



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL 316 OF 2007**

**MOHAN MEAKIN (K) LIMITED..... APPELLANT**

**VERSUS**

**MUTUNGA KIUNDI.....RESPONDENT**

**J U D G M E N T**

Mutunga Kiundi the respondent in this appeal initiated a suit in the Senior Resident Magistrate's Court at Kajiado in which he sought general and special damages from Mohan Meakin Distillers who is the appellant in this appeal. The respondent who was an employee of the appellant claimed that he suffered damages as a result of an accident at his place of work. The accident was caused by the negligence and or breach of contract of employment on the part of the appellant, its agent or servants.

The appellant filed a defence in which it denied all the allegations made by the respondent. In particular the appellant denied that it was negligent or in breach of contract. Without prejudice the appellant contended that the respondent's injury if any was caused by the respondent's own negligence. The appellant further claimed that the court had no jurisdiction to entertain the suit as the suit ought to have been filed in Nairobi where the appellant's registered office is situated. Before the hearing of the suit commenced, the appellant's counsel raised a preliminary objection on the issue of jurisdiction which objection was overruled by the trial magistrate. Thereafter, the hearing of the suit proceeded.

The respondent explained that on the material day he was working for the appellant when he was stabbed by a broken bottle and was injured on the right leg. He was taken to Kitengela Health Centre where he was treated. The respondent was later examined by Dr. Thuo who prepared a medical report. On the appellant's request, the respondent was again examined by Dr. Khushal Singh who also prepared a medical report. Both reports were produced in evidence by the consent of the parties.

The appellant testified through Francis Muthee Murithi who is an administrative clerk employed by the appellant. The witness explained that on the material day, the respondent was working for the appellant as a casual. He was among ten casuals assigned to clean second hand bottles. All were given protective clothing which included hand gloves and gumboots. After sometime, the respondent complained that he had a cut wound having stepped on a piece of a broken bottle. It transpired that the respondent had for unexplained reasons removed the gumboots. The respondent was taken to Kitengela Health Clinic where he was treated and given two days sick off. He resumed duty after two days. The witness maintained that the cut wound was minor. He further denied any negligence on the part of the appellant and maintained that the respondent was the one negligent.

In his written submissions, counsel for the respondent urged the trial magistrate to find the appellant fully liable. He urged the court to award the respondent Kshs.80,000/= as general damages. Counsel for the appellant on the other hand, urged the court to find the respondent's claim not proved and dismiss his suit

with costs.

In her judgment, the trial magistrate found that there was nothing before the court to show that the respondent received and signed for any gloves or gumboots. She therefore found the appellant negligent in failing to provide a safe working environment. Relying on the case of **George Theuri Githeiya vs Kenya Breweries Ltd and Another HCCC No.3303 of 1979**, the trial magistrate found that since the accident took place at the appellant's premises during working hours it was for the appellant to prove that the respondent was not acting in the cause of his employment which burden the appellant had failed to discharge. She therefore held the appellant 100% liable and awarded the respondent general damages of Kshs.60,000/= and special damages of Kshs.2,000/= thereby giving rise to this appeal.

The appellant has challenged the judgment of the trial magistrate on 11 grounds as follows: -

- (i) The learned magistrate erred in law when she ruled that her court at Kajiado in the Rift Valley Province had territorial jurisdiction to entertain a suit founded on a course of action which arose at Athi River in Machakos District of Eastern Province and when the defendant's registered office was at Nairobi.
- (ii) The learned magistrate erred in law in defying the mandatory provisions of Section 15 of the Civil Procedure Act as to territorial jurisdiction.
- (iii) Since the trial court lacked territorial jurisdiction in law the proceedings and subsequent orders including the judgment were a nullity lock stock and barrel.
- (iv) The learned magistrate erred grievously in law when she ordered that medical reports be produced without the necessity of calling the authors as witnesses.
- (v) In any case the medical report by Dr. Khushal Singh clearly showed the plaintiff suffered no disability as a result of injury.
- (vi) The trial magistrate erred in law in reaching a judgment oblivious of the fact there was no proof of the degree of injury nor of negligence nor breach of contract nor duty of care.
- (vii) The trial magistrate erred in fact and in law by defying the mandatory provisions of Order XX Rule 1 of the Civil Procedure Rules thereby rendering the judgment null and void.
- (viii) The quantum of damages assessed by the court was inexplicably unrealistic too high and turned itself into a promenade for misjustice.
- (ix) The trial magistrate's judgment, once again, defied clear explicit mandatory demands of statute Order XX Rule 4 of the Civil Procedure Rules thereby exposing a set of prodigious proclivity.
- (x) The trial magistrate erred in finding that the defendant was negligent when the preponderance of evidence<sup>3</sup> was repellent, and various strokes of inadequacies undermined the plaintiff's case and veracity.
- (xi) The trial magistrate erred in failing to adequately consider, evaluate, appreciate and rely on the evidence of the defence witness Francis Mureithi who clearly swore that the plaintiff was given protective devices at his workplace and was responsible for the self inflicted injury.

Mrs. Kea who appeared for the respondent submitted that the trial magistrate had no jurisdiction to try the suit as the suit ought to have been filed in Machakos. In this regard counsel relied on **Misc. Application No.503 of 2004 Masaku Ndonge vs Mbilini Farmers Cooperative Society**. Mrs. Kea further submitted that the trial magistrate failed to take into account the submissions made by the appellant's counsel urging the court to invoke the doctrine of *volenti non fit injuria*. She referred to the case of **Sotik Tea Company vs Philip Cheruiyot Marel HCCA No.243 of 2002** where it was held that contribution ought to be apportioned between the parties. It was further submitted that the medical reports were not produced by

the makers and therefore Section 35 of the Evidence Act was not complied with.

Mr. Nzavi who appeared for the respondent urged the court to find that the trial magistrate had jurisdiction to hear the matter. He relied on **Section 3