REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 669 of 2004

ATHI RIVER MARBLE AND GRANITE LTD.....APPELLANT

VERSUS

PATRICK MUTUKU.....RESPONDENT

(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Nairobi

[Mrs. H.A. Omondi] dated 13th day of August, 2004 in Civil Suit No. 5560 of 2000)

J U D G M E N T

1. This appeal arises from a suit which was filed in the Chief Magistrates Court at Nairobi by Patrick Mutuku, hereinafter referred to as the respondent. He had sued his employer Athi River Marble and Granite Ltd, hereinafter referred to as the appellant, seeking general and special damages arising from injuries suffered by him during the course of his employment.

2. The respondent contended that the accident resulting in his injuries was caused by the appellant's negligence and/or breach of statutory duty or breach of contract. The appellant responded to the claim through an amended defence, in which it contended that the respondent's suit was incompetent, having been filed after the statutory limitation period. Without prejudice to that defence, the appellant further denied being negligent or in breach of contract or statutory duty. The appellant maintained that the accident was wholly caused or contributed to by the respondent's negligence.

3. The hearing of the respondent's suit commenced on 7th May, 2002 before a Senior Resident Magistrate, G.N. Ombongi who took the evidence of one Dr. Okoth Okere and thereafter adjourned the hearing to 29th May, 2002. On that date, the respondent testified and closed his case. One Patrick Musembi a supervisor in the appellant's firm then testified on behalf of the appellant.

4. The evidence adduced for the respondent was as follows: On the 12th October, 1995 the respondent who was an employee of the appellant was on duty. He was in the process of lifting some granites stones using a crane when the chain link snapped and the stone hit the respondent on the head. The respondent who became unconscious was taken to a hospital in Athi River where he was attended to. He was thereafter transferred to Kenyatta National Hospital where he was admitted for five days. The respondent blamed the appellant for his injuries, contending that he was provided with a defective chain which broke. The respondent also claimed that the appellant did not provide him with any protective clothing.

5. Dr. Okoth Okere who examined the respondent on 19th November, 1999, noted that he had a depressed fracture and a lacerated scar of frontal bone. Dr. Okere assessed the respondent's permanent disability as 10% and noted that there was a possibility of the respondent suffering epileptic seizures.

6. Patrick Musembi who testified for the appellant, explained that the accident in which the respondent was injured, was caused by the breaking of the chain used to lift the granites. He blamed the respondent for having chosen a worn chain when the right chain was provided. He maintained that the supervisor was not to blame for the respondent selecting a wrong chain.

7. Counsel for each party filed written submission each urging the trial Court to find in favour of his client. For the respondent, it was submitted that the appellant was fully liable for the accident having provided a chain which was not suitable for the work, and having failed to provide proper supervision. The Court was urged to award general damages of Kshs.400,000/= and special damages of Kshs.6,500/=.

8. For the appellant it was submitted that the respondent's suit in so far as grounded on contract, should be dismissed for want of evidence, whereas the claim on negligence should fail for having been brought after the statutory limitation period and also for want of evidence. It was submitted that the respondent could not blame the appellant as he was the one who chose the chain which he used. It was further maintained that there was no evidence of the existence of any contract between the appellant and the respondent, requiring the appellant to take precaution for the safety of the respondent. It was submitted that the respondent had failed to prove any negligence on the part of the appellant. It was noted that there were no particulars of any breach of statutory duty pleaded. The Court was urged not to rely on the report of Dr. Okere as he examined the respondent four years after the accident. It was submitted that the respondent suffered soft tissue injuries affecting the head and an award of Kshs.50,000/= would have been adequate compensation.

9. It appears from the record that the Senior Resident Magistrate who took the evidence was for some reasons unable to prepare the judgment. Judgment was therefore prepared and delivered by Hon. Mrs. H.A. Omondi, Chief Magistrate (as she then was) presumably in accordance with Order XVII Rule 10 (1) of the Civil Procedure Rules.

