REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 111 OF 2009

H. YOUNG & CO [E.A.] LTD...APPELLANT

VERSUS

CORNEL OCHIENG ABUYA...RESPONDENT

JUDGMENT

By a plaint dated 14th July 2007 the plaintiff, **Cornel Ochieng Abuya** (herein the respondent) claimed general damages against the defendant, **H. Young & Co Ltd** (herein the appellant) arising from breach of statutory duty of care and / or common law duty of care or breach of contract of employment on the part of the defendant .

It was averred that at all material times relevant to the suit, the plaintiff was employed by the defendant. It was a term of the contract of employment and/or it was the duty of the defendant to take all reasonable precautions for the safety of the plaintiff while engaged in the said employment, not to expose him to risk of damage and / or injury of which it knew or ought to have known, to provide and maintain adequate and suitable measures for the safety of the plaintiff and to provide and maintain a safe system of work.

However, on or about the 26th December 2006 while the plaintiff was lawfully working as a store – keeper he suddenly developed chest pain which caused him injury. He contended that the said incident was caused by breach of statutory duty of care and / or common law duty or breach of the contract of employment on the part of the defendant. He therefore prayed for general damages for pain, suffering and loss of amenities as well as costs of the suit and interest.

In its statement of defence, the defendant denied that the plaintiff was its employee and that he suffered injury in the manner claimed on the material date. Further, the defendant denied the allegations of

negligence and / or breach of statutory duty and contended that if at all the plaintiff suffered any injury on the material date the same did not occur at the defendant's work place and as such the defendant is not liable for the same.

Further, if at all the plaintiff suffered injury as alleged the same was solely caused or contributed to by his own negligence. For these reasons, the defendant prayed for the dismissal of the plaintiff's case with costs.

At the trial before the learned Resident Magistrate at Menara / Tamu, the plaintiff (PW1) testified that he worked for the defendant and his work in the store included carrying cement, off loading cement and feeding it into a machine. In the process, he developed a chest problem and reported to his supervisor who did nothing such that on the 20th December 2006 he was admitted to the Kisumu District Hospital for a period of five (5) days. He produced the necessary treatment notes. He was told by a doctor that his chest problem was due to dust from cement. He was later examined by **Dr. Okombo** who compiled a medical report. He was also seen by a **Dr. Aluoch** based in Nairobi.

The plaintiff blamed the defendant for his condition and contended that he was not provided with any protective gear such as a mouth mask. He said that he was never given any off days and that in a day he would off –load between 3000 to 4000 bags of cement. He also contended that he had not fully healed and that he usually experienced chest pain and persistent cough. He therefore asked for compensation from the defendant.

Dr. Were Okombo (PW2), a physician based in Kisumu testified that he examined the plaintiff on 16th August 2007 who gave a history of having developed chest pain and congestion when breathing and while working for the defendant at the defendant's store in Sondu Miriu. He complained of chest pain and difficulties in breathing and on examination a wheezing sound was detected on inspiration and explication of the chest.

The doctor diagnosed a condition known as silicosis which develops as a result of narrowing of the breathing pipes in the lungs resulting from alternation of dust i.e. cement dust. After the examination the doctor complied a medical report which he tendered in evidence. He said that he relied on treatment notes from Kisumu District Hospital where the plaintiff was treated by a **Dr. Otedo.**

Elly Opere Odugo (DW1) testified on behalf of the defendant. He said that he was a store- keeper and confirmed that the plaintiff was working with them at Sondu Miriu. During the time, the plaintiff made no complaints to him. He said that the cement warehouse was only occupied to the extent of ¾ and was generally in good order since the circulation of air was good. He said that the ventilation was adequate and that during the 2 ½ years that the plaintiff had worked there, there was nothing unusual about his state of health. He (plaintiff) was never hospitalized.

The store-keeper (DW1) said that nine people worked in the store loading and off-loading cement. He contended that disposable nose masks and a packet of milk were provided to the workers to protect them against the dust. He said that the store manager was one Mr. Mohan and contended that the working conditions were generally good.

After considering all the foregoing evidence as well as the submissions presented by both sides, the learned trial magistrate found in favour of the plaintiff and held the defendant fully liable for the pain and suffering occasioned to the plaintiff. To that extent, the plaintiff was awarded general damages for pain and suffering in the sum of Kshs. 180,000/= together with costs and interest.

The defendant was aggrieved. It appealed to this court on grounds that:-

(1) The learned trial magistrate erred in law in making findings on liability at 100% against the appellant which was not supported by the evidence on record.

