REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

Civil Appeal 232 of 2005

NJUCA CONSOLIDATED LTD ……..… APPELLANT

VERSUS

TOM MOGAKA ONDIEKI ……..…. RESPONDENT

(Appeal from the judgment decree of S.M. S. Soita (P.M)

dated 1st September, 2005 in Kisii CMCC.NO.1334 OF 2005).

JUDGMENT

The respondent was the plaintiff in the original suit. He averred that he had been employed by the appellant as a Security Officer at a place known as Kenyerere site. On 29th July 2003 while at the said place of work, which was a construction site, the respondent was hit by a stone which was being moved by a tractor as a result which he sustained injuries, the respondent so averred. He blamed the appellant for the said accident saying that it was caused by the appellant's breach of statutory duty of care and/or negligence. He set out the particulars of breach of statutory care and negligence. He stated that he suffered injuries to his left knee swelling of the left leg from the knee to the thigh, blunt injuries to the chest and blunt injury to the back. He claimed general damages for pain suffering and loss of amenities as well as special damages in the sum of Kshs.3500/= for a medical report.

The appellant filed his statement of defence and denied the respondent's averments. However, the appellant went on to plead that if the respondent was his employee and if he was involved in an accident on 29th July 2003, the same was not occasioned due to breach of statutory duty of care or due to negligence on its part. The appellant alleged that the accident was caused and/or substantially contributed to by the negligence of the respondent. Particulars of negligence on the part of the respondent were set out. However, in a reply to the statement of defence the respondent joined issue with the appellant and denied all the allegations of negligence attributed to him.

During the hearing, the respondent testified that on the material day the appellant's manager called him to the quarry to remove some people who had gone there. While the manager was talking to him, a piece of stone hit the respondent on his left leg. The respondent said that he had not worked in that section before and so he did not know that the area was dangerous. He blamed the appellant for the occurrence of the accident because when he was called by the manager, one Mr. Wachira, he was not given any protective clothing like gum boots, gloves and a helmet. He further claimed that if the quarry area was fenced the accident would not have occurred.

To prove that he was an employee of the appellant, the respondent produced his employment card as an exhibit. His work number was 34. After the accident, the respondent was taken to Kenyerere Dispensary and later on he was treated at Gucha District Hospital. He produced the treatment records as an exhibit. Thereafter the respondent saw **Dr. Ezekiel Ogando, PW2,** who examined him and prepared a medical report at a cost of Kshs.3500/=.

In its defence, the appellant called two witnesses. The first one, James Mwangi Wachira, was the appellant's Human Resources Manager. He confirmed that he was the one who engaged the respondent in the appellant's employment as a watchman. Sometimes in June/July 2003 the respondent was redeployed to work as a casual. The witness testified that on the material day the appellant was working as a casual in the quarry area when he was hit by a stone on his left leg. He denied that he was talking to the respondent when he was hit by the stone. The witness added that all the appellant's employees had been given lessons on safety precautions by Ministry of Labour Officials. Mr. Wachira further testified that the respondent had been provided with a full protective gear. He blamed the respondent for the occurrence of the accident, saying that he ignored instructions regarding handling of a hammer. The respondent was supposed to hit a stone away from him but he did not do so.

In cross-examination, the witness said that he was present when the respondent was given a helmet, gum boots and gloves. He insisted that the respondent was injured because he mishandled a hammer, contrary to the instructions that had been given to him.

Solomon Ombui Moiga, DW2, was employed by the appellant as a supervisor. He also testified that on the material day the respondent was working as a casual labourer when he was injured but not as a watchman. He said that the respondent was splitting stones and the accident occurred because of his carelessness. DW2 added that he had instructed the respondent and other workers on how to split stones in a way that the chips would be deflected away and that the respondent had done that work for two weeks prior to the date of the accident. At the time, the respondent had gloves on his hands and a helmet on his head; the witness added. It is DW2 who took the respondent to a clinic immediately after the accident.