10. In her judgment, the Magistrate noted that the occurrence of the accident was admitted by the defence witness, and therefore the only issue for consideration was who was to blame for the respondent's injuries. The Magistrate found that the appellant was liable as it provided the respondent with a defective chain and further failed to inspect the chain to ensure that it was safe to use. The Magistrate accepted Dr. Okere's report and awarded the respondent general damages of Kshs.350,000/- and special damages of Kshs.1,500/=.

11. Being aggrieved by that judgment, the appellant has lodged this appeal raising 15 grounds as follows:

(i) The learned Magistrate erred in entering judgment against the appellant.

(ii) The learned Magistrate erred in not considering and upholding the defence of limitation raised by the appellant (pursuant to section 4(2) of the Limitations of Actions Act Chapter 22 of the Laws of Kenya) to the alleged cause of action of breach of statutory duty and/or negligence.

(iii) The learned Magistrate erred in entering judgment against the appellant upon the alleged cause of action based on negligence when the same was plainly statute barred by reason that the respondent's suit was commenced way outside the relevant limitation period of three years from the date the alleged cause of action arose.

(iv) The learned Magistrate misapprehended the issues which had been presented for adjudication in particular:

(a) She failed to appreciate that it was common ground that the accident giving rise to these proceedings

was not due to a defective chain but rather because the respondent used a chain that was too short for the particular assignment.

(b) She failed to appreciate that the only issues in dispute were whether:

a. The respondent was responsible as he was the one who chose an inappropriate chain as alleged by the appellant or

b. The appellant had failed to provide the large chains as alleged by the respondent.

(v) The learned Magistrate erred in failing to hold that the respondent was barred from pursuing the alleged negligence of an inappropriately small chain as it had not been pleaded.

(vi) The learned Magistrate erred in considering and concluding that the appellant supplied a defective chain despite the fact that the same was not pleaded or led in evidence by either party or indeed their submissions.

(vii) The learned Magistrate erred in failing to hold that the respondent was an incredible witness who lied under oath when he changed his story during cross-examination.

(viii) The learned Magistrate despite making a proper finding that it was the respondent who selected the type of chain to use on the material day erred in holding that the appellant was wholly to blame for the respondent's injury.

(ix) The learned Magistrate erred in failing to hold that the appellant had discharged his duty to take reasonable care for its employee's safety by providing chains of various sizes to be used by an employee as and when appropriate for a particular task.

(x) The learned Magistrate erred in accepting in totality the medical evidence advanced on behalf of the respondent despite the fact that the doctor giving such evidence had no training in and/or was not a specialist in the area of orthopedic surgery, let alone the fact that owing to the lapse of time; four years after the date of the respondent's injury, such evidence may have been inaccurate.

(xi) The learned Magistrate erred in assessing general damages at Kshs.350,000/= which was too high and out of keeping with the relevant bracket of the applicable range of general damages.

(xii) The learned Magistrate erred in assessing and awarding special damages in the sum of Kshs.1,500/- without sufficient proof.

(xiii) The learned Magistrate failed to consider and appreciate the submissions made on behalf of the appellant.

(xiv) The learned Magistrate erred in not considering the authorities submitted on behalf of the appellant.

(xv) The learned Magistrate erred in failing to dismiss the respondent's suit with costs.

12. Mr. Muchiri who argued the appeal on behalf of the appellant, relying on the case of ***Karauri vs. Ncheche [1995-98***] ***1 E.A. 87,*** submitted that the appellant raised the defence of limitation which was an issue dealing with jurisdiction, and therefore the respondent's suit ought to have been dismissed for being filed out of time. Mr. Muchiri submitted that under Section 4 (2) of the Limitation of Actions Act, a claim in tort should be filed within 3 years. It was thus incumbent for the respondent to seek leave of the Court to file his suit outside that period. The respondent having failed to obtain leave, his suit filed after the three year period, was incompetent. In support of this submission, Mr. Muchiri relied on the following authorities:

· ***Karauri vs. Ncheche*** (supra)

· ***BOC Kenya Limited vs. Karanja & Another [2007] 1 E.A. 35***

· ***Mweu vs. Kabai & Another [1972] E.A. 242***

13. Mr. Muchiri further submitted that the respondent did not plead in its particulars of negligence, that the appellant provided a defective chain. He noted that the Magistrate failed to appreciate that the defective chain was selected by the respondent. Relying on ***Statpack Industries vs. James Mbithi Munyao HCCA No. 152 of 2003*** (UR), Mr. Muchiri submitted that the employer was not expected to babysit the employee, and the respondent having selected a chain which was short, he was responsible for the misfortune which befell him. Mr. Muchiri pointed out to the Court that there was no submission made on behalf of the respondent, that the respondent's claim was founded on contract. He urged the Court to set aside any judgment in that regard.

