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

Civil Appeal 633 of 2002

SIMON MUMO MALONZA……...…….APPELLANT

VERSUS

BRITISH AMERICAN TOBACCO (K) LTD....RESPONDENT

J U D G M E N T

Simon Mumo Malonza (hereinafter referred to as the appellant) was the plaintiff in the Chief Magistrate's Court at Nairobi Civil Case No.1488 of 1999. He had sued his former employer British American Tobacco (K) Ltd (hereinafter referred to as the respondent), seeking general and special damages for personal injuries suffered by him, in an accident, during the course of his employment. The appellant contends that the accident was caused by the negligence and/or breach of statutory duty of the respondent. The respondent filed a defence denying the appellant's claim and particulars of negligence attributed to the respondent, contending that the accident was in fact caused by the negligence of the appellant. In the alternative the respondent claimed the defence of *volenti nonfit injuria*.

During the trial the appellant was the only witness who testified. He explained that he was employed by the respondent as a leaf technician and that he was assigned a motorbike registration No.KAG 784A to use in the course of his employment. On the material day, the appellant was riding the motorbike from Suba in Kuria to Migori when the motorbike experienced mechanical problems. The appellant tried to brake but he was unable to do so and the motorbike crashed. The appellant suffered injuries which included a fracture of the left leg and bruises on the knees. The appellant was treated at Ombo Hospital from where he was transferred to the Aga Khan Hospital. The appellant blamed the respondent for the accident contending that the accident was caused by a mechanical defect. He produced a letter dated 14th July, 1999 written by the respondent in which the respondent indicated that they were pursuing the processing of the appellant's insurance compensation under their general personal accident cover.

The respondent did not call any evidence. However both counsel for the appellant and counsel for the respondent filed written submissions.

For the appellant it was submitted that the issue of liability was settled by the letter dated 14th July, 1999. It was maintained that the respondent having committed itself in the letter that it was processing the appellant's compensation for damages, it was estopped from denying liability. The court was further urged to find the appellant's evidence sufficient to establish that the motorcycle given to the appellant by the respondent for the performance of his duties, was mechanically defective and was poorly maintained. It was maintained that the respondent having failed to call any evidence, did not prove the particulars of negligence alleged against the appellant nor did the respondent prove its defence that the doctrine of *volenti nonfit injuria* applied. It was submitted that the respondent could not depart from its pleadings by introducing a new defence regarding an independent contractor which defence was never pleaded. The

court was urged to find any arrangement between the respondent and any third party irrelevant to the contract between the appellant and the respondent. With regard to quantum the court was urged to award the sum of Kshs.500,000/= as general damages, 137,410/= as special damages and 50,000/= as costs for future medical operations.

For the respondent it was submitted that the appellant had not proved his case against the respondent to the required standard. It was maintained that there was no independent evidence supporting the appellant's contention that he was involved in an accident nor was there any evidence establishing the appellant's contention that the motorcycle was defective. In the alternative it was contended that from the appellant's own evidence, it was apparent that the motor cycle was supplied and maintained by a third party, Motor Mart, who were independent contractors. It was therefore submitted that the respondent cannot be blamed for the negligence of the third party. The court was urged to find the appellant not liable. With regard to quantum it was submitted that an award of between the sum of Kshs.90,000/= and Kshs.120,000/= was adequate.

In her judgment, the trial magistrate rejected the appellant's contention that there was admission of liability. She found that the appellant had neither established that there was an accident nor did he prove the particulars of negligence or breach of contractual duty alleged against the respondent. She therefore found the respondent not liable and dismissed the appellant's suit.

Being dissatisfied, the appellant has lodged this appeal raising six grounds all touching on liability as follows: -

(1) That the learned trial magistrate erred in law and in fact in finding and holding that the respondent was not liable to compensate the appellant.

(2) That the learned trial magistrate erred in law and in fact in failing to find and hold that the respondent was in breach of its contractual obligations to the appellant as its employee.

(3) That the learned trial magistrate erred in law and in fact in failing to find and hold that the respondent had committed itself to compensate the appellant.

(4) That the learned trial magistrate erred in law and in fact in dismissing the appellant's suit.

(5) That the learned trial magistrate erred in law in failing to consider the submissions of the appellant.

(6) That the learned trial magistrate erred in law in considering matters which were not pleaded and proved by the respondent.

