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

Civil Appeal 1026 of 2004

DEVKI STEEL MILLS LIMITED…..……. APPELLANT

VERSUS

STEPHEN NGUI MUSYOKI...…...……..RESPONDENT

J U D G M E N T

This appeal arises from a suit which was filed in the SRM's Court at Nairobi by Stephen Ngui Musyoki (hereinafter referred to as the respondent). The suit was brought against Devki Steel Mills Ltd (hereinafter referred to as the appellant), who was at the material time the respondent's employer.

The cause of action arose from an accident suffered by the respondent at the appellant's premises, during the course of his employment, when molten metal splashed onto the respondent causing him to suffer serious injuries. The respondent contended that the accident was caused by the negligence and breach of contract of employment by the appellant's servants or agents in failing to provide a safe system of work, failing to take adequate precautions towards the plaintiff's safety and exposing the plaintiff to a risk of injury which they knew or ought to have known.

In its defence, the appellant admitted having employed the respondent but denied having been negligent or in breach of its statutory or contractual duty. The appellant further denied the occurrence of the alleged accident or that the respondent sustained serious injuries.

At the hearing of the suit, 4 witnesses testified in proof of the respondent's claim. In a nutshell their evidence was as follows: On the material day, the respondent was working for the appellant as a furnace charger. His duty was to collect scrap, sort them out and put in the furnace. He was working with Stephen Muthama Kioko (Muthama) whose duty was to push the scrap down so that it can melt. At about 3.00 p.m. when the two had just resumed work from lunch break, the respondent bent down to collect scrap to charge the furnace and was shocked when the furnace suddenly exploded and he was burnt on the right thigh. The respondent was taken to the first aid room by Muthama, and he was given some first aid then told to go and rest. The next day was a public holiday. The respondent went to the clinic of one Erastus Thuo Kamau (Dr. Thuo), where he was attended. Dr. Thuo noted that the respondent had superficial wounds on his thigh. Five days later the respondent was examined by Dr. Cyprianus Okoth Okere a physician who noted that the respondent suffered burns on right thigh, right knee, and on right lower leg and foot. The surface area burns was 8%. He noted that the injuries were soft tissue injuries though extensive.

The appellant also called 4 witnesses in support of their defence. Their evidence was as follows:

On the material day the respondent was on duty. He worked form 7.00 a.m. to 7.00 p.m. Amongst the persons who saw him on duty were Gibson Kahisa a general worker and Jonathan Wambua who was the

furnace manager. Both witness maintained that there was no explosion of the furnace nor did the respondent suffer any injury. Stephen Mutuku the assistant personnel manager testified that the respondent did not report any injury nor was the witness aware of any furnace explosion. Susan Chebet Rono who works with the appellant company as a nurse also denied that the respondent was taken to her for first aid, or that she refused to give him any first aid. She produced her injury register for the relevant period and confirmed that the respondent's name did not feature in the register.

Counsel for the respondent filed written submission urging the court to find in favour of the respondent and award him general damages of Kshs.250,000/=. Counsel for the appellant, also filed written submissions urging the court to dismiss the respondent's suit. Counsel contended that the respondent had failed to prove on a balance of probability that there was any accident, or that the accident was caused by any negligence on the part of the appellant. In the alternative counsel for the appellant urged the court if inclined to find for the respondent to award no more than Kshs.20,000/= as general damages.

In her judgment, the trial magistrate found that the respondent was on duty on the material day, and that there was sufficient evidence confirming that there was an explosion in the furnace, and that the respondent was injured. She rejected the appellant's evidence and found that the appellant was negligent as the accident was caused by new employees who were not properly trained. The trial magistrate awarded the respondent general damages of Kshs.180,000/=.

Being dissatisfied with that judgment the appellant has brought this appeal raising 8 grounds. Generally the appellant faults the trial magistrate's finding on liability contending that there was no evidence to support the trial magistrate's finding. The appellant also complains that the award of Kshs.180.000/= was excessive and unjustified.

In his submissions in support of the appeal counsel for the appellant submitted that the respondent did not prove his case as pleaded in the plaint. He pointed out contradictions in the respondent's evidence, and noted that the evidence adduced by the defence witnesses was never considered. He maintained that the doctor's evidence could not prove that the respondent suffered injuries at the appellant's premises, or that such injuries were a result of the appellant's negligence.

As regards the damages awarded, it was submitted that the doctor having testified that the burns were superficial soft tissue injuries with no disability anticipated, the award of Kshs.180,000/= was excessive as it did not take into account comparative awards of soft tissue injuries which were cited to the trial magistrate. It was submitted that an award of Kshs.50,000/= would have been appropriate.

For the respondent it was maintained that the respondent and his witness explained how the accident happened. It was submitted that the evidence of the defence witnesses was contradictory and unreliable. It was submitted that the decision of the trial magistrate was proper and the award fair. The court was therefore urged to uphold the same.

I have carefully reconsidered and evaluated the evidence as I am expected to do in this first appeal. It is clear that it was not in dispute that the respondent was employed by the appellant and that he was on duty on the material day. The issue was whether there was an accident at the appellant's premises involving the respondent, if so whether the accident was caused by any negligence or breach of contractual duty on the part of the appellant, and what injury if any that was suffered by the respondent.