14. Mr. Ongoto who appeared for the respondent, submitted that the respondent's claim was within the limitation period, as it was a claim based on contract, and in respect of which the limitation period is six years. Mr. Ongoto relied on the case of ***Kenya Cargo Handling Services Ltd. vs. David Ugwang [1982-88] 1 KLR 672***, in support of that submission. Mr. Ongoto submitted that the Magistrate properly considered the evidence regarding the chain and noted that it was the company's responsibility to provide tools which are not defective. Mr. Ongoto pointed out to the Court that the particulars relating to the chain were properly pleaded in paragraph 5 of the amended plaint.

15. Mr. Ongoto distinguished the case of ***Karauri vs. Ncheche*** (supra) contending that it related to extension of time and service of the order in a tort case, and not a contract case. Mr. Ongoto submitted that ***BOC Kenya Limited vs. Karanja & Another,*** and the case of ***Mweu vs. Kabai & Another*** were not applicable to the present case, leave of the Court not being necessary, as the suit was brought within 6 years. Mr. Ongoto referred the Court to the amended plaint wherein he pointed out that the issue of contract, and the particulars of breach of contract, were properly pleaded. He submitted that the circumstances of the accident, showed that the accident was beyond the control of the respondent, and that the appellant did not provide the respondent with any protective gear. The Court was therefore urged to dismiss the appeal as the appellant was liable.

16. I have carefully reconsidered and evaluated the evidence which was adduced before the lower Court and the submissions which were filed. I have also considered the submissions made before me. The pertinent issue raised in the pleadings, which was apparently not addressed in the judgment of the lower Court was the competence of the respondent's suit with regard to the statute of limitation. It is evident from the amended plaint that the respondent's cause of action arose on the 12th October, 1995. The lower Court record shows that the respondent's suit was filed in Court on 18th July, 2000. Therefore, the suit was filed almost 5 years after the cause of action arose. Section 4(1)(a) of the Limitation of Actions Act provides for a limitation period of 6 years for actions founded on contract whilst section 4(2) of the same Act, provides for a limitation period of three years for actions founded on tort.

17. In this case, the gist of the respondent's claim is contained in paragraph 3 to 6 of the amended plaint which states as follows:

"(i)….

(ii)….

(iii) At all material times to this suit the plaintiff was lawfully in the employ of the defendant where he worked as a machine operator.

(iv) It was a term of contract of employment between the plaintiff and/or the duty of the defendant to take all reasonable precautions for the safety of the plaintiff while engaged in the aforesaid employment not to expose the plaintiff to any risk of injury or damages which they knew or ought to have known, to provide

and maintain safe working conditions, to take reasonable care that the place of which the plaintiff carried out his work was safe, and to provide and maintain a safe proper system of work.

(v) On or about the 12/10/95 the plaintiff was operating a crane when the chain of the crane snapped and hit his head causing serious injuries.

(vi) The said accident occurred purely as a result of the defendant's negligence in that they failed to observe their statutory duty to the plaintiff and/or breach of duty or breach of contract of employment of defendant to provide safe working conditions for its employees including the plaintiff."

18. From the above it is clear that the respondent's case was grounded on tort in so far as negligence was alleged, and contract in so far as breach of contract was alleged. It was not disputed that the respondent was an employee of the appellant. The question as to whether an act or omission by an employer may support an action both in tort and for breach of contract was considered in ***Mathius vs. Kuwait Bechtel Corporation [1959] 2 All.E.R. 345*** wherein it was held that such an action was maintainable at the option of the employee either as an action in tort or as an action in contract, there being an implied term of the contract imposing a duty of care on the employer. In this case, the respondent opted not to pursue his claim in tort. This is not surprising considering that the respondent's suit was filed more than three years after the cause of action arose, and there was no evidence of the respondent having obtained any leave to have his claim in tort brought after the limitation period. The claim in tort was therefore statute barred. The respondent however argued that his action was maintainable in contract.