Counsel for the appellant who argued all the grounds together submitted that there was no mandatory requirement that a police abstract report must be produced in evidence in an accident case. He maintained that there was sufficient evidence before the trial magistrate establishing the occurrence of the accident. He drew the court's attention to the fact that it was the respondent who arranged the transfer of the appellant from Ombo Hospital to the Aga Khan Hospital Kisumu and paid all the hospital bills. The respondent could not therefore deny the accident. He further referred the court to documents which were produced by the appellant in evidence. He maintained that there was implied admission of the accident in the letters whilst the personal accident claim form was duly completed by the respondent's own doctor. One of the documents produced was also a medical report from the respondent's doctor who examined the appellant. It was maintained that the respondent having failed to call any evidence the trial magistrate misdirected herself in laying undue emphasis on the absence of the police abstract report. It was further submitted that the motorcycle belonged to the respondent and it was therefore the duty of the respondent to have the motorcycle inspected after the accident. It was contended that the maintenance records for the motorcycle if any, were in the possession of the respondent and the court was wrong to blame the appellant for the failure to produce the documents.

For the respondent it was submitted that the respondent clearly denied the accident in its pleadings and therefore it was upon the appellant to prove the occurrence of the accident and the fact that the same was caused by the negligence of the respondent. It was maintained that the appellant failed to discharge this burden. It was further submitted that since the motorcycle was supplied, maintained and repaired by Motor Mart who was an independent contractor the respondent could not be held liable. It was contended that there was no evidence connecting the appellant's injuries to any act of omission on the part of the respondent. Finally it was submitted that the issue of liability remained in dispute and the letters and documents produced by the appellant were not conclusive proof of liability.

I have carefully considered and evaluated the evidence which was adduced before the trial magistrate. It is clear that the burden of proof in this case was upon the appellant who desired the court to give judgment in his favour, to redress his loss alleged to have been suffered as a result of the respondent's negligence and/or breach of statutory duty. It was therefore upon the appellant to establish the circumstances upon which his case was grounded. As per the further amended plaint, which formed the basis of the appellant's claim, the appellant contended that he was involved in an accident during the course of his employment whilst riding a motorcycle which was allocated to him by the respondent for performance of his duty. The motorcycle is alleged to have been owned and maintained by the respondent. In its defence, the respondent admitted having employed the appellant but denied that the appellant was injured whilst lawfully carrying out his duties. The respondent also denied being negligent and contended that it was in fact the appellant whose negligence caused the accident.

Thus in order for the appellant to succeed in his action he had to establish the following facts:

1. That he was injured in an accident involving a motorcycle owned by the respondent.

2. That at the time of the accident appellant was lawfully riding the motorcycle during the ordinary cause of his duties.

3. That the accident was caused by the respondent's negligence and or breach of contractual duty.

In his evidence before the trial magistrate the appellant testified that he was involved in an accident whilst riding the motorbike from Suba in Kuria District on his way to Migori. Although the appellant did not produce any police abstract report of the accident or a P3 form it was apparent from the exhibits produced i.e. the respondent's letter to the appellant dated 27th January 1997 (Pexh.1), the personal accident claim form (P.Exh.5) the report of Dr. Cyprianus Okoth Okere (P.exh.7) and the report of Mr. M.A. Sheikh (P.Exh,.8), that the appellant was injured in a road traffic accident involving a motorcycle. Although a police abstract report of the accident would have been appropriate to prove beyond doubt the identity of the motorcycle and the exact location of the accident, the absence of the police abstract report, did not in any way negate the evidence adduced before the trial magistrate. That evidence was sufficient to prove on a balance of probabilities that the appellant was injured in an accident involving the respondent's motorcycle. Indeed there is sufficient evidence that the accident was reported to the respondent and that the termination of the appellant's services was as a result of the circumstances of that accident. The trial magistrate applied the higher standard of proof normally applied in criminal cases of "beyond reasonable doubt" and therefore came to a wrong finding that the accident was not proved.

In his evidence, the appellant testified that on the material day he was riding the motorbike which had been assigned to him by the respondent for the performance of his duties. The appellant explained that he was coming from Suba Kuria where he had gone to meet farmers and was now riding back to Migori where he was to park the motorbike. Although the respondent denied that the appellant was at the material time lawfully carrying out his duties in the scope of his employment, there was no evidence to contradict the appellant's evidence in that regard and the court had no reason to reject that evidence.

