REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Appeal 30 of 2005

MECOL LIMITED……..…….…….. APPELLANT

VERSUS

GEOFREY NJOROGE KABUU……..……. RESPONDENT

(Being an appeal from the judgment and the decree of the Chief Magistrate (Mrs. Omondi) delivered on 16th December, 2004 by Mr. Were (Resident Magistrate) in CMCC No. 4339 of 2003)

J U D G M E N T

1. This an appeal arising from a judgment delivered by a Chief Magistrate in Milimani CMCC No. 4339 of 2003. The suit was filed by Geodfrey Njoroge Kabuu, hereinafter referred to as the respondent against his former employer, Mecol Limited hereinafter referred to as the appellant. The respondent claimed general and special damages arising from injuries suffered by him during the course of his employment with the appellant. The respondent claimed that the injuries were caused by negligence on the part of the appellant and/or breach of statutory duty of care. The appellant filed a defence to the suit in which it denied the respondent's claim and the particulars of negligence and/or breach of statutory duty. In the alternative the appellant claimed that the respondent suffered injuries as a result of his own negligence. During the trial in the lower Court, the respondent testified and also called Dr. Leanda Saur Otieno. The appellant did not call any evidence. Written submissions were however filed on behalf of both parties.

2. In her judgment, the trial Magistrate found the appellant fully liable and gave judgment in favour of the respondent, and awarded him damages of Kshs.300,000/= for pain and suffering, and Kshs.480,000/= for loss of earnings and Kshs.5000/= for special damages.

3. Being aggrieved by the judgment, the appellant lodged this appeal raising three grounds as follows:

(i) The learned Magistrate erred in failing to consider the appellant's application to have the respondent re-examined by the appellant's doctor.

(ii) The learned Magistrate erred in failing to consider contributory negligence on the part of the respondent and awarding the applicant 100% liability.

(iii) The learned Magistrate erred in awarding Kshs.480,000/= as lost earnings, Kshs.300,000/= as general damages and Kshs.5,000/= as special damages.

4. Following agreement between the parties, written submissions were filed on behalf of both parties, and the Court invited to determine the appeal based on those submissions. In the submissions, the appellant abandoned ground No. 1 and submissions were made only in respect of grounds No. 2 and 3.

5. For the appellant it was submitted that the Court erred in not seeking a causal connection between the appellant's provision of a face mask, and the alleged injury allegedly suffered by the respondent for failure to provide a nose mask. ***Relying on Afro Spin Limited vs. Peter Wagumu Obiero Nakuru HCCA No. 34 of 2002,*** it was submitted that the lower court was wrong in finding the appellant liable despite the fact that no evidence on causation was called.

6. Relying on ***Coast Bus Services vs. Murunga & Others, Civil Appeal No. 192 of 1992,*** it was submitted that the trial Magistrate should have found the respondent guilty of contributory negligence to the extent of 30%. It was maintained that the issue of contributory negligence could be determined on the basis of defendant's evidence alone. It was submitted that in his evidence, the respondent showed that he needed a nose mask to avoid being hurt by gases which were where he was working, and that the appellant failed to supply the nose mask. It was argued that since the respondent knew that the nose mask was necessary, he was negligent in continuing to expose himself to the poisonous gas, and therefore should have been held at the very least 30% negligent.

7. It was submitted that the awards made were manifestly excessive and therefore ought to be set aside. It was maintained that the trial Magistrate totally misapprehended the evidence of respondent and the law applicable. Firstly, the trial Magistrate did not take into account the principle of mitigating the plaintiff's loss. Secondly, the trial Magistrate was wrong in adopting a multiplier of 20 instead of 17 which could have been consistent with the case of ***Coast Services vs. Murunga*** (supra). Thirdly the multiplicand of Kshs.2,000/= used was wrong.

8. With regard to damages for pain and suffering, it was submitted that the respondent did not prove that he suffered serious injuries. The medical reports reflected evidence of sickness which was "anecdotal". It was maintained that the extent of the respondent's illness could not be verified as there was no evidence of regularity in seeking treatment. Relying on ***Kiragari vs. Aya [1985] KLR 273*** it was submitted that a sum of Kshs.175,000/= would have been appropriate.

9. As regards the claim for lost earnings, it was submitted that evidence regarding the respondent's earnings was inconsistent. It was submitted that the respondent's salary was Kshs.2,625.65 and not Kshs.7,000/=. It was maintained that since the respondent and his wife were self employed following his retirement, and were making a monthly profit of Kshs.2,000/=, the loss suffered was only Kshs.625/=. Therefore the trial Magistrate was therefore wrong in adopting Kshs.2,000/=.

10. With regard to special damages it was contended that the same was not specifically pleaded

and therefore ought not to have been allowed. In that regard, the following cases were relied upon:

· ***George Otieno vs. Attorney General and Shadrack Kyalo, Nairobi HCCC No.711 of 2004***

· ***Provincial Insurance Company of East Africa vs. Mordekai Nandwa [1995-1998] 2 EACA 288***.

· ***Kimatu Mbuvi vs. Kioko [2007] 1EACA 139.***

11. For the respondent, it was submitted that the appeal ought to be dismissed on the following grounds:

(i) The appellant was given a chance by the learned trial Magistrate to have the respondent re-examined by the appellant's doctor but squandered the chance.