The learned trial magistrate held that the capacity in which the respondent was working at the time of the injury, whether as a watchman or as a casual labourer, was not an issue since either way, he was not on a frolic of his own. The learned magistrate further held that no evidence was produced by the appellant to prove that the respondent had been supplied with gum boots.

Liability was apportioned at 80% against the appellant and 20% against the respondent. Regarding the respondent's injuries, the trial court established that the chest injury had nothing to do with the material accident. The trial court further held that the respondent exaggerated his injuries when he went to see Dr. Ogando. General damages on full liability were assessed at Kshs.80, 000/= and after taking into account the 20% contributory negligence, the net sum payable was Kshs.64, 000/=. Special damages of Kshs.3, 500/= were allowed.

The appellant was aggrieved by the said decision and preferred an appeal to this court. The following grounds of appeal were set out:

"***1. The learned trial magistrate erred in fact and in***

law in holding that the respondent had proved

his case on a balance of probabilities, when

in fact, the respondent's evidence was at

variance with his pleadings, thus negating

proof of the respondent's case.

2. The learned trial magistrate erred in law and in

fact when he held that the capacity in which the

respondent was working with the appellant on the material day was a non-issue, whereas it was material in determining the liability and/or responsibility of the appellant to the respondent.

3. The learned trial magistrate erred in law in believing and relying on the evidence of the respondent when the trial magistrate had found as a fact that the respondent had lied to his own Doctor and hence was a liar incapable of being believed.

4. The learned trial magistrate erred in

apportioning liability in the ratio of 80:20 in

favour of the respondent, without assigning

any reason for such apportionment, thus

constituting an error in exercise of judicial

discretion.

5. The learned trial magistrate erred in

apportioning liability of 80:20 in favour

of the respondent, contrary to the evidence

on record.

6. The learned trial magistrate failed to exhaustively and/or cumulatively evaluate the

evidence on record and thus arrived at an

erroneous conclusion that the appellant was liable for the injuries suffered by the respondent.

7. The award of general damages was/is

manifestly and/or inordinately high, thus

connoting an error in principle, taking into

account the proven injuries suffered by the

respondent."

Mrs. Asunah for the appellant submitted that in paragraph 5 of his plaint, the respondent pleaded that on 29th July 2003 he was carrying out his duties as a Security Officer when he was hit by a stone which was being moved by a tractor. However, in his evidence in chief, he made no mention of any tractor. He merely stated that he was talking to the appellant's manager when he was hit by a stone.

From the evidence on record, it is true that the respondent's pleadings were at variance with his evidence in chief. There was neither evidence of any excavation that was being done on the material day nor of any vehicle or tractor that was being used at the scene of the accident.

The capacity in which the respondent was working at the time of the accident was important because parties are bound by their pleadings. The conduct of a case and the determination thereof is largely dependant on the issues that are pleaded and proved. See **WAREHAM t/a A. F. WAREHAM & 2 OTHERS VS KENYA POST OFFICE SAVINGS BANK** [2004] 2 KLR 91.

In that matter, the Court of Appeal stated as hereunder:

"***We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings and the issues of fact or law framed by the parties or the court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail."***

If the respondent was a security man who happened to have been summoned to the quarry area by the appellant's manager when a stone that was being moved by a tractor rolled down and hit him, the finding on liability would have been different from a case where the respondent was lawfully engaged in crushing stones and while so doing a chip happened to hit his left leg and injured it. In the first scenario, liability would most likely be 100% against the appellant. On the other hand, if the facts are proved to have been as per the latter case, it can be argued that the respondent is partially to blame for the accident. Every job has its attendant risks, which an employee knows or is presumed to know.

From the evidence on record, I am satisfied that the respondent was on the material day engaged as a

casual worker and was splitting stones when a chip thereof hit his left leg. There was no truth in his averment that he was talking to the appellant's manager when he "***was hit by a stone which was being moved by a tractor."***

The respondent pleaded that the appellant failed to provide a safe system of work and emphasized that he was not provided with gum boots. When such an averment is made, a plaintiff has an obligation to adduce evidence as to what the proper system of work was or ought to have been.

