REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Appeal 8 of 2005

AFRO APIN LIMITED……..APPELLANT

VERSUS

GEORGE MANGAA MAGANYA…….....RESPONDENT

(An appeal from the Judgment in Nakuru C.M.C.C.NO.712 of 2001 by Hon. A.B.M. Mong'are, Resident Magistrate, Nakuru dated 9th December, 2004)

JUDGMENT

As clearly stated in the appellant's submissions before the court below, the only question before that court was whether the injuries allegedly sustained by the respondent were suffered in the course of his duty with the appellant. Of course, depending on the answer to this question, there is also the issue of the level of quantum of damages.

Issues having been so narrowed and this being the first appellate court, the evidence on record must be re-evaluated in order to arrive at an independent decision bearing in mind that the witnesses were only seen in the court below. Second, on the quantum of damages, it is settled that assessment of damages is an exercise of discretion and an appellate court should be slow to reverse the trial court's assessment unless that court has either acted on wrong principles or awarded so excessive or so little damages that no reasonable court would, or has taken into consideration matters that ought not to have been considered or failed to take into consideration those that ought to have been considered and in the result arrived at a wrong decision. See **Nakuru Industries Limited** Vs. **Lidoro,** HCCA No.35/2002 where the famous

Butler Vs. **Butler** (1984) KLR 225 was relied up.

It was the evidence of the respondent that as he operated a what he called a suture machine a pump fell and cut his hand thereby causing injury to his 3rd, 4th and 5th fingers on the right hand. In his evidence, he blamed the appellant for the injuries on the grounds that:

i) the machine was not inspected before he was allowed to work on it
ii) there was no supervisor on duty when the accident occurred.

In the plaint he also blamed the appellant for:-

i) exposing him to danger and/or injury
ii) failing to provide him with proper/safe system of work
iii) failing to provide him with protective devices

In cross-examination, the respondent who stated that he had been trained on the use of the machine and that he had worked for the appellant for four (4) years also conceded that he received the injuries when he attempted to remove what he referred to as lapping when the machine was in motion. He explained that it was a requirement that the machine be turned off before removing any lap.

The respondent testified that after sustaining the injury, first aid was administered on him by Charles Manuma and that the next day he went to the hospital. Dr. Kiamba examined the respondent on 5th December, 2000, one year after the alleged accident and noted the scars on the fingers.

The appellant through Julius Adamba Odenyo, a supervisor, was categorical that no staff was injured on 28th December, 1999 as there was no report in the accident register. In particular, he confirmed that the respondent's name was not at all in the accident register. He further confirmed that the respondent was on duty on 28th December, 1999 and the next day, 29th December, 1999. As a supervisor, he did not receive any report regarding the respondent's injuries. I have considered the foregoing evidence and the very useful authorities cited by counsel. I will consider only two aspects of this claim. First, the respondent instituting the suit the subject of this appeal on a specific contention that he suffered injury to his right fingers while on duty on the night of 28th December, 1999. It was therefore incumbent upon him to prove on a balance of probability that he indeed sustained those injuries while at work; that he received treatment for those injuries and therefore is entitled to an award of damages. The strength of his case lay first and foremost in the proof of injury and indeed the appellant in its statement of defence had specifically denied that the respondent had sustained any injury on the date in question or at all.

The respondent alleged that immediately his fingers were cut, he reported to the foreman as the supervisor was not present; that Charles Manuma administered on him first aid and the next day he went to the hospital. In view of the denial of the occurrence of the accident, it was necessary for the respondent to call the foreman and Charles Manuma.

He told the court that he went to the hospital the next day but he or his counsel carelessly failed to produce any document to prove that fact. The only evidence left is that of Dr. Kiamba. That evidence was of no use to the respondent's claim. It was compiled one year after the alleged accident. Secondly, the fact that an accident has occurred is not, without more, evidence of negligence. Negligence is a question of fact which must be proved by evidence.

The respondent conceded that he had four years experience in the operations of the machine in question; that he had been trained; that he was aware of the dangers of attempting the lap without turning the machine off, yet he went ahead to do the opposite. I do not see how the appellant can be held liable for such self-inflicted injury, if at all it was sustained at the appellant's factory.

The appeal for the above reasons succeeds. The respondent's claim before the court below is dismissed and judgment and decree set aside with costs. There will also be costs of this appeal to the appellant.

Dated, signed and Delivered at Nakuru this 30th day of July, 2010.

W. OUKO

JUDGE