REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 67 OF 2007
NJUCA CONSOLIDATED CO. LTD. …….. APPELLANT
-VERSUS-
ELIJAH OMBATI MATOKE ……...……... RESPONDENT
JUDGMENT

(Being an appeal from the judgment and decree of Hon. S.M.S Soita (Ag Senior Principal Magistrate) dated 18th April 2007 in the original Kisii CMCCC No. 339 of 2005

The respondent filed a suit against the appellant in the chief Magistrate's court at Kisii being **CMCCC No. 339 of 2005.** He sought damages both special and general on account for the injuries he sustained on 27th August, 2004 as he worked for the appellant at Kenyerere. It was the respondent's case that as he was splitting stones at Kenyerere on the orders of his supervisor and or site agent by the name of **Solomon**, one of the stones hit him on the forehead as a result of which he was injured thereby suffering pain, loss and damage. According to **Dr. P.M Ajuoga**, who subsequently examined him and prepared a medical report, the respondent had sustained a deep cut wound on the forehead which left him with an ugly scar. He concluded that he suffered soft tissue injuries which had healed well. Prior coming to see **Dr. Ajuoga** for the said examination, the respondent had been treated at Kenyerere Dispensary where the wound was sutured. **Dr. Ajuoga** charged the respondent Kshs. 2,000/= for the services. As far as the respondent was concerned, he was an employee of the appellant as a casual labourer at Kenyerere. Thus it was the duty of the appellant to train him on how to do his work, provide a safe working system by giving the respondent gloves, helmet, overall and boots. By not providing the aforesaid safety gadgets, the appellant abdicated its fundamental duty of care towards him and exposed him to great risk of danger which the appellant knew and or ought to have known.

The case for the appellant was however that the respondent was not its employee nor was he involved in any accident or at all on the material day. Alternatively it argued that if ever the respondent was its employee, it took reasonable precaution and prescribed such safety measures as were necessary to ensure that all its employees were adequately protected from risk of damage and or injury. Thus if any common law or contractual duty existed on its part, the same was at all material times fully and reasonably discharged by it and therefore no liability attached. Finally it was the case for the appellant that if ever the respondent was injured, as alleged, then the same was wholly and or partly due to his own negligence.

The learned magistrates having evaluated the evidence tendered by the respondent as well as the appellant and the respective written submissions found for the respondent holding thus:

"I have carefully appraised the evidence on record. It was the evidence of the plaintiff that when he was injured his supervisor was Solomon. The defence called this same witness. From the evidence on record I believe on a balance of probabilities that he was injured while on duty. I am minded to apportion liability at 80% to 20% in favour of the plaintiff. In view of the injuries sustained I am minded to assess general damages at Kshs. 90,000/= which will work down to kshs. 72,000/=. The plaintiff also exhibited a receipt for Kshs.3,500/= in support of specials. I will award him this amount. There shall, therefore, be judgment for the plaintiff for Kshs. 72,000/= being general damages and Kshs. 3,500/= being special damages plus costs of this suit and interest".

The appellant was aggrieved by the judgment and decree aforesaid. It accordingly preferred this appeal on grounds that:

"1. The learned trial magistrate erred in fact and law in finding and holding that the respondent was indeed an employee of the appellant in the absence of any credible evidence or at all, attesting to any employment contract and/or relationship between the parties.

2. The learned trial magistrate erred in law in finding and holding that the respondent was injured as alleged on the 27th April, 2004, in the absence of any medical evidence to that effect.

3. The learned trial magistrate erred in fact and in law in believing the evidence of the respondent and disregarding appellant's evidence, without assigning any, credible reason and/or lawful basis, for such belief.

4. That the learned trial magistrate erred in fact and in law in holding the appellant culpable for the injuries, if any, suffered by the respondent, when the injury complained of, arose as a result of performance of a manual work, by the respondent, which work did not require any skill, training and/or expertise, of whatsoever nature.

5. The learned trial magistrate erred in law in apportioning liability in the ratio of 80:20 in favour of the respondent, without laying any legal basis, for such apportionment, contrary to established Principles of law.

6. The learned trial magistrate misapprehended the principles governing assessment of general damages, when he proceeded to assess general damages, without appreciating and/or taking into account the nature of injuries, the extent of healing and the comparable authorities cited by the appellant.

7. The learned trial magistrate erred in fact and in law in failing to cumulatively and/or simultaneously analyze and/or evaluate the evidence on record and thus arrived at an erroneous conclusion contrary to the weight of evidence on record.

8. That the judgment of the learned trial magistrate contravenes the mandatory provisions of order XX Rule 4 of the Civil Procedure Rules. Consequently, the said judgment is deficient and void ab initio.

9. That the award of general damages, in favour of the respondent was/is manifestly excessive, taking into account the nature of (sic) the injuries, allegedly sustained."

When the appeal came up for hearing before me on 31st May, 2010, parties agreed to canvass the same by way of written submissions. Those submissions were subsequently filed and exchanged. I have carefully read and considered them alongside cited authorities.

It is the duty of this court to assess and re-evaluate the evidence on record before the trial court with a view of making its own findings as regards the entire case. See **Selle and another -vs- Associated Motor Boat Company and others (1968) E.A 123**

The issues for determination before the trial court and in this appeal is whether liability was proved against the appellant and the quantum of damages payable if at all. It is trite law that he who alleges must prove. Indeed, this is the import and or purport of section 112 of the Evidence Act. Accordingly, it was the duty of the respondent to prove that he was an employee of the appellant and that he was injured in the course of such employment. Finally he had to prove that the injuries sustained were as a result of common law negligence or breach of statutory duty towards him by the appellant.