The appellant's evidence regarding the respondent's negligence and or breach of contractual duties was as follows:

"*Accident was caused by mechanical defect of motorbike. I had sensed the problem and motorbike had*

been repaired twice about 2-3 weeks prior to the accident. Defendant used to maintain the motorbike."

Under cross-examination the appellant stated as follows: -

"*Motor Mart supplied motorbikes to defendant. Motor Mart used to repair them. Motor Marts were independent contractors. Defendant issued me the motorbike."*

This evidence was not sufficient to prove the particulars of negligence and or breach of contractual duties alleged against the respondent which were as follows:

(a) Failing to keep the said motorcycle in a sound mechanical condition.

(b) Giving the plaintiff the said motorcycle while knowing that the same was in unsound mechanical condition.

(c) Failing to provide the plaintiff with protective clothing and or equipments.

(d) Failing to take any or any adequate precautions for the safety of the plaintiff while he was engaged in his work.

(e) Exposing the plaintiff to a risk of damage and or injury of which it knew or ought to have known existed.

(f) Failing to provide or maintain adequate and or suitable motorcycle to enable the plaintiff carry out his said work in safety.

(g) Failing to take any or any adequate measures to ensure that the motor cycle was in proper and safe mechanical condition.

(h) Failing to provide suitable and or adequate measures to enable the plaintiff carry out his said work in safety.

The evidence adduced by the appellant did not show that the respondent failed to keep the motorcycle in a sound mechanical condition. To the contrary, the evidence shows that the respondent maintained the motorcycle and the motorcycle was being repaired by a 3rd party - Motor Mart.

There was no evidence to confirm the appellant's evidence that the motorcycle was in unsound mechanical condition or that the respondent was aware of such mechanical condition. According to the appellant the motorcycle had developed a mechanical problem and had been repaired twice about 2 or 3 week prior to the accident. The appellant cannot therefore be heard to complain that the respondent took no action to ensure that the motorcycle was in proper and safe mechanical condition. Further, there is no evidence as to the nature of the alleged mechanical problem that was attended to two or three weeks prior to the accident, and whether the accident had any connection with that mechanical problem. Further while, it was contended that the maintenance records for the motorcycle were in the possession of the respondent, there was no attempt on the part of the appellant to procure those documents through discovery.

Moreover, the appellant was the one assigned the motorcycle for his normal duties, and he was in a better position to know the mechanical condition of the motorcycle. There is no evidence of any complaint made by the appellant to the respondent about the mechanical condition of the motorcycle or the fact that it was exposing the appellant to risk of damage and or injury other than the problem reported and attended to two or three weeks prior to the accident.

According to the appellant's evidence the motorbike developed steering problems. There is however no evidence that the motorbike had such a problem prior to the accident. Although the appellant is trying to shift the blame onto the respondent, I find that the circumstances of the accident were such as to lead to

the conclusion that the accident was probably caused by the appellant's own negligence in the management and control of the motorcycle.

I come to the conclusion that the evidence adduced by the appellant was insufficient to prove the particulars of negligence alleged against the respondent or establish liability against the respondent. Notwithstanding the failure by the respondent to call any evidence, the appellant having failed to discharge the burden of proving his case, the appellant's suit could not succeed.

As concerns the quantum of damages, the appellant's injuries included compound comminuted fracture of left tibia and fibula, and lacerations in both hands and the left knee, leaving him with a permanent incapacity of between 5 - 25%. The injuries required a further medical operation estimated at a cost of Kshs.50,000/= for removal of the metal plates. For these injuries, the trial magistrate assessed general damages at Kshs.120,000/=. Given the seriousness of the injuries suffered by the appellant, the damages assessed by the trial magistrate was so low such as to justify the intervention of this court. Given the authorities which were cited to the trial magistrate, an amount of Kshs.300,000/= would have been adequate compensation for the injuries suffered.

Nevertheless, the appellant having failed to prove liability on the part of the respondent as above stated, his appeal is dismissed with costs.

Those shall be the orders of this court.

Dated and delivered this 24th day of September, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Ogutu for the appellant

Miss Odhiambo for the respondent