REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Appeal 179 of 2006

SPIN KNIT LIMITED……APPELLANT

VERSUS

VINCE WANGARI……..……..RESPONDENT

(An Appeal from the Judgment of Hon. H. M. Nyaga,
Senior Resident Magistrate, in Nakuru C.M.C.C.No.428 of 1998)

JUDGMENT

The respondent who was an employee in the appellant's textile factory sued the latter for:

i) Retirement/Terminal benefits
ii) Loss of earnings
iii) General damages
iv) Costs and
v) Interest

It was her contention that due to the negligence of the appellant, she was exposed to a considerable concentration of chemicals and industrial pollutants in the appellant's factory as a result of which she suffered:

a) chronic allergic rhinitis and
b) irritating cough and dyspnoea

The appellant denied negligence and blamed the respondent for her contribution to her problems. They counter-claimed against her for having deserted work without notice.

The trial magistrate after listening to the evidence of the respondent, as there was no evidence from any other witness found in favour of the respondent and awarded to her Kshs.150,000 in general damages and Kshs.141,000/= in loss of earnings. The appellant has, in this appeal challenged the award claiming that ;

i) negligence has not been proved
ii) the award of Kshs.141,000/= under the head of loss of earnings was erroneous
iii) that trial magistrate considered matters not pleaded
iv) the general damages awarded were excessive
v) the trial court erred in failing to allow the appellant ventilate its defence

The respondent gave evidence, which was not conctroverted that she was employed by the appellant in 1987 and worked for it through to 1995. That in 1995, she fell ill as a result of what she attributed to the condition of work. On advice of the doctor, she stopped working. She explained that she suffered chest problems, irritation of the nose, ears and the skin. The only medical report relevant to this claim that was produced was a letter by E.N.T. Specialist at the Provincial General Hospital dated 19th May, 1995. It states in part that the respondent suffered from a condition called chronic allergic rhinitis which began immediately she was employed in the textile factory. The learned trial magistrate resolved the issue as follows:

"Again from the evidence it is clear that the plaintiff contracted the condition at her place of work. I

am thus satisfied that she has proved her case on negligence. She has stated that she used to find wool in her mucus meaning that she had no mask to filter the air she inhaled. Exh. 1 states that he condition was "*Most likely due to environmental factors at her place of work.*" That further convinces me that she has proved her case on negligence"

With due respect the respondent's evidence was below the balance of probability threshold. First of all the maker of Exh.1 did not testify to explain how he arrived at the conclusion that the respondent's condition was due to the environmental factors at the factory. The maker would have explained if he visited the factory and the nature of those environmental factors. Secondly, the mere presence of wool in the respondent's mucus does no link her condition to the work place.

In a nutshell, the respondent failed to lead evidence of negligence as pleaded in the plaint or at all. If that be so, then all the other awards crumble.

For that reason, this appeal succeeds with costs to the appellant. The judgment of the court below is set aside.

Dated, Signed and Delivered at Nakuru this 7th day of May, 2010.

W. OUKO
JUDGE