REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

Civil Appeal 102 of 2007

VYATU LIMITED ……. APPELLANT

VERSUS

BENARD AUNDA OMOORIA …….. RESPONDENT

From original conviction and sentence in Criminal case number 241 of 2004 of the Senior Resident Magistrate's Court at Maseno.

JUDGMENT

The appellant Vyatu limited is a limited liability Company incorporated in Kenya and having registered offices in Kisumu. The respondent Bernard Aunda Omooria is an adult Kenyan and was at the material time employed by the appellant as a general worker.

On or about the 18th December 2002 the respondent was in the course of his employment engaged in cutting plastic scraps when he was injured on his right thumb. He attributed the injury to the appellant's breach of statutory duty in:-

(i) Failing to provide a safe working place

(ii) Employing the respondents without instructions as to the dangers likely to arise in connection with his work or without providing a safe system of work.

(iii) Failing to provide a safe system of work

(iv) Failing to maintain consistently and keep in position any fencing or guard.

In the alternative, the respondent attributed his injury to the appellant's negligence. He therefore sued the appellant claiming general damages and costs.

The appellant filed its defence in which it denied all allegations of breach of statutory duty and/or negligence made against itself by the respondent. It contended that if the respondent suffered injuries as alleged then the same were caused by and/or contributed to by his sole and/or substantial negligence and/or carelessness.

In the alternative, the appellant contended that if the plaintiff suffered injuries as alleged then the same were caused by and/or contributed to by circumstances which could not reasonably be foreseen by itself.

After the trial before the Ag. Senior Resident Magistrate at Maseno, liability was apportioned between the appellant and the respondent at the ratio of 90%: 10% respectively.

The learned Senior Resident Magistrate then awarded the respondent general damages in the sum of Kshs. 80,000/= for pain, suffering and loss of amenities less 10% respondent's contributory negligence i.e. a total sum of 72,000/=. The respondent was also entitled to costs and interest of the suit.

The appellant being aggrieved and dissatisfied with the judgment of the learned Senior Resident Magistrate lodged this appeal praying that the judgment in Maseno SRMCC number 241 of 2004 be set aside and the said suit be dismissed with costs or alternatively, the court do find the award of general damages and liability excessive and replace the same with an appropriate and reduced award of damages and apportion of liability.

The appellant also prays for the costs of the appeal.

The appeal is based on the following grounds:-

(i) That the award of General Damages by the learned Magistrate is excessive and puntive considering the nature of the injuries suffered by the respondent.

(ii) That the learned Magistrate erred in law and fact in awarding general damages for injuries suffered while there was insufficient evidence to support the same

(iii) That the learned Magistrate erred in law and in fact by ignoring the authorities submitted by the appellant in its submission when arriving at a judgment in favour of the respondent.

(iv) That the learned Magistrate erred in law and fact in finding that the appellant was 90% liable for the injuries of the respondent while it is apparent that the respondent failed to prove any negligence on the part of the appellant.

(v) That the learned Magistrate erred in law and fact in failing to appreciate that the respondent was the sole and/or substantial author of his own misfortunate.

(vi) That the learned Magistrate erred in law and fact in disbelieving the submission of the appellant without affording sufficient reasons while believing that of the respondent against the weight of evidence in arriving at his decision.

(vii) That the learned Magistrate disregarded totally the evidence from the respondent as it emanated from cross-examination

(viii) That the learned Magistrate disregarded totally the evidence from the appellant's witnesses when arriving at a decision on quantum and liability

At the hearing, the appellant was represented by learned counsel, Mr. Gadhia while the respondent was represented by the learned Counsel, Mr. Ochieng.

Mr. Gadhia argued that the suit in the lower court ought to have been dismissed on account of contradiction. He said that while the pleadings show that the respondent was injured on the right arm the respondent stated that he was injured on the left arm. Mr. Gadhia contended that a party is bound by his own pleadings. He went on to state that the respondent was in sole control of the instrument which injured him, liability could not in the circumstances attach to his employee, the appellant. In that connection Mr. Gadhia referred to the decisions in the cases of WILSON N. MUSIGISA =vs= SASINI TEA & COFFEE KERICHO HCC / APP NO. 15 OF 2003 and MUMIAS SUGAR CO LTD =vs=

SAMSON MUYINDA KAKAMEGA HCC / APP NO. 58 OF 2000. He contended that the appellant could not be found responsible for the respondent's injury and in any event, the appellant did establish that the respondent was supplied with protective gear and failed to use it thereby rendering him culpable for his injuries.

