REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 40 of 2006

SASINI TEA & COFFEE LIMITED…....…………APPELLANT

VERSUS

CHRIS WAFULA KIBET….…………………..RESPONDENT

J U D G M E N T

1. Sasini Tea & Coffee Limited (hereinafter referred to as the appellant), was the defendant in Limuru SRMCC No.36 of 2005 which was brought by Chris Wafula Kibet (hereinafter referred to as the respondent). In the suit the respondent who was an employee of the appellant sought general and special damages from the appellant arising from personal injuries allegedly suffered by the respondent during the course of his employment. The respondent claimed that the accident which resulted in the injuries was caused by the appellant's breach of common law duty of care, and breach of statutory law duty of care.

2. The appellant filed a defence denying the respondent's claim. In particular the appellant denied that the contract of employment if any included any term whereby the appellant undertook to take precautions for the safety of the respondent whilst in the course of his employment. The appellant further denied having been negligent or in breach of any statutory duty and or breach of contract on common law duty of care. The appellant maintained that if the accident occurred then it was inevitable. The appellant pleaded in the alternative that the accident was caused by the negligence of the respondent.

3. During the hearing before the trial magistrate three witnesses testified on behalf of the respondent. These were Dr. George Kungu Mwaura who examined the respondent and prepared a medico-legal report. He formed the opinion that the respondent suffered blunt injuries to the right groin and that the injuries were soft tissue injuries with no permanent degree of incapacity. The respondent also testified explaining how he was on duty together with his colleague Ernest Tsaka (Pw3) working on a table saw circular machine sawing 8" x 8" poles. He explained that the saw was small for the size of the beam poles that they were working on. As a result the poles twisted and produced a powerful kick back which pulled the respondent to his side and he was hit on the groin. The beam rammed into the respondent's colleague cutting off his left 5 fingers. The respondent and his colleague were taken to Kiambu Hospital where respondent was treated and discharged whilst his colleague was admitted in hospital.

4. Both the respondent and his colleague blamed the appellant for the accident contending that the saw was a wrong size for the beam poles, and also because the power saw did not have a guard which could have covered the saw and beam. The respondent and his colleague also claimed they were not provided with adequate protective clothing.

5. The appellant testified through Robert Irari Kamau a manager with the company. He explained that at the material time he was relieving a colleague who was the one in charge of the timber section. He was not present at the time of the accident. Nevertheless, he maintained that the respondent and his colleagues were splitting 3" timber and using a 7" radius saw. He received a report of an accident involving the respondent. He met the respondent's colleague and noted that he was injured. He saw the respondent but noted that he was not hurt nor did he report any injury. The witness maintained that only the respondent's colleague was injured. He contended that no protective tools could have avoided the accident. He denied having instructed the respondent to split an oversize log. He maintained that the saw had barrier which separated the worker and the blade. He blamed the respondent who was experienced on working on the power saw and ought to have known better.

6. Counsel for the appellant filed written submissions in which he submitted that no liability can be attributed to the

defendant given the circumstances of the accident. He maintained that the respondent was the author of his own misfortune, as he did not inspect the beam so as to ascertain whether it had twisted grain. Counsel maintained that there was no evidence that the circular saw blade was defective. He maintained that the appellant had discharged his common law and statutory obligation. He maintained that the respondent did not prove his case, no evidence of hospital attendance or treatment having been produced. Relying on ***Abdalla Mwanyule vs Swalahaderi Said t/a Jamvu Total Service Station Civil Appeal No.211 of 2002***, Counsel urged the court to find that the appellant duly discharged its duty of reasonable care and that the respondent voluntarily consented to accept such risk and waived any claim in respect of damages given the dangerous character of the work upon which he was engaged.

7. In his judgment, the trial magistrate found that the occurrence of the accident was not in dispute but that what was disputed is whether the respondent sustained any injury. He found that there was ample evidence that the respondent suffered injuries to the groin as described in medical report. The trial magistrate further found that the saw mill had no guards in place. He therefore found the appellant 100% liable and awarded general damages of Kshs.130,000/= and special damages of Kshs.7,000/=.

