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

Civil Appeal 76 of 2004

ALEXANDER MUTHUI MALUKI…..…….. APPELLANT

VERSUS

SEYANI BROTHERS CO. LTD...…..……..RESPONDENT

J U D G M E N T

Alexander Muthui Maluki (hereinafter referred to as the appellant), was the plaintiff in the Chief Magistrate's Court at Milimani. He had sued Seyani Brothers Co. Ltd who are his former employers. The appellant claimed that on the 15th May, 1998, during the course of his employment he was in the process of cutting roofing tiles using a grinding machine, when the machine cut him and he suffered severe bodily injuries. The appellant contended that the accident was caused by the negligence and breach of statutory duty of the respondent.

The respondent filed a defence denying that the appellant was in their employment or that it was in breach of any statutory duty. The respondent further contended that if the appellant suffered any injuries the same was as a result of the appellant's own negligence.

During the trial, the appellant testified that he was working for the respondent as a mason and had worked for a period of eight months when the machine he was using slipped from his hand and caused him injuries. He explained that he had no experience with the use of that machine and could not tell whether it was defective. He stated further that the machine was made slippery by the sweat on his hand. He maintained that he was not supplied with any gloves or gumboots. Dr. Moses Kihuria who examined the plaintiff also testified and confirmed that he was involved in an industrial accident and sustained laceration wounds on both feet.

The respondent called one witness, one Peter Owino, an employee of the company. The witness testified that he knew the appellant as he had worked with him for three years at the company. He explained that the employees were supplied with overalls, gloves and gumboots. He maintained that the appellant was not assigned to work on the grinding machine, but he used a friend's grinder. He further explained that the grinder was not a dangerous tool nor was it defective. He blamed the appellant for failing to take the gloves and gumboots which were available.

Counsel for the appellant and Counsel for the respondent each filed written submissions urging the court to find in favour of his client.

In his judgment, the trial magistrate found that the appellant did not prove any negligence on the part of the respondent. He therefore found the respondent not liable.

Being dissatisfied with that judgment, the appellant brought this appeal raising five grounds as follows: -

(1) That the learned magistrate erred in both law and fact in holding that the appellant was not certain on how the accident occurred despite the weight of the evidence on record.

(2) That the learned magistrate erred in both law and fact in holding that the appellant could not blame the respondent for not supplying the appellant with protective garments despite the weight of the evidence on record.

(3) That the learned magistrate erred in both law and fact in exalting the position of the defendant's witness who was not an expert at the expense of the appellant's case despite the weight of the evidence on record.

(4) The learned magistrate erred in both law and fact in holding that the appellant's claim of negligence against the respondent had failed the tests of probabilities against the weight of the evidence adduced.

(5) The learned magistrate erred in both law and fact in dismissing the appellant's suit.

Before the appeal was heard, the respondent brought a motion under Order XLI Rule 9(1) and Order L Rule 1 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, seeking *inter alia*, an order that the appellant do give security for the costs of the appeal and that the appellant do prepare a supplimentary record of appeal to include the respondent's submissions in the subordinate court. This application was heard on 30th April, 2008 and dismissed by this Court. The main reason for the respondent seeking an order for security for costs was that the appellant is only a watchman, a man of straw, with no known assets which can be attached in execution should the appeal fail.

It may well be true that the appellant is only a watchman, who has no attachable assets, however, that is no reason why the appellant should be denied an opportunity to pursue his appeal. For indeed, if that is the appellant's position, demanding security for costs would have the effect of blocking the appellant from pursuing the appeal as he will obviously be unable to raise the required security. For this reason, the respondent's notice of motion is frivolous. With regard to the omission of the respondent's submission from the record of appeal, that was a serious omission, however, the same ought to have been raised on the 16th of November, 2007 when the appeal came up before the Judge for directions. Raising the matter when the appeal is already scheduled for hearing is a mere attempt to scuttle the hearing so as to delay the disposal of the appeal. In my considered view, no prejudice will be caused to the parties by this omission as the court has the original record of the lower court which contains the submissions. It was for these reasons that the Court dismissed the notice of motion dated 31st March, 2008.

With regard to the appeal, I have carefully considered and evaluated the evidence which was adduced before the trial magistrate. Although the respondent denied in its defence that the appellant was its employee, the defence witness clearly admitted that at the material time, he was working with the appellant at the defendant company. The appellant did not produce any contract of employment, nevertheless, the evidence was clear that the appellant was injured whilst using a grinder during the course of his employment with the respondent.