(2) The learned trial magistrate erred in law and in fact in failing to appreciate and find that the respondent did not prove his case to the required standards being the preponderance of probability.

(3) The learned trial magistrate erred in law and fact in failing to find that the plaintiff's evidence on record was at variance with the pleadings and as such the plaintiff could not prove that

which is not pleaded.

(4) The trial magistrate erred in law and in fact in failing to find that the respondent failed to produce the initial treatment documents to vouch the injuries sustained.

(5) The learned trial magistrate misdirected himself in failing to find that the respondent had not proved his case particularly owing to the fact that the latter failed to lead evidence of an occupational health specialist / expert on the general / aerobic state of the warehouse which is "sine quo non" in claims for occupational health.

(6) The learned trial magistrate erred in law and in fact in failing to consider and analyse the strong rebuttal evidence led by the defence witness.

(7) The learned trial magistrate erred in law and in fact in upholding the respondent's version of the occurrence of the accident not withstanding that the latter had neither established causation nor the appellant's negligence.

(8) The learned trial magistrate failed to appreciate the totality of the evidence before him and the submissions made on behalf of the appellant.

These grounds were argued on behalf of the appellant by the learned Counsel, **Mr. Mbago**. The respondent opposed through the learned Counsel **Mr. Adiso**.

Having heard the arguments in the light of the grounds of appeal and the evidence adduced in the trial which evidence was re-visited by this court in line with its obligation as a first appellate court bearing in mind that the trial court had the advantage of seeing and hearing all the witnesses, it is apparent that the respondent was indeed an employee of the appellant at the material time. This was confirmed by the defendant's store – keeper (DW). It was also not a disputed fact that the respondent developed chest problems while so employed.

The basic issue that fell for determination was whether the respondent's illness was as a result of the work environment he was exposed to.

The evidence by both the respondent and the defendant's store-keeper showed that the respondent worked in an environment which was dusty i.e. a warehouse where the loading and unloading of cement was the main job.

Indeed, the respondent said that his job was to carry cement, off load and empty it in a machine. He contended that his chest problem was caused by the cement dust. This was confirmed by Dr. Okombo (PW2) a physician cum chest specialist. He stated that the respondent developed a condition known as Silicosis associated with dust. This evidence was never disputed or discredited by any other medical evidence. A report by a Dr. Aluoch seems to have been marked for production by the defendant but it was never produced and could not form part of the evidence.

Given that the respondent was working in a cement warehouse, the possibility that he was unduly exposed to dust could not be overruled. It was therefore the appellant's obligation to ensure that the dust did not create a health hazard. The appellant was in that regard required to provide protective gear to ensure that its workers including the respondent were guarded against any health hazard associated with dust.

Although the respondent firstly, indicated that he was never provided with a mask to cover his mouth and nose to prevent inhaling dust, he changed his story during cross- examination and conceded that protective masks were provided. He however, alleged that the mask was not enough.

The defendant's store-keeper (DW1) confirmed that protective masks were provided to the workers and in addition each worker was given a packet of milk.

Why then did the respondent develop chest problems associated with dust yet he was provided with protective gear while performing his chores?

The most probable answer is that the respondent failed or neglected to use the dust mask provided to him and others. This explains why he was the only worker in that warehouse to develop health problems. He largely contributed to his predicament. If the defendant was to shoulder – any blame then it was minimal since it did all it could to ensure that its workers were protected against the adverse effects of dust. Even if the masks did not provide 100% protection, the effort to provide them showed that the defendant was mindful of its workers welfare and if by not providing 100% protection it breached its statutory obligation then the breach was negligible.

To that extent, this court would on liability interfere with the finding of the learned trial magistrate and hold the appellant 20% culpable. The reminder 80% must be held against the respondent for his immense contribution to his illness.

On quantum, the award of Kshs. 180,000/= made by the learned trial magistrate was reasonable only that it shall be deducted to the extent of 80% representing the respondent's contributory negligence. The respondent would therefore be entitled to Kshs. 36,000/=, general damages for pain and suffering.

In sum, this appeal is allowed to the extent that the judgment of the learned trial magistrate is set aside and substituted for a judgment in favour of the respondent against the appellant for the sum of 36,000/= general damages for pain and suffering together with costs. The costs of the appeal shall be borne by the respondent.

Ordered accordingly.

Delivered, dated and Signed at Kisumu this 7th day of October 2010

J. R. KARANJA
J U D G E

JRK/aao