8. The appellant has raised 6 grounds of appeal against that judgment as follows:

(i) The learned magistrate erred in law and f act in failing to find that the plaintiff/respondent was the sole author of his own misfortune and/or substantially contributed to the occurrence of the purported accident.

(ii) The learned magistrate erred in law and in fact in finding that the defendant/appellant was 100% to blame for the alleged accident when the plaintiff/respondent had not demonstrated breach of common law duty of care and/or breach of statutory duty on the part of the defendant/appellant.

(iii) The learned magistrate erred in law and fact in finding that the defendant/appellant 100% to blame when the plaintiff/respondent had not demonstrated (as by law required) mechanisms which the defendant ought to have put in place to avert the occurrence of the purported accident.

(iv) The learned magistrate erred in law and fact in finding that the plaintiff/respondent was injured in the course of employment when it was clear that the plaintiff reported the incident three days after the occurrence of the alleged accident and when in fact no evidence of treatment at all was tendered.

(v) The learned magistrate erred in law and fact in holding the defendant/appellant liable in negligence against the weight of evidence.

(vi) The learned magistrate erred in law and fact in awarding the plaintiff/respondent kshs.130,000 (which is on the higher side) for the minor soft tissue injuries allegedly sustained by the plaintiff/respondent.

9. In support of the appeal counsel for the appellant argued the 6 grounds under two main headings i.e. liability and quantum. Counsel reiterated the submissions which he had made in the lower court, that there was no evidence that the respondent was injured or that he was treated at Kiambu District Hospital. Counsel maintained that the respondent ought to have been held contributorily negligent. With regard to quantum counsel submitted that the injuries being soft tissue injureies the award should not have gone beyond Kshs.50,000/=.

10. For the respondent it was submitted that the award of Kshs.130,000/= was not inordinately high nor was it based on wrong principles or misunderstanding of facts as to justify the intervention of the court. As regards liability it was contended that the appellant has not contested the issue of liability in SRMCC No.37 of 2005 which arose from the same accident and is therefore estopped from raising the issue. It was further submitted that the appellant’s witness was not present at the time of the accident.

11. I have carefully reconsidered and evaluated the evidence which was adduced before the trial magistrate. I find that there was clear evidence that an accident involving a power saw did occur at the appellant’s Saw Mill. The respondent and his colleague Erenst Okenda Tsaka explained how the accident occurred. The appellant’s witness who attempted to contradict the evidence of these two witnesses, was not present at the time of the accident. He cannot therefore swear positively as to how the accident occurred. Indeed the evidence of the appellant’s witness that the respondent and his colleague were splitting 3” timber was not supported by the evidence of any eye-witness. Contrary to the submissions of the appellant’s counsel, the respondent’s evidence was not that the Saw Blade was defective, but that it was too small for the size of the log beam which was being split and that was what caused the kick-back.

11. Secondly, there was sufficient evidence that the Power Saw was not properly guarded and this aggravated the situation. I find that on the evidence which was adduced before the trial magistrate there was ample evidence that the appellant had a reasonable duty of care to the respondent against risk of injury reasonably foreseeable or which could be

prevented by taking reasonable precaution. The appellant failed to discharge this obligation by failing to guard the Power Saw, and causing the respondent to split log beams on an undersized Power Saw. I find that the appellant was fully liable to the respondent.

12. With regard to quantum, the respondent suffered soft tissue injuries with no permanent incapacity or residual effect. In awarding the sum of Kshs.130,000/= as general damages, the trial magistrate did not identify any comparable awards that she relied upon. I find that the award of Kshs.130,000/= was manifestly excessive and based on wrong principles as it is not in line with awards for comparable injuries. I concur with the appellant's counsel that the injuries ought to have attracted an award of no more than Kshs.50,000/=.

13. In the circumstances, I would allow the appeal against the quantum, set aside the award of Kshs.130,000/= and substitute it thereof with an award of kshs.50,000/=. Each party shall bear his own costs of the appeal. To that extent only does the appeal succeed.

Orders accordingly.

Dated and delivered this 27th day of January, 2009

H. M. OKWENGU

JUDGE

In the presence of: **-**

Advocate for the appellant absent

Kaka for the respondent