In ***"WINFIELD AND JOLOWICZ ON TORTS"*** 13th edition page 203, the learned authors have stated as follows:

"***At common law the employer's duty is a duty***

of care and it follows that the burden of proving

negligence rests with the plaintiff workman

throughout the case. It has even been said

that if he alleges a failure to provide a reasonably

safe system of working the plaintiff must plead,

and therefore prove, what the proper system was

and in what relevant respect it was not observed."

It was not denied by the appellant that the respondent was its casual employee at the time of the accident. Both DW1and DW2 admitted as much. Both of them were present when the accident occurred. They stated that the respondent was splitting stones using a hammer. **James Mwangi Wachira, DW1**, alleged that a stone chip went through the respondent's gum boots and injured his leg. The witness said he had no record to show that the respondent had been issued with any gum boots. **Solomon Ombui Moiga, DW2,** produced a book that showed that the respondent was provided with a jembe, a spade, gloves and a helmet only. Both witnesses said that the accident occurred because the respondent did not do his work as per the instructions that had been given to him.

On the other hand, the respondent's contention was that he was injured because he had not been provided with gumboots. I find and hold that the appellant's evidence did not displace the respondent's contention that he had not been supplied with gumboots. Likewise, the respondent did not adduce evidence to show that he went about his work carefully and in strict adherence to instructions as had been given to him. In fact the respondent did not even admit that he was splitting stones when the accident occurred. In the circumstances, liability should have been apportioned equally between the appellant and the respondent. I therefore set aside the learned trial magistrate's apportionment of liability at 80:20 and substitute therefor an apportionment of liability at **50:50** between the parties.

Coming to the issue of quantum of damages, the trial court considered the two medical reports on record and found that the respondent had not given true and accurate information to Dr. Ogando. It therefore relied more on the medical report by Dr. Owuor who stated that the only significant finding regarding the respondent's injuries was a cut wound measuring about 4 cm on the left leg, which had healed well.

Mr. Ogweno, learned counsel for the respondent, cited several authorities regarding appellate Courts' handling of appeals against quantum of damages. The common holding in those decisions and which I accept to be right is that an appellate court will not disturb an award of damages by a trial court unless it is shown that the same is inordinately high or low as to represent an entirely erroneous estimate. An appellate court will also interfere with a trial court's assessment of damages where the trial court

proceeded on wrong principles or misapprehended the evidence in some material aspect and thereby arrived at a figure that is either inordinately high or low, see **BUTT VS KHAN** [1981] KLR 349.

The advocates for the parties herein filed written submissions and cited several authorities to guide the learned trial magistrate in his assessment of damages. The respondent's advocate urged the trial court to award Kshs.170, 000/= whereas the appellant's advocate submitted that an award of Kshs.40, 000/= was sufficient. The learned trial magistrate did not refer to any of the cited cases before he went on to award Kshs.80, 000/=.

I am of the view that the award of Kshs.80, 000/= for a cut wound which had healed well was inordinately high. Having considered the nature of the respondent's injury and other relevant decided cases, I set aside the award of

Kshs.80, 000/= and award Kshs.50,000/= on full liability. The appellant did not appeal against the award of

Kshs.3, 500/- as special damages and consequently I will not interfere with the same.

In conclusion, the appellant will pay a net sum of Kshs.25, 000/= as general damages plus Kshs.3, 500/= as special damages. As the appellant has partially succeeded in this appeal, it will pay half of the costs before the trial court and half of the costs of this appeal.

DATED, SIGNED and DELIVERED at KISII this 18th day of July, 2008.

D. MUSINGA

JUDGE.

Delivered in open court in the presence of:

Mr. Ochwangi HB for Mrs. Asunah for the Appellant

Mr. Ogweno for the Respondent.

D. MUSINGA

JUDGE