



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

Civil Appeal 98 of 2007

PYRAMID PACKAGING LTD:.....APPELLANT

VERESUS

PATRICK NAMASAKA:.....RESPONDENT

JUDGMENT

This is an appeal on both liability and quantum. The Appellant was found 100% liable for an accident said to have occurred on the night of 27th April 2001 while the Respondent was engaged as an employee of the Appellant. The Respondent was awarded a sum of Kshs.120, 000/= in general damages for soft tissue injuries and a lacerated wound on his right leg dorsum.

On liability the Respondent blamed the Appellant for not providing a safe working environment and for not providing protective gear. The Appellant's case was that the Respondent was not injured on duty on the material date and if he was then it was due to his own negligence.

The Respondent's evidence at trial was that he was at work when he was injured at about 12:30a.m and that he reported the incident to the supervisor and the in charge. He gave no names of the supervisor and the in charge to whom he reported. He said he was at home for one week and half and that he was not on duty on the following day. The Appellant's account as given by its personnel manager was that he got no report of an accident involving the respondent on the night of 27/4/2001 and he produced in evidence as D exhibit no.2 the general register. That exhibit showed that the Respondent was on duty on 27/04/2001, 28/04/2001 and on 29/04/2001. That evidence was not controverted in cross-examination or in submissions. I will revisit this issue later in this judgment.

The Respondent stated that he was not wearing any protective gear as none was provided. He did not state what evasive action he took or keenness of care of self that he exercised to avoid injury to himself once he had accepted to undertake work without protective gear. He did not state what protective gear was needed for his safety in that particular job and which gear was not provided. His account was that he was injured at about 12:30 a.m at night and he reported to an unnamed supervisor and in charge. He said he went to hospital the following day at 9:30a.m. Where was he and what was he doing between the time of injury and the time he went to hospital. That question was not asked by the trial court and was therefore not addressed. This I find to have been a major failure in light of the Appellant's assertion that the Respondent was not injured while on duty. The issue becomes all the more important in my view in light of the register showing the Respondent as being on duty on two days following his injury despite his evidence that he was "at home". In these circumstances I find that the trial court did not have sufficient evidence to find the Appellant liable 100%. There was great doubt as to whether indeed the Respondent was injured while on duty. He did not call Ken Wafula to adduce evidence in support of his case yet he stated that the said Ken Wafula saw the accident occur. In the premises I find that liability could not attach to the Appellant at 100% on the available evidence. The Respondent alleged that the accident occurred on 27/4/2001 while he was at work. It was his onus to prove that. I do not find that he discharged his onus 100%. This coupled with the fact that he did not name the persons he reported to after the accident and further that he did not state what he did to avoid the accident or why he performed his duties without whatever protective gear he should have been provided for would lead me to apportion blame at 50/50 basis. I so do.

The injury complained of is soft tissue injury to the right foot and a lacerated wound to the dorsum of the foot. The authorities in support of the award of damages were of "multiple" soft tissue injuries involving cuts over the left upper arm, multiple cuts over the left wrist, cuts over the left knee, right arm, strained ankle and blunt injury to head with swelling – **Fanny Esilako –vs- Dorothy Muchene Nrb. HC.CC.NO.642 of 1991** where an award of Kshs.150, 000/= was given in 1993. The present injuries are far less severe and as per the register the respondent was on duty on two days following the injury. Considering inflation and time lapse I would consider an award of damages in the sum of Kshs.100, 000/= appropriate and adequate in this case. I so order.

In the end this appeal succeeds in terms that liability is apportioned at 50/50 basis between the parties and an award of Kshs.100,000/= is ordered awarded in place of that awarded by the trial court of 120,000/=.

Orders accordingly.

DATED SIGNED AND DELIVERED AT ELDORET THIS 7TH DAY OF JULY 2010.

P.M.MWILU
JUDGE

IN THE PRESENCE OF

N/A - Advocate for Appellant

N/A - Advocate for Respondent

Andrew Omwenga - Court Clerk.

P.M.MWILU
JUDGE