REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 825 of 2006

UNIVERSAL PARENTAL LIMITED……..….. APPELLANT

VERSUS

FREDRICK MALENYA MUHALI…..……..RESPONDENT

J U D G M E N T

Universal Parental Limited (hereinafter referred to as the appellant), was the defendant in a suit filed at the Principal Magistrate's Court at Kikuyu by the plaintiff Fredrick Malenya Muhali (hereinafter referred to as the respondent). In the suit the respondent sought general and special damages for personal injuries. The respondent claimed that he suffered the injuries during the course of his employment with the appellant. He maintained that the injuries were caused by the negligence and/or breach of statutory duty on the part of the appellant. The appellant filed a defence in which he denied that the respondent was his employee or that the appellant was negligent or in breach of statutory duty. In the alternative the appellant contended that if the respondent suffered any injuries, the same were caused solely or substantially contributed to by the respondent's own negligence. The appellant further denied that the doctrine of *volenti non fit injuria* applied.

During the trial the respondent and Dr. George Kungu Mwaura testified in support of the respondent's case. It was the respondent's evidence that on the material day he was working for the appellant company as a casual labourer when he was injured by a nail. He reported the matter to his supervisor but he was informed that he would be taken to hospital the following day. The next day he went to work and waited until 11.00 a.m. by which time the supervisor had not arrived. He therefore went to Kinoo Medical Clinic where he was treated. The respondent blamed the appellant for the accident as he claimed that the appellant failed to provide any protective clothing. He also claimed that the working conditions were bad as there was timber with nails all over the place. He maintained that he had not received any payment under the workman's compensation.

Dr. George Kungu Mwaura who examined the respondent at Kinoo Medical Clinic testified that the respondent had a four centimeter cut on the left leg for which he received treatment. He prepared the medical report showing that the injury was a cut wound which healed leaving a scar. There was however no permanent incapacity.

Kimji Naran Patel, a head supervisor with the appellant company was the only witness for the appellant. He testified that the respondent was known to him as the respondent was a worker in a construction site at Kikuyu. The witness confirmed that on the material day the respondent was working for the appellant. He produced a master roll showing that the respondent was on duty. From the master roll the witness showed that the respondent worked the whole day on 12th June, 2004, on 13th June which was a Sunday and worked again from 14th June, 2004 to 1st July, 2004. The witness produced the records for the daily payments made to the respondent as daily wages. He maintained that the respondent was not injured on 12th June, 2004 as he did not report the injury to anyone. He produced the injury book maintained by the appellant to confirm that no such report was reflected in the injury book.

In his judgment the trial magistrate believed and accepted the respondent's evidence that he was injured during the course of his employment with the appellant. He found the appellant negligent as nails

were left on the staircase. He also held the respondent contributory negligent and apportioned liability at 80% – 20% against the appellant. The trial magistrate awarded general damages of Kshs.60,000/= subject to contribution.

Being aggrieved with that judgment, the appellant has filed a memorandum of appeal raising nine grounds. In arguing the appeal, counsel for the appellant summarized the substance of the appeal as follows: the issue of liability with regard to whether there was an accident at the appellant's place of work involving the respondent as alleged; if so, whether the appellant was to blame for the accident; and finally whether the magistrate's apportionment of liability was proper.

It was submitted for the appellant that the respondent's oral evidence regarding the accident was rebutted by the documentary evidence produced by the appellant i.e. master roll and injury register for the material period. It was maintained that the court misconstrued the evidence relating to the injury register as the register was not intended for injuries treated at the PCEA hospital only. The court's attention was drawn to the fact that the doctor purported to have examined the respondent and prepared a report on a Sunday. It was submitted that the court placed undue weight on the evidence of the respondent and shifted the burden of proof upon the appellant. It was further maintained that there was no proof of negligence in terms of causation and blame worthiness.

For the respondent, it was submitted that the trial magistrate considered all the evidence which was adduced in totality. The court's attention was drawn to the fact that the master roll and the injury register were made and kept by the appellant and there was no way of the respondent ensuring the information recorded therein. It was submitted that there was sufficient evidence that the respondent had reported the accident to one Francis and therefore no adverse inference could be drawn against the respondent for the failure to record that report. As regards the master roll it was submitted the trial magistrate did consider the issue of signature. It was further maintained that the respondent did raise the issue of non-protective clothing and this was evidence of negligence which was considered by the trial magistrate. Finally it was submitted that the trial magistrate properly apportioned liability and gave reasons for her apportionment. The court was therefore urged to uphold the judgment and dismiss the appeal.

I have carefully reconsidered and evaluated the evidence as I am expected to do in this first appeal. I find that although the appellant denied in his amended defence that the respondent was his employee, the appellant's witness Kimji Naran Patel did admit that the respondent was working for the appellant on the material day. Indeed the appellant produced a master roll which proved beyond doubt that the respondent was employed by the appellant.

As regards the accident, the respondent maintained that he was injured during the course of his employment and that he did report the accident to his immediate supervisor one Francis and also to the foreman. The respondent has also produced treatment notes from Kinoo medical Clinic and a Medical report prepared by Dr. G.K. Mwaura. Against the respondent's evidence, was the denial by the appellant's witness that no such accident took place. I have considered the evidence relating to the injury register. I find that this register was being maintained by the appellant and therefore the respondent cannot be answerable for any omission. The respondent testified that he was injured and that he did report the accident to the supervisor and the foreman. The respondent's evidence regarding his injury was supported by the evidence of Dr. George Kungu Mwaura who treated the respondent a day after the accident and subsequently prepared a medical report. The doctor did explain in his evidence that he works on Sundays. This is not unusual for doctors considering that they provide what is often referred to as essential services. The trial magistrate who saw and assessed the demeanor of the witnesses chose to believe the respondent's evidence. It was really a question of credibility and I have no reason to depart from the trial magistrate's finding in this regard.

As to the issue of negligence it is apparent that the primary cause of the accident was a nail which was left dangerously by the appellant's servants or employees in the premises. The trial magistrate properly considered this evidence and found the respondent partly to blame for failing to take adequate of his own safety. The trial magistrate's finding and apportionment of liability was therefore proper. In the light of the above I come to the conclusion that there is no merit in this appeal. It is accordingly dismissed with

costs.

Dated and delivered this 18th day of September, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Mwaniki for the appellant

Muthiga H/B for the respondent