The respondent testified that he had been engaged as a casual worker by the appellant. His work number was 136. On 27th August, 2004 he was on duty splitting stones on behalf of the appellant at Kenyerere. He tendered in evidence attendance register to show that he worked for the appellant. As he worked a stone hit him on the head. He blamed the appellant for the injury for failing to provide him with gloves, helmet, overall and boots.

On the other hand the appellant, through **Solomon Ombui Machoga** took the position that the respondent was not its employee. He added that No. 136 that the respondent alleged he was working under, belonged to one, **Cleophas Morare** and not the respondent. He further testified that there was no injury at the appellant's site on the material day.

It is common ground that the appellant was on site where the respondent alleged to have been injured. What a coincidence that the respondent would allege to have been injured at Kenyerere site, the same place that the appellant was operating from on the material day. It is also incredible that the respondent would claim to have been a casual employee at the said site, and yet the appellant disowns him. Why would the respondent pick on the appellant to make the accusation and not any other person or entity. It is also instructive that the respondent even knew his immediate supervisor and indeed the manager. His supervisor was one, **Solomon** and the manager, **Stanley Theriri**. The appellant did not disown these people as not being part of its team. If anything a person going by the name **Solomon Ombui Machoga** testified on behalf of the appellant. He was in fact a supervisor just as the respondent had testified to. What a coincidence again! Much as the appellant has submitted that the fact that the respondent referred to one **Solomon** as his supervisor and the fact that the appellant's witness bore a similar name is not proof enough that the respondent worked for the appellant on the material or at all,

however, as I have already said there is too much of coincidence in the matter. The existence of **Solomon** or lack of it was not put to the respondent under cross-examination. In deed he was not at all cross-examined on the issue.

Though the appellant denied having employed the respondent, the evidence on record is to the contrary. Much as it claimed that no injury was reported on site on the said date, the appellant failed to produce documentary evidence to back up that claim. It had an accident register but failed to produce the same in evidence. Further during cross-examination the appellant's witness admitted that he did not have any documents to show that he was on duty that day. That being the case, his evidence must be disregarded. In any event it was his testimony that all the exhibits tendered in evidence were not signed by him nor the respondent. In fact he was not the maker of the documents as they were never signed by him nor did they bore the official stamp of the appellant or even its logo if it had any. Those defence exhibits were suspicious and their source was not established. It is possible that the same may have been generated purposely for the case. Coming back to the issue of the accident register, the appellant's defence witness agreed that he was aware of the accident register where injured employees are recorded but did not produce the same in court to support his allegation that no accident was reported on 27th April, 2004. The only presumption is that production of such accident register could not have favoured its case. With regard to work number 136 which the appellant claimed belonged to **Cleophas Morare,** one would have expected that the appellant would avail the said **Cleophas Morare** to testify on its behalf. For reasons best known to the appellant, it failed to avail the said person. The assumption again must be that no such person existed and if he existed perhaps his evidence would have been adverse to the appellant's case. For all the foregoing reasons, I am satisfied just like the learned magistrate did that the respondent was an employee of the appellant as a casual.

Was he however injured in the course of his employment? The evidence on record leads to no other answer but yes. There was the evidence of the doctor as well as treatment records from Kenyerere Dispensary. I doubt that the respondent would have injured himself that much merely to enable him lodge a fake claim.

The evidence on record suggests that the respondent was splitting stones using a hammer. The stone which hit him must have come from the ones he was splitting. I am unable to agree with the appellant that the stone might have come from elsewhere and or that it may have been thrown at him. The appellant did admit that the respondent was not provided with a helmet. Much as it submits that the alleged failure by it to provide gumboot, helmet, overall or gloves is neither here or there as such failure could not have been the cause of injury, I am of the view however that it could perhaps have prevented or lessened the injury. In this kind of trade, a helmet, gumboots and gloves are absolutely vital to protect employees from injuries associated with splitting of stones such as was suffered by the respondent. The appellant no doubt abdicated its fundamental duty of care towards the respondent by not providing him with a helmet to cover his head when it knew or ought to have known that it was dangerous to split stones without such a helmet. On this account alone, the respondent proved that the appellant owned him duty of care which it failed to discharge as required.

Appreciating that the respondent was also partly to blame for the accident having chosen to work without a helmet, the learned condemned him and rightly so in my view to 20% contributory negligence. On the basis of the evidence on record I do not think that the learned magistrate can be faulted in that regard.

With regard to the damages awarded, I do not think that I will have interfered with the same had I allowed the appeal on the question of quantum. The respondent suffered what is commonly referred to as soft tissue injuries. Those sort of injuries attract awards ranging from as low as Kshs. 20,000/= to as high as Kshs. 200,000/=. The authorities cited by the respondent were relevant and the injuries sustained therein almost similar and or comparable. I cannot however say the same of the appellant's authorities.

The principles to be observed y the appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial court are that the appeal court must be satisfied either that the trial court in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or high that it must by a wholly erroneous estimate of the damages. See **Ilanga .V. Manyoka (1961) E.A 705** and **Kemfro Africa Ltd .V. A.M. Lubia and Another (1982 – 88) 1 KAR 727**. I discern no such misgivings in the circumstances of this appeal.
The entire appeal therefore lacks merit. It is accordingly dismissed with costs to the respondent.

Judgment dated, signed and **delivered** at Kisii this 30th July 2010.

ASIKE-MAKHANDIA

JUDGE