(ii) The issue of contributory negligence was considered by the learned trial Magistrate and the appellant found to be 100% to blame according to the evidence that was on record.

(iii) The award as granted by the trial Magistrate was not exaggerated.

12. It was submitted that the appellant never called any evidence to defend the respondent's claim, despite being granted an opportunity to do so. It was maintained that the trial Magistrate properly considered the evidence, and explained her reasons for finding the appellant liable. It was submitted that the respondent testified that he was only provided with the face mask to protect the eyes, but was never provided with a nose mask. The Court was referred to the evidence of the doctor who was called by the respondent, and who testified that the respondent's illness was a direct result of the nature of his work. It was argued that there was sufficient evidence to prove causation of the appellant's illness.

13. The Court was referred to ***Clifford vs. Charles Challen & Sons Limited [1957] 1KB 495,*** wherein it was held that an employer who asks his employees to work with dangerous substance must provide proper appliances to safe guard them. With regard to the quantum of damages, it was submitted that the trial Magistrate relied on the documents produced by the respondent and the doctor in assessing the damages. The trial Magistrate was also guided by appropriate authority. It was submitted that the trial Magistrate used the evidence available before her in calculating the loss of use and that she neither misread nor misapprehended the evidence. It was maintained that both the multiplier of 20 years and multiplicand of 2000 was reasonable. As regards special damages, it was maintained that the record of appeal indicates that an oral amendment was made, and particulars of special damages indicated to include Kshs.5000/= doctor's attendance. The Court was therefore urged to dismiss the appeal.

14. I have carefully reconsidered and evaluated all the evidence which was adduced before the trial Magistrate. I have also considered the judgment of the lower Court, the submissions made by both counsel and authorities cited. It was not disputed that the respondent was employed by the appellant. It is also evident from the record that the appellant did not call any evidence. Notwithstanding that fact, Section 107(1) and (2) of the Evidence Act places the burden of proof upon the respondent. The respondent testified that he was not supplied with any nose mask to protect him from poisonous gases which were being emitted during the welding exercise which was going on in the mabati enclosure where he was working.

15. That evidence not having been challenged and the respondent having called medical evidence which showed that he suffered injury as a result of poisonous gases which he inhaled, there was sufficient evidence to prove the respondent's allegations that he suffered injury and that the injury was a direct result of his working environment. The appellant as an employer was under a duty to take reasonable care for the safety of its employees against risks which were reasonably foreseeable. It is clear that in failing to provide the respondent with a nasal mask the appellant was in breach of that duty. It was alleged that the respondent was contributorily negligent in working without the nasal mask knowing the danger that was involved.

16. The respondent did testify that he requested for a nasal mask from the appellant through their shop steward, but none was supplied. In the circumstances, the appellant must bear full responsibility for exposing the respondent for failing to take adequate precaution for the respondent's injury and for failing to provide the respondent with protective gear. In the circumstances, the finding of the trial Magistrate that the appellant was liable was fully supported by evidence.

17. As regards the award of damages, it is trite law that an appellate Court can only interfere with an award of damages where the award was either based on wrong principle or is so inordinately high or low as to be a wholly erroneous estimate. (***Kemfro Limited t/a Meru Express Services vs. Lubia and Another [1987] KLR 30***).

18. In this case, the award of Kshs.300,000/= for pain and suffering was based on the injuries which were suffered by the respondent which included: severe abdominal pains, cough and bronchial asthma which led to the respondent's premature retirement from his employment. In her judgment the trial Magistrate was guided by the ***Thomas Momanyi Mukhaya vs. Furca Diatomite Industries Limited HCCC No. 90 of 1996***. In my view the award of Kshs.300,000/= was neither too excessive nor based on wrong principles as to justify the interference of this Court.

19. With regard to special damages, the record of the lower Court indicates that an application for amendment was made on 27th January, 2004 to include the special damages of Kshs.5,000/=. Appropriate receipts having been produced, I find that the damages were specifically pleaded and proved.

20. With regard to the claim for loss of use, the pay slip which was produced by the respondent as plaintiff Exh.5 showed that his basic pay was Kshs.2,170/= and that plus a house allowance and over time, the gross monthly salary came to Kshs.2,625/=. Thus the respondent did not establish his claim that he was earning a monthly salary of Kshs.7,000/=. The trial Magistrate accepted the appellant's evidence that following his retirement he was now getting a monthly income of Kshs.2,000/= through self employment.

21. I concur with the appellant that under those circumstances the respondent's loss of earnings was only Kshs.625/= monthly. The respondent was 32 years of age and the multiplicand of 20 adopted by the trial Magistrate was reasonable. Accordingly, I would calculate the damages for loss of use using the applicant's monthly loss of Kshs.625/= as follows: 625 x 12 x 20 = 150,000.

22. The upshot of the above is that I allow the appeal only to the limited extent of setting aside the award of loss of earnings of Kshs.480,000/= and substituting thereof an award of Kshs.150,000/=.

To this extent only does the appeal succeed.

Dated and delivered this 12th day of November, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Ms. Mwangi for the appellant

Advocate for the respondent, absent

Eric, court clerk