of his work he was in the trench breaking stones, when he slipped. The soil wall of the trench then broke and the mallet fell on the respondent's back.

2. The respondent was injured and had to be taken to Thika District Hospital for treatment. The respondent blamed the appellant contending that the appellant should have used a machine, instead of digging the trenches manually. The respondent resumed duty after three days, but he was paid for the whole of the week. The respondent was later examined by Dr. Jane Ikonya on 21st April, 2005. Dr. Ikonya formed the opinion that the respondent had suffered soft tissue injuries which had healed leaving some residual pain. The respondent sued the appellant for general and special damages alleging that the appellant was negligent and or in breach of contract or statutory duty.

3. The appellant testified through its supervisor Samuel Nganga Kieti. The witness claimed that the respondent was not involved in any accident, as no report was made to him, nor was any injury recorded in the injury accident register.

4. In her judgment the trial magistrate found that the respondent was injured at work. The trial magistrate held the respondent 10% contributorily negligent, and assessed general damages at Kshs.120,000/=. The trial magistrate gave judgment for the respondent for the sum of Kshs.120,000/= subject to contribution.

5. Being aggrieved by that judgment the appellant has lodged this appeal raising 6 grounds as follows:

- (i) The learned magistrate erred in law and fact in failing to appreciate that no medical evidence of the injury alleged by the plaintiff was adduced.
- (ii) The learned magistrate erred in law and fact in failing to appreciate that no physical evidence of the injury alleged by the plaintiff was adduced.
- (iii) The learned magistrate erred in law and in fact in awarding an excessive amount of damages to the plaintiff.
- (iv) The learned magistrate erred in law and in fact in giving judgment in the plaintiff's favour when the plaintiff had not proved his case to the required standard.
- (v) The learned magistrate erred in law and fact in rejecting the defendant's documentary evidence without legal basis.
- (vi) The learned magistrate erred in law in determining issues not before the court.

6. Ms Nyatich who appeared for the appellant noting that no treatment notes in respect of the respondent were produced in evidence, submitted that the medical report produced in evidence was not sufficient to confirm the occurrence of the injury. This is because the doctor simply relied on what the respondent told him. Ms Nyatich further pointed out that the respondent admitted having signed the payroll even for the day he was allegedly injured. She maintained that the trial magistrate was wrong in giving judgment in favour of the respondent and further that the sum award was excessive.

7. Mr. Kimathi who appeared for the respondent submitted that the trial magistrate's findings on liability was based on evidence which was before her and that the court had reason to reject the master roll and the injury book. With regard to the absence of the treatment notes, it was submitted that the doctors do not prove the occurrence of an accident, but merely testify as to the injuries observed. It was submitted that the medical report produced showed how the doctor arrived at his finding. It was pointed out that the appellant did not request for a second medical report though it had the liberty to do so. The court was urged to find the respondent's case proved.

8. I have reconsidered and evaluated all the evidence which was adduced before the trial magistrate, taking into consideration that the trial magistrate had the advantage of seeing and assessing the demeanour of the witnesses. I have also considered the judgment, the memorandum of appeal and the submissions made before me. I find that in her judgment, the trial magistrate did not comply with Order XX Rule 4 of the Civil Procedure Rules. On liability the trial magistrate merely stated:

“It is not denied that the plaintiff was working for the defendant's company. Plaintiff was injured at work. The court finds it prudent to assess liability at 10/90 with plaintiff shouldering 10% liability.”

9. The trial magistrate did not analyze the evidence before her nor did she give any reason for her decision. I do note that in his plaint, the respondent alleged several particulars of negligence and or breach of contract or statutory duty on the part of the appellant. It was for the respondent to establish those particulars which he alleged. Assuming that the respondent was injured while digging the trench as he alleges, it was upon the respondent not only to show that the appellant was negligent but also provide a clear nexus between the appellant's alleged negligence and his injuries. The only thing that the respondent testified to was that the appellant ought to have provided a trench digging machine. There was no evidence provided that the digging of the trenches could not be done safely without the use of a trench digging machine. There was no evidence to show that the system of using manual labor for digging the trenches was unsafe. Thus, the respondent did not prove any of the particulars of negligence which he alleged against the appellant and there was no basis for the trial magistrate's finding against the appellant on liability.

10. The respondent merely relied on the fact that he was injured as evidence of negligence. However, the respondent was the one digging the trench and it was upon him to exercise due care for his own safety. The fact that he slipped and fell into the trench and the hammer/mallet fell upon him did not demonstrate any negligence at all on the part of the appellant. Nor was there any evidence of breach of contract or statutory duty. This is simply a case of an employee accidentally suffering an injury during the course of his employment in respect of which compensation (if any) ought to have been pursued under the Workman's compensation Act.

11. Further, with regard to the assessment of damages the respondent's injuries as pleaded in the plaint were as follows:

(i) Injures to his back

(ii) Further particulars of injuries to be furnishes at the hearing by way of medical report.

12. The medical report which was produced by the doctor showed that the respondent suffered soft tissue injuries which healed leaving residual pains which were expected to subside with time. Even going by that medical report the respondent's injury were relatively minor and the award of Kshs.120,000/= was inordinately excessive. A sum of Kshs.30,000/= would have been appropriate.

13. The upshot of the above is that the judgment of the trial magistrate cannot stand. Accordingly I allow the appeal, set aside the judgment of the trial magistrate and substitute thereof an order dismissing the respondent's suit. I make no orders as to costs.

Dated and delivered this 10th day of May, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Ogembo H/B for Ngetich for the appellant

Kimathi H/B for Kebongo for the respondent

Eric - Court clerk