On damages, Mr. Gadhia, argued that the award made by the lower court was excessive and the contribution of 10% against the respondent was very low. He suggested a 50% contributory negligence and general damages not exceeding Kshs. 30,000/= since the respondent suffered minor and soft tissue injuries.

On his part, Mr. Ochieng, for the respondent argued that the respondent's suit was based on negligence and breach of statutory duty by the appellant. He said that the pleadings showed that the respondent was injured while in the course of his employment and that no dispute existed as to his employment. He also said that the medical documents tendered in evidence confirmed the respondent's injuries and that he was injured by a panga. He further said that the appellant's exhibit D. Ex 2 showed that the appellant was under a statutory obligation to supply the respondent with protective gear but this was not done as the gloves register was not produced in court to show that it was done. He contended that the respondent was not supplied with the gloves unlike in the case of Mumias Sugar Company limited =vs= Samson Muyinda (supra) where no evidence existed to show that protective gear was provided at all.

As for damages, Mr. Ochieng argued that the award made by the lower court was not excessive considering that the authorities cited in the lower court by the appellant were about twenty one (21) years and fifteen |(15) years old. He said that the authorities were considered by the trial magistrate before he made his decision on quantum.

Mr. Ochieng concluded by stating that the evidence led by the respondent showed and was confirmed by PEX1 & 2 that he was injured on the left arm. He said that the injury was even confirmed by the appellant's witnesses and that the plaint is indicative of injury on the left arm. He said that the appeal is baseless and ought to be dismissed.

The cardinal obligation of this court is to reconsider the evidence, asses it and make appropriate conclusion on such evidence bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (See SELLE & ANOTHER =vs= ASSOCIATED MOTOR BOAT CO LTD OTHERS [1968] EA 123 and EPHANTUS MWANGI & ANOTHER =vs= DUNCAN MWANGI WAMBUGU [1982 – 88] IKAR 278)

The case for the respondent was that he was at the material time employed by the appellant and was on the 18th December 2002 assigned the duty of cutting scrap plastic into pieces for the purpose of grinding. He was using a panga (machete) in performing the task and was in the process injured on his left thumb when he was cut by the panga. He later filed a claim against the appellant for damages arising out of the injury.

The appellant's case was that the respondent was employed as a general worker and would be assigned any work available. He was on the material date assigned the work of splitting plastic and was provided with protective gloves for the purpose. He was however slightly cut by a panga he was using but was to blame for the injury since he had been supplied with safety gear.

Basically, the issue that arose for determination is whether the injury occasioned to the respondent was as a result of the appellant's negligence and/or breach of its statutory duty and if so, whether the respondent was entitled to damages and to what extent.

The fact that the respondent was at the material time employed by the appellant and that he was injured on his left thumb while in the course of such employment was not in dispute.

On liability, the respondent (PW1) in his evidence said that he was cut on his left thumb while cutting plastic using panga. He said that he had not been provided with protective gloves at the time. He also

said that the gloves had not been provided to him for a period of one and half years but after the month of August 2002 they were provided. He further said that he was cutting the scrap plastic in a hurry but was injured because of lack of protective gloves and the slippery nature of the panga handle.

The appellant's supervisor Lukas Okom Ouko (DW1) was categorical when he stated that the respondent had at the material time been provided with gloves and was putting them on when he was injured. He (DW1) said that the record to show that the respondent was issued with protective gloves was lost after being produced in another case. He exhibited notices [EX 2 (a) (b) (c)] showing that the appellant's employees were required to apply safety measures in the course of their duty.

From the foregoing, it is apparent that the appellant was very much aware of its statutory duty to provide a safe working environment and protective gear to its employees. It contended that it provided protective gloves to the respondent on the material date but that the respondent was to blame for his injury. It's representative (DW1) said that the record to show that the respondent was provided with protective gloves could not be availed to the court because it had been misplaced after being produced in another court case. This was given credence by a letter dated 15th March 2005 from a law firm to the appellant (i.e DEX 1).