According to the plaint, the accident was caused by the negligence of the respondent and breach of statutory duty whose particulars were given as follows:

(a) Failing to take any or any adequate precautions for the plaintiff's safety while he was engaged in the said work.

(b) Exposing the plaintiff to the risk of injury which it ought to have known.

(c) Requiring the plaintiff to do dangerous job.

(d) Failing to have any or any adequate regard for the plaintiff's safety.

(e) Failing to provide or maintain a proper, safe and efficient working system.

(f) Facilitating the occurrence of the accident.

(g) Failing to warn the plaintiff in time or at all of the impending danger.

The appellant's evidence regarding how the accident occurred was as follows: -

"***On that date, I was at work at the defendant company. I was a mason. I had worked for 8 months. The machine I was using slid from the hand and caused me injuries. I had no experience in the use of the machine and I cannot tell whether it was defective. It was made slippery by the sweat on my hand. I was injured on the legs. I had no gloves or gumboots. They were not supplied."***

The appellant further explained that he blamed the respondent for the accident as he (i.e. appellant) was not trained on the use of the grinder machine nor was he supplied with gloves and gumboots.

It is evident that as an employer the respondent had a statutory duty of care to the appellant, the question is whether respondent was in breach of this duty as alleged. Specifically whether the appellant proved the particulars of negligence alleged against the respondent. The appellant's evidence as quoted above appears to be that the machine slid from his hands and that the probable reason for the machine sliding from his hand was the appellant's lack of experience in the use of the machine, and the fact that the machine became slippery because of the appellant's sweaty hands. This fell far short of proving the alleged breach of statutory duty. To the contrary it confirms the respondent's allegation that the appellant failed to take adequate measures for his own safety.

There was an issue as to whether the appellant was specifically assigned to work on the grinder and whether the appellant was given overalls, gloves and gumboots. In this regard the respondent relied on the evidence of Peter Owino. However, this witness stated that he did not witness the accident as he was working in a different area. Further, although the witness was treated as an expert, there was no evidence of his training or how long he had worked on a grinder machine. Although it was alleged that the grinder used by the appellant was allocated to one Henry, neither the said Henry nor the storeman was called to testify.

There was therefore no evidence to support the evidence of Peter Owino and his evidence in that regard remained no more than mere hearsay and the trial magistrate was wrong in relying upon the evidence of this witness. Moreover, there was no evidence from the storekeeper whose duty it was to supply the tools and protective clothing, confirming that the appellant failed to collect his protective clothing. On his part, the appellant did not call any evidence to establish that had he been supplied with gloves and gumboot, the grinder machine would not have slipped from his hands or that the injury to his legs would have been minimized, nor did the appellant call any evidence of the possible risks such as would have required the protective clothing as measures to eliminate the risks.

Further, the appellant's evidence that he was not trained to use the grinder machine appears to confirm the respondent's evidence that he was not supposed to be working on the grinder machine, for if indeed the appellant had been working on the machine for 8 months he would no doubt have known how to operate it, otherwise how else could the appellant have worked for 8 months on the machine if he did not know how to use it?

Whilst the appellant has established that he was injured in an accident whilst working for the respondent, this is not sufficient to establish the cause of the accident or that the same was caused by the negligence of the respondent. I would thus concur with the trial magistrate that the appellant failed to prove his allegations of negligence on the part of the respondent.

A pertinent issue was raised by the respondent's counsel regarding the contradiction in the date of the

alleged accident as deponed in the pleadings and as per the testimony of the appellant. Contrary to the pleadings, the appellant maintained that the accident occurred on the 15th May, 1999. No attempt was made to amend the pleadings to change the date of the alleged accident which therefore remained 15th May, 1998. Technically the appellant is bound by his pleadings. There being no evidence in support of the pleaded dated of 15th May, 1998, the appellant did not prove the pleaded facts.

Notwithstanding the paucity of evidence on the part of the respondent under Section 107 and 108 of the Evidence Act, the burden of proof was upon the appellant to establish the existence of the facts upon which the respondent's liability arose. It is evident that the appellant failed to discharge this burden and the trial magistrate came to the right conclusion in dismissing his suit.

I therefore find no substance in this appeal and accordingly do hereby dismiss it with costs.

Those shall be the orders of this court.

Dated and delivered this 22nd day of September, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Miss mambo for the appellant

Wambua for the respondent