



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 341 of 2007**

**PARVINDER SINGH SAUND T/A S.V. FURNITURE MART.....APPELLANT**  
**VERSUS**  
**JOHNSTONE LASARO MWANZIA.....RESPONDENT**  
**(Being an appeal from the judgment of Miss Wekesa Senior Resident Magistrate dated**  
**17th October, 2003 in CMCC No.1417 of 2003 at Milimani Commercial Courts, Nairobi)**

**J U D G M E N T**

1. This appeal arises from a suit which was filed by Johnstone Lasaro Mwanzia (hereinafter referred to as the respondent) in the Chief Magistrate's Court at Milimani. He had filed the suit against Parvinder Singh Saund t/a S.V. Furniture Mart (hereinafter referred to as the defendant). The respondent's claim against the defendant was for general and special damages for personal injuries suffered by him whilst working for the appellant. The respondent claimed that he was injured during the course of his employment as a result of the defendant's negligence and or breach of terms of contract or breach of employment.
2. The defendant filed a defence in which it denied the description in the plaint. The defendant admitted having employed the respondent, but denied all the allegations of negligence made by the respondent. The defendant contended that the respondent was the author of his own misfortune as he was careless and negligence whilst operating the machine.
3. During the trial the respondent and Dr. Okere testified in support of the respondent's case. The respondent maintained that he was employed by the defendant as a machine operator. On the material day he was working on the grinding machine when the bearing came out and his left hand was caught in the machine and his left hand thumb and middle finger injured. His left leg was also hit by the bearing and was injured. The respondent blamed the defendant for the accident because the machine was located in a squeezed place thereby making it difficult for the respondent to escape. The respondent also alleged that the machine was not serviced and he had complained that the machine was not in good condition. The respondent further blamed the defendant for failing to provide him with gloves.
4. Dr. Okere who examined the respondent on 17th January, 2003, produced a medical report which showed that the respondent suffered deep cuts on the left thumb, left middle finger and left lower leg. The injuries left the respondent in permanent scars.
5. The defendant testified through Parvinder Singh Sachini, who testified that the respondent was employed as a polisher. The witness denied that there was any Limited Liability company called known as S.V. Furniture Mart Company Ltd. He maintained that he was running his business as a sole proprietor. He denied that the respondent was injured and maintained that there was no record of the respondent having suffered any injury.
6. In her judgment, the trial magistrate found that the respondent was injured as a result of a fault in the machine. She therefore found the defendant 100% liable and awarded the respondent general damages of Kshs.60,000/= and special damages of Kshs.1,500/=.
7. Being aggrieved by that judgment, Parvinder Singh Saund t/a S.V. Furniture Mart (hereinafter referred to as the appellant) lodged an appeal raising 5 grounds as follows:
  - (i) That the learned magistrate erred in law in entering judgment against a non-existent defendant.
  - (ii) That the learned magistrate erred in law and in fact by arriving at the conclusion that the plaintiff had discharged his onus probandi.
  - (iii) The learned magistrate erred in law and in fact in not considering the evidence adduced by the

defendant.

(iv) The learned magistrate erred in law and in fact on relying on a Doctor's report which was based on hearsay.

(v) That the judgment is incapable of being executed since the defendant as sued does not exist.

8. Mr. Kinga who argued the appeal on behalf of the appellant, pointed out that although the respondent sued the defendant he admitted in his evidence that he was employed by Parvinder Singh. Mr. Kinga submitted that Mr. Parvinder Singh maintained that his business was a sole proprietorship and not a limited company. Mr. Kinga therefore argued that the respondent's suit was filed against a wrong person and should therefore have been dismissed. The court was therefore urged to allow the appeal.

9. For the respondent it was submitted that the defendant was properly served with summons and that the appellant accepted service as the defendant. It was further argued that the appellant did not produce any certificate of registration to show that the business was not a limited company but a sole proprietorship. The court was urged not to allow technicalities to be used to deny the plaintiff his lawful judgment.

10. I have carefully reconsidered and evaluated the pleadings and all the evidence which was adduced in the lower court. I have also considered the memorandum of appeal and the submissions made before me. It is true that the issue of the legal capacity of the defendant was raised in the defence as the defendant denied the description that it was a limited liability Company. Nonetheless, the respondent maintained in his evidence that he was employed by the defendant which was a Limited Liability Company, although the person who actually employed him was Parvinder Singh Saund. My understanding of this evidence is that Parvinder Singh in employing the respondent was only acting as an agent or employee of the defendant company.

11. Under Section 112 of the Evidence Act,

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

12. In this case, the fact as to whether the defendant was a sole proprietorship or a limited liability company was a matter which was especially within the knowledge of the defendant. Although the defendant's witness denied that the appellant was not a limited liability company, nothing was produced to show that the defendant was a sole proprietorship. In the circumstances, since it was admitted that the respondent was employed by the defendant, the trial magistrate was right in finding the defendant (as sued) liable.

13. Moreover, in filing the appeal in the name of the appellant, without any specific orders from the court, the appellant being a distinct legal entity from the defendant who was sued, he was a stranger to the proceedings and had no locus standi to file the appeal. In that regard, the appeal before the court was incompetent. Further, from the evidence that was adduced, the defendant's witness denied any knowledge of the accident. However, it was evident from the evidence of the respondent that he was indeed injured. The defence denial could not therefore hold. Moreover, the defendant did not attempt to establish its allegations of negligence against the respondent. I find that the trial magistrate was right in finding the defendant fully liable.

14. As regards the medical report, the same was produced by the Doctor who examined the respondent. Although the doctor made reference to the patient's history and previous medical record, the report was not hearsay as it was based on the doctor's own observation.

15. For the above reasons, I find no merit in this appeal and do therefore dismiss it in its entirety.

Dated and delivered this 30th day of September, 2010

**H. M. OKWENGU**  
**JUDGE**

**In the presence of: -**

**Advocate for the appellant absent**

**Advocate for the respondent absent  
Kosgei - Court clerk**