Although the respondent indicated that he had not been provided with protective gloves on the material date, the evidence available did establish that most likely than not, the gloves were provided to him. He conceded that from the month of August 2002 he was provided with gloves. He was injured on 18th December 2002 meaning that he must have had the protective gloves. He did not give any explanation why the gloves were not provided on the material date while they had all along since August 2002 been provided for his safety. Why was the material date an exception?.

This court would find that the appellant did on a balance of probabilities establish that indeed the respondent had been provided with protective gloves on the material date. He may have or may not have used them. Whether the gloves were capable of protecting an employee from a sharp panga is another thing dependant on the type of gloves. If the respondent was cutting plastics using a panga then it was required to be and must have been a sharp object. If the panga cut through the gloves (assuming that the respondent was wearing them) then the appellant may not have supplied appropriate gloves for the task. It was to that extent liable. However, the respondent was equally liable. He was a person used to performing similar task and was expected to exercise care. He said that he was in a hurry while cutting the plastic. He was thus careless while performing his duty and cannot entirely blame the appellant for his injury. Besides, he was in control of the offending instrument. If anything, he was more culpable than the appellant. Had he exercised due care and attention while cutting the plastic he would not have suffered anything with or without proper gloves. However, in the present circumstances, control alone ought not be a determinant factor in holding that the appellant would escape liability on the basis of breach of statutory duty or outright negligence. Failing to provide proper protective gear is almost as good as failing to provide any gear.

The learned trial magistrate was very much alive to the fact that the respondent was also to shoulder some degree of responsibility for his injury when he stated that:-

" The plaintiff was also reasonably expected to exercise a degree of caution when cutting the plastics knowing that he could be cut. He should also assume a proportion of liability for the injury".

The learned Magistrate then proceeded to apportion liability at 10% against the respondent and 90% against the appellant.

This court would agree with the learned counsel for the appellant that the respondent's negligent contribution to his injury should have been much higher than 10%.

Consequently, on liability, the court would hold the appellant responsible at 30% and the respondent at 70%.

The respondent would thus be entitled to damages from the appellant to the extent stated hereinabove.

In assessing general damages, the court takes into account the particular circumstances of the injuries suffered the extent and duration of pain prior to healing as well as the residual disabilities. In so doing, the court is guided by conventional awards for comparative cases. Each case is however dependant on own circumstances.

The assessment of general damages is therefore a matter of judicial discretion which puts an appellant in a position where he has to demonstrate that the award made by a trial court was wrong or that it was based on wrong principle or was so manifestly excessive or inadequate that the application of a wrong principle may be inferred (See, KIGARAGARI =vs= AYA [1985] KLR 273). The respondent, according to the medical report by Dr. Nyamogo (PEX3), sustained a deep extensive cut to the left thumb which healed well after treatment.

After considering comparative cases cited by the appellant, the learned trial magistrate awarded a sum of Kshs. 80,000/= general damages for pain, suffering and loss of amenities. He took into account evidences of inflation and made the award. There was no demonstration from the appellant that the award was wrong or that it was based on wrong principles.

This court finds no good reason to interfere with the award and upholds it.

In conclusion, it may be noted that a party is bound by his pleadings and that pleadings may be amended at any stage of the proceedings (See Order VIA Civil Procedure Rules). It is apparent that there was a cancellation in the pleadings to show that the respondent was injured on the left thumb rather than the right. The evidence with regard to the injury on the left thumb was no disputed. The case proceeded on the basis that the respondent suffered injury on his left thumb. It may therefore be safely inferred that the cancellation was more or less a correction of a typographical error rather than an amendment. The failure to authenticate the cancellation would not be a factor to disprove that the respondent was injured on the left thumb. The respondent's pleadings regarding his injury were not in contradiction with the evidence on record.

In the end result, the judgment of the lower court is upheld with variation that liability is apportioned at 30% against the appellant and 70% against the respondent. The general damages awarded shall remain Kshs. 80,000/= less 70% respondent's contributory negligence. i.e. Kshs. 24,000/=.

The respondent is entitled to Kshs. 24,000/= general damages for pain, suffering and loss of amenities plus costs and interest of the suit.

The appellant is awarded the costs of the appeal.

Ordered accordingly.

Dated, signed and delivered at Kisumu this 30th day of September 2008.

J. R. KARANJA

JUDGE

In the presence of:

Mr. Maube for Ochieng for Respondent.

JRK/aao