REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Appeal 7 of 2006

SHER AGENCIES LTD. …….PLAINTIFF

VERSUS

FELIX MUSUMBA …….DEFENDANT

JUDGMENT

By a decree in SPMCC at Naivasha No. 555 of 2004 judgement was entered in favour of the Respondent as against appellant as follows:

General damages Kshs 180,000/-

Special damages Kshs 2,000/-

Being aggrieved by the said judgment the appellant appealed and relied on four *(4)* grounds of appeal. These grounds were presented together during the hearing of the appeal. The appellants faulted the decision by the learned trial magistrate on the grounds that there was no prove of negligence against the appellant. Secondly, the decision by the trial magistrate was challenged by failure to comply with the provisions of **order 20 rule 4** of the **Civil Procedure rules**. In that the reasons for the decision were not given. There were no reasons given why the appellant was found liable for negligence. Counsel for the appellant also submitted that the defence evidence as well as the medical report submitted on behalf of the appellant were never taken into consideration by the trial court. The trial court taken the defence into the consideration the court would have arrived at a different conclusion. There was evidence by the defence to show that the respondent was supplied by the necessary gumboots. On quantum the medical report showed the injuries that were suffered by the respondent were of minor nature. The respondent thus ought to have been awarded Kshs 40,000/- for the soft tissue injuries.

This appeal was opposed by the Counsel for the respondent. He submitted that the respondent had established his case on a balance of probability. The respondent was injured in the course of his employment. He was treated at the clinic owned by the appellant where he was given two (2) days off duty. The respondent alleged that he was not provided with protective gear and the trial court found that the plaintiff was not provided with gumboots. It is the trial court that heard the witnesses and after the evaluating the evidence concluded that the respondent proved their case to the required standard. Counsel made reference to the case of **Makupe -vs- Nyamuro [1983] KLR page 403** where the Court of Appeal held that:

"***A court on appeal will not normally interfere with the finding of facts by a trial court unless it is based on no evidence or on misapprehension of the evidence, or the judge shown demonstrably to have***

acted on wrong principles in reaching his conclusion".

Counsel for the respondent went on to submit that the appellant admitted that the respondent was on duty on the material day. They alleged that the injuries complained about the appellant were as a result of foot rots which is a fungal infection and not caused at the place of work. The trial court after considering the evidence dismissed this line of defence and found that in addition to the injuries sustained by the respondent on his feet, he also had injuries on the arms which was consistent in the plaintiff's evidence and the medical report produced as evidence. On the issue of quantum counsel submitted that the plaintiff suffered injuries of the 1st degree burns on both hands and on the feet and according to decided cases which were submitted before the trial court general damages have been assessed for Kshs.250,000/- for pain and suffering in the case of **Ngala Shedi –vs- Jackson M. Nyambu HCCC 152 of 1992 Mombasa.** It is for the above reasons that counsel for the respondent urged the court to dismiss the appeal.

This being a first appeal this court is mandated to evaluate the evidence before the trial court and arrive at its own decision. The court must bear in mind that it never heard or saw the witness testify and give due allowance for that. The principles to be followed by the first appellate court have been set out in several decisions by the Court of Appeal and one such leading authority is a case of **Peter vs. Sundy (1958) E.A. page 429**:

"***It is a strong thing for an appellate court to defer from the finding, on a question of fact, of the Judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion."***

In this regard therefore failure by the trial court to state the concise statement of the case and identified the issues for the determination should be taken care of in this judgment. The issues raised in this appeal are two fold. Firstly whether the respondent was able to prove his case on a balance probability that the appellant was negligence. Lastly whether the assessment of the general damages is exorbitant and erroneous. Upon evaluation of evidence before the trial court, it is clear the trial magistrate considered the respondent's evidence against that by the defence. The trial court found that the injuries were sustained by the respondent on 11th May 2003 and the registered which was produced by the appellant's witness showed that the gumboots were issued to the respondent on 1st December, 2003. The court therefore disregarded this evidence and went on to find that the evidence by the defence that the respondent's injuries were as a result of fungal infection without basis because the court found that the plaintiff was on duty on the material day and he was treated at the appellant's clinic. Besides he also sustained injuries on the arm. These injuries were confirmed by both doctors Dr. Kiamba and Dr. Malik. It is for the above reasons that the court arrived at the decision after considering the authorities cited against the injuries suffered by the respondent. According to a leading text by **Winfield and Jolowicz on Tort by W. V. H Rogers, 14th Edition, London Sweet & Maxwell** at page **213** the learned authors have given the following opinion:

"***If a worker is injured just because no one has taken the trouble to provide him with an obviously necessary safety devise, it is sufficient and in general satisfactory to say that the employer has not fulfilled his duty".***

Further, pages 215-216 states *inter alia* that:

"***The employer must take reasonable care to provide his workers with the necessary pant and equipment and is therefore liable if any accident is caused through the absence of some item of equipment … He must also take reasonable care to maintain the plant and equipment in proper condition, and the more complex and dangerous that machinery, the more frequent must be the inspection."***

On the issue of the assessment of the damages it is undesirable for this court to interfere with the trial court decision in assessing general damages unless it can be proved that the court proceeded on the wrong principles of the law or that the award of damages was inordinately high or law as to present the wrong estimate. (See the case of **Kitoli –vs- Coast Bottlers Ltd [1985] KLR page 56).** Taking the totality of all the evidence before the trial court I am not satisfied that the trial court judgment should be interfered with. Accordingly the appeal lacks merit and it is hereby dismissed with costs to the respondent.

Judgment read and signed this 6th June, 2008

M. KOOME

JUDGE

6/6/2008

Before Koome – Judge

Kihara – Court clerk

Ombati for the appellant

Matiri for the respondent

Court: Judgment read and signed on 6th June, 2008

M. KOOME

JUDGE