Both the respondent and his witness Muthama swore that a metal exploded in the furnace and splashed molten on the respondent, burning him on the right leg/thigh. The appellant's witnesses denied that any such accident occurred. It is however noteworthy that the defence witness Gibson Kahisa conceded that he was not working on the same floor with the respondent. He did not see the respondent being injured nor did he know whether the respondent was injured. The furnace Manager Jonathan Wambua also maintained that there was no explosion of the furnace nor did the respondent suffer any injury. However, it is important to note that all the defence witnesses were still in the employment of the appellant at the time of testifying, and therefore their evidence had to be treated cautiously. In assessing the evidence of the witnesses, I have carefully examined the exhibits which were produced by the appellant in support of

their contention that the respondent suffered no injury. These were the injuries register, daily attendance sheets, and casual employees wage sheet. (defence exhibit 1, 2 and 3). Both the casual wages payments sheets and the daily attendance register, contain typed names of the employees and also the following typed words: "no injury or other claim". It is evident that the signatures of the employees are appended against their names with the pre-typed words. It cannot therefore be said that the pre-typed words were a confirmation that the employee whose signature is appended thereto did not suffer any injury. Indeed, it was conceded by the defence witness Jonathan Wambua that everything except the signature of the employee was pre-recorded. The respondent's explanation that one had to sign the attendance sheet in order to get paid is consistent with the evidence of this witness. Indeed this is confirmed by the case of Keffa Panyako who was recorded in the register of injuries as having been injured on the 10th December, 2002 and yet in the attendance register for that date, he has signed against his names with the words "no injury or other claim" appearing next to the signature. The registers produced by the appellant were therefore not of much help. The trial magistrate who saw and assessed the demeanour of the witnesses chose to believe the evidence of the respondent as against that of the appellant with regard to the occurrence of the accident. I have no reason to depart from this finding.

In his plaint, the respondent pleaded that the accident was caused by the negligence and or breach of employment and terms thereof on the part of the appellant, his agent and or his servants. In his evidence, the respondent blamed some newly employed workers who had put scrap which should not have been put in the furnace. The respondent's complaint was not the failure of the appellant to put in place a safe system of work, but the casual departure from that system as a result of the negligence of an individual fellow workman. The respondent did not however, identify any such employees nor did he testify as to any particular training that the employees were not exposed to. In fact under cross-examination, the respondent conceded that he did not see anybody putting in any scrap, and that he could not make out what caused the explosion. Although Muthama claimed to have witnessed the accident, he was also unable to identify the furnace charger who put in the metal which exploded. He in fact conceded that he did not see the metal which was put in the furnace. It is therefore evident that both the respondent and Muthama could not state with certainty who or what was responsible for the explosion. There was no evidence adduced by the respondent to show any risk of injury which he was exposed to, which the respondent knew or ought to have known, nor was there any evidence that the appellant failed to provide a safe system of proper instruction and supervision. The respondent maintained that he was not supplied with overalls and that if he had overalls he could not have sustained burns. I fail to appreciate the logic of the respondent's reasoning. For one, the overalls could not have protected the legs and secondly, the overalls could not have provided protection against burns caused by molten metal. For these reasons I find that the respondent failed to prove any negligence or breach of statutory, contractual or common law duty on the part of the appellant. Accordingly there was no basis upon which the appellant's liability could arise.

As regards the injuries suffered by the respondent, both the respondent and Muthama testified that the respondent was burnt from the "right thigh down to the foot". Dr. Thuo who first examined the respondent a day after the accident indicated in the treatment notes that he was treated for burns on his right thigh and that the wound was superficial. Dr. Cyprianus Okoth Okere who examined the respondent 5 days after Dr. Thuo noted burn wounds on the upper leg, burn wounds on the knee, and lacerated scars on the lower leg and foot. He assessed the degree of burns at 8%. It is apparent that the observation of the injury by the two doctors was not consistent. It is difficult to understand why Dr. Thuo did not note any burns on the respondent's knees or the right foot if indeed the respondent had suffered these injuries in the accident. Secondly, the injuries noted by Dr. Thuo were superficial injuries while the injuries noted by Dr. Okere which were extensive soft tissue injuries with 8% area.

I am inclined to believe that the observations by Dr. Thuo which were made a day after the accident was the more accurate. I would therefore reject the report of Dr. Okere as either exaggerated or inclusive of injuries other that those suffered by the respondent on 11th December, 2002. The award of Kshs.180,000/= made by the trial magistrate having been inclusive of the doubtful injuries indicated in Dr. Okere's reports, I find that the award is so excessive as to justify the intervention of this court. I would therefore have reduced the general damages to a sum of Kshs.100,000/=. However, since the respondent failed to establish liability on the part of the appellant his suit could not succeed.

Accordingly, I do allow this appeal, set aside the judgment of the trial magistrate and substitute it with an order dismissing the respondent's suit.

In the circumstances of this case, I do not find it appropriate to award any costs. Each party shall therefore bear his own costs in this appeal and in the lower court.

Those shall be the orders of this court.

Dated and delivered this 30th day of September, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Miss Mwangi for the appellant

Advocate for the respondent absent