19. In the case of ***Kenya Cargo Handling Services Ltd. vs. David Ugwang*** (supra) which was relied upon by the respondent's counsel, the Court of Appeal held that:

"***Section 27(1) of the Limitation of Actions Act provides only that s.4 (2) does not afford a defence in actions of tort. It is not a substantive provision laying down any period of limitation, nor does it restrict the period to three years in actions for breach of contract arising out of personal injuries."***

I therefore find that although the respondent's claim under tort was statute barred, his claim under contract was not, as 6 years had not elapsed. The respondent's suit was therefore, competent under contract.

20. The particulars of negligence given in the amended plaint related to both the claim for negligence and contract. The question is what duty did the appellant have towards the respondent as an employee arising from the contract of employment? That duty is a common law duty which is best described in ***Halsbury's Laws of England 4th Edition, Vol.16 par.562***, as follows:

"***It is an implied term of the contract of employment at common law, that an employee takes upon himself risks necessarily incidental to his employment. Apart from the employer's duty to take reasonable care; an employee cannot call upon his employer, merely upon the ground of their relation of employer and employee, to compensate him for any injury which he may sustain in the course of his employment in consequences of the dangerous character of the work upon which he is engaged. The employer is not liable to the employee for damage suffered outside the course of his employment. The employer does not warrant the safety of the employee's working condition nor is he an insurer of his employee's safety; the exercise of due care and skill suffices."***

21. In this case the respondent particulised the breach by the appellant as follows:

"(a) Failing to provide the plaintiff with protective gadgets.

(b) Failing to provide the plaintiff with safe working conditions or at all.

(c) Failing to take any or adequate precautions for the safety of the plaintiff while operating the crane.

(d) Exposing the plaintiff to a risk of damage or injury of which they knew or ought to have known.

(e) Failing to ensure a safe working environment for its employees.

(f) Breach of its statutory to the plaintiff in all circumstances.

(g) Failing to give the plaintiff proper working tools.

(h) Failing to put in place an efficient and safe system of work.

22. It was common ground that the respondent was injured after the chain which was used to lift the granites snapped. The respondent blamed the appellant for failing to provide a safe system of work in that the appellant provided a suitable chain which was not suitable. The appellant on its part blamed the respondent for selecting a chain which was not suitable for the work. I cannot but concur with the finding of the Magistrate, that it was the appellant who provided the chain and whose responsibility it was to ensure that the chain was suitable for the work. The appellant must, therefore, take responsibility for the accident. Moreover, the appellant did not in its particulars of negligence alleged against the respondent, allege any negligence on the part of the appellant in selecting the chain. The allegation that the appellant chose a chain which was short therefore appears to be an afterthought. In failing to provide an appropriate chain, the appellant failed to provide a safe system of work and therefore failed in its duty to exercise reasonable care for the respondent's safety. Accordingly, I am satisfied that the appellant was liable to the respondent.

23. With regard to the quantum of damages, the respondent only produced the medical report prepared by Dr. Okoth Okere who examined him about 4 years after the accident. The accuracy of that report may be questionable. However, since there is no doubt that the respondent suffered an injury, I have no reason to fault the trial Magistrate for relying on that report. The principles upon which an appellate Court can disturb the quantum of damages awarded by a trial Judge were stated in ***Kemfro Limited t/a Meru Express Services [1976] vs. Lubia and Another*** as follows:

"***that it must be satisfied that either the Judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one or the short of this the amount is so inordinately low or so inordinately high that it should be an erroneous estimate of the damage***."

24. In this case, I am not convinced that the trial Magistrate took into account an irrelevant factor or left out of account a relevant factor nor do I find the amount awarded to be so inordinately high as to justify the intervention of this Court.

25. The upshot of the above is that I find no merit in this appeal and do therefore dismiss it in its entirety. Those shall be the orders of the Court.

Dated and delivered this 16th day of September, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Muchiri for the appellant

Ongoto for the respondent