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

**Civil Appeal 334 of 2006**

**JOSEPH ANJICHI.....APPELLANT**

**VERSUS**

**KENYA VEHICLE MANUFACTURERS LTD.....RESPONDENT**

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

1. This appeal arises from a suit which was filed in the magistrate's court at Thika by Joseph Anjichi (hereinafter referred to as the appellant). He had sued Kenya Vehicle Manufacturers Ltd, (hereinafter referred to as the respondent), who was his former employer, seeking to recover damages for injuries suffered by him during the course of his employment. The appellant maintained that the injuries arose as a result of the respondent's negligence and or breach of statutory duty.

2. During the trial in the lower court, the appellant testified that he was employed by the respondent as a mechanic. On the material day during the course of his employment, he had to sort out some spare parts which were contained in two 20 litre jerry-cans. He had to lift each jerry-can and pour out the contents of the jerry-can in order to sort out the spare parts. The appellant poured out the contents of the first jerry-can. He then lifted the second jerry-can and poured out its contents. However, as the appellant lifted the second jerry-can he felt pain on his back and he fell down. He was taken to the company doctor. He was referred for X-ray and then admitted at Thika Nursing Home.

3. Dr. Nimrod Mwangombe examined the appellant about 2 years after the incident. He noted that X-rays revealed a linear fracture of the 4$^{th}$ lumber vertebrae. At the time of examination the appellant still complained of severe lower back pain, weakness in both legs, lower abdominal pain and a reduced sexual urge, the appellant was still wearing a lumbar corset. Dr. Mwangombe formed the opinion that the appellant was predisposed to early osteoarthritis. He assessed his permanent disability at 60%.

4. The appellant blamed the respondent for his injuries. He explained that the work he was doing was supposed to be done by two people. However, the appellant was forced to do the work alone as there was shortage of staff. The appellant testified that as a result of his injuries he was unable to perform his duties and was therefore prematurely relieved of his employment on 9$^{th}$ March, 2001. The appellant claimed he was the sole bread winner of his family and had lost his monthly income of Kshs.10,202/=.

5. The respondent testified through Jackson Makau Mutua an employee of the company who was at the material time the mechanic team leader. The witness testified that he assigned the appellant to sort out spares with one Patrick Ndelesi. He maintained that there was no shortage of staff nor did the appellant complain to him. He explained that the spare parts which the appellant was to sort out were in a jerry-can and that the appellant did not need to lift the jerry-can but could have tilted it and poured out the spares.

He maintained that sorting out the spares was not a hazardous job. The witness testified that he was not present at the time the appellant got injured but only came to learn about it later.

6. In his submissions counsel for the appellant urged the court to find the respondent liable to the appellant as the appellant was made to do work meant for two persons and that his request for assistance was rejected. On liability counsel pointed out to the court that as a result of his injuries appellant was unable to work. He urged the court to award a sum of Kshs.900,000/= as general damages. In respect of loss of future earnings, counsel urged the court to adopt a multiplier of 7 and award Kshs.820,092/= for loss of future earnings and Kshs.1,260,000/= for future medical expenses.

7. Counsel for the respondent on his part submitted that the appellant had not proved the particulars of negligence pleaded and therefore his suit must fail. In support to that submission counsel relied on ***HCA No.16 of 2001 Unga Maize Millers vs. James Munene Kamau***. Counsel submitted that the appellant was not given work outside the scope of his duties, but that the appellant is the one who endangered himself by lifting rather than tilting the jerry-can.

8. With regard to quantum counsel for the respondent urged the court not to allow the damages claimed in respect of future medical costs as same were special damages which were neither pleaded nor proved. Counsel proposed an award of Kshs.300,000/= in respect of general damages for pain and suffering. With regard to loss of future earnings it was submitted that the appellant's disability according to Dr. Yusuf Khandwalla was only 30%. The court was urged to adopt a multiplier of 5 years and reduce the amount by $^{1}/_{3}$ .

9. In her judgment, the trial magistrate could not:

"***Understand how the mere lifting of a 20 litre jerry-can full of spares could have caused a 44 year old man suffer the injuries that this plaintiff suffered***". She further noted that it did not require two healthy men to lift a 20 litre jerry-can containing spare parts of the like of washers, bolts, and other small spare parts. Further the trial magistrate found that the appellant could not explain why he had to lift the jerry-can rather than tilt it to pour out its contents. The trial Magistrate found that there was contradiction between the pleadings in the plaint wherein the appellant claimed to have slipped and fell, and the appellant's evidence in Court when he claimed he just felt pain whilst he was in the process of lifting the second jerry can and he fell down. She therefore found that the appellant had failed to prove that his injuries were as a result of the nature of the work that he was allocated, or a result of the working conditions or a result of gross negligence of the defendant. The trial magistrate concluded that the appellant had failed to prove on a balance of probability the particulars of negligence or breach of statutory duty as set out in his amended plaint. She therefore dismissed the appellant's suit.

10. Being aggrieved by that judgment the appellant has lodged this appeal raising 11 grounds as follows:

(i) The learned Chief Magistrate erred in fact and in law in holding as she did that the plaintiff was to blame for the misfortune.

(ii) That the learned Chief Magistrate erred in fact and in law in failing to consider the entire evidence before her and in particular the appellant's evidence on a balance of probabilities.

(iii) That the learned Chief Magistrate erred in fact and in law in not considering that the appellant was injured within the course of his employment.

(iv) That the learned Chief Magistrate erred in law in failing to consider that an employee is entitled to safe place of work.

(v) That the learned Chief Magistrate erred in law in not finding that an employee, the appellant has to be compensated when one is injured during the course of his employment.

(vi) That the learned Chief Magistrate erred in not finding that the appellant's evidence did cover all the

particulars of negligence.

(vii) That the learned Chief Magistrate erred in fact in not considering that the appellant was injured as a result of the work he had been assigned to do.

(viii) That the learned Chief Magistrate erred in law and in fact in failing to consider that the appellant was injured as a result or gross negligence of the defendant.

(ix) That the learned Chief Magistrate erred in law and in fact in not considering that the respondent had admitted that the appellant was injured in the course of employment and that he had been certified as not fit to continue working as a result of the injury.

(x) That the learned Chief Magistrate erred in law and in fact in not assessing the plaintiff's evidence as per the evidence on record.

(xi) That the learned Chief Magistrate erred in law and in fact in dismissing the plaintiff's suit against the defendant with costs to the defendant.

11. I have carefully reconsidered and evaluated the evidence as I am expected to do in this first appeal. I have also given due consideration to the submissions made by counsel. It is clear from the pleadings that the appellant's suit was grounded on negligence. Therefore it was imperative for the appellant not only to prove that he was injured during the course of his employment, but also to prove that the respondent was either negligent or in breach of his statutory duty, and that the appellant's injuries resulted from that negligence and/or breach of statutory duty.

12. In this case the particulars of negligence and/or breach of statutory duty alleged by the appellant were given as follows:

(i) Failure to provide and take adequate precaution for the safety of the plaintiff while engaged in his work.

(ii) Exposing the plaintiff to risk of damage or injury, which the defendant knew of, or ought to have known.

(iii) Failing to take measures to prevent the said accident.

(iv) Failing to provide the plaintiff with appropriate safety appliances, and equipment to prevent the said accident.

(v) Failing to provide a safety system of work.

(vi) Allocating the plaintiff duties outside his normal and skilled work.

13. In paragraph 4 of the plaint, the appellant pleaded that -

"he was allocated some work which due to its nature, working conditions and gross negligence of the respondent, the appellant slipped and fell down thereby sustaining severe bodily injuries".

In his evidence before the Court the appellant explained that he was given a job to separate bolt, washers and other small spares. The spares were in a 20 litre jerry can from which he was to pour out the spares to be able to sort them out. The appellant explained that he poured out the spares in the first jerry can, then poured out the spares in the second jerry can, and it was whilst lifting the second jerry can that he felt pain on his back and fell down. It is noteworthy that nowhere in his evidence does the appellant testify to having slipped.

14. The appellant's only complaint is that he was supposed to be doing the work with another officer,

but on that particular day he was assigned to do the work alone, as there was a shortage of staff. From the appellant's evidence it is apparent that the appellant did not fall down because he slipped, but fell down because of the pain which he felt on his back. No evidence was adduced to show what caused that pain. The appellant attempted to attribute the pain to the weight of the jerry can which he lifted. That jerry can was only a twenty litre jerry can. The spares were small articles which the appellant described as "bolts, washers and other small spares". The weight of the jerry can, even with the spares, could hardly be said to be of such weight as would cause an injury to a normal person. The appellant's injuries were therefore not foreseeable. Thus the respondent could not be expected to take reasonable precaution against such risk of injury not reasonably foreseeable. Although the appellant claimed that the work was normally done by two people, there was nothing to show that two people were necessary for the lifting of the jerry can. In any case the appellant could easily have poured out the contents of the jerry can by tilting the jerry can without lifting it up.

15. Further the work that the appellant was required to do was simple manual work which did not require any particular system or safety appliances. The appellant's evidence was therefore insufficient to establish any negligence or breach of statutory duty on the part of the respondent. The mere fact that the appellant got injured during the course of his employment was not sufficient to impute negligence on the part of the respondent. Thus the appellant has failed not only to prove negligence or breach of statutory duty on the part of the respondent, but has also failed to establish any causation between his injury and the alleged negligence and/or breach of statutory duty. While it is true that an employee who is injured during the course of his employment is entitled to compensation, in the absence of negligence and/or breach of statutory duty, compensation to the appellant could only have arisen under the Workman's Compensations Act. However, the suit before the trial Magistrate did not invoke this Act. I am therefore satisfied that the trial Magistrate properly addressed her mind to the evidence before her and arrived at the correct decision.

16. I do note that there was an omission on the part of the trial Magistrate in failing to assess the quantum of damages with respect to the appellant's injuries. The trial Magistrate was obliged to do so notwithstanding her finding on liability. According to the report of Dr. Nimrod Mwangombe, the appellant suffered a fracture of the fourth lumbar vertebrae which resulted in weakness of both lower limbs, lower back pain and reduced sexual urge. Dr. Mwangombe assessed the appellant's permanent disability at 60% whilst Dr. Yussuf Kodwavwala assessed the appellant's permanent disability at 30%. In his submissions before the trial Magistrate counsel for the appellant urged the Court to award a sum of Kshs.900,000/= as general damages for pain and suffering, and damages of Kshs.820,000/= for loss of future earnings.

17. Counsel for the respondent on his part urged the Court to award no more than Kshs.300,000/= as damages for pain and suffering. With regard to loss of future earnings, counsel urged the Court to award no more than Kshs.142,424/=. Having considered the authorities referred to, and noting that the appellant did not make any specific claim in his plaint for loss of future earnings, I am of the considered view that a global sum of Kshs.600,000/= would have been appropriate compensation to the appellant as general damages for pain, suffering and loss of amenities. The upshot of the above is that the appellant having failed to establish any liability on the part of the respondent, his appeal fails. It is accordingly dismissed with costs.

Those shall be the orders of this Court.

Dated and delivered this 17th day of September, 2009

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Ms. Muriungi for the appellant

Advocate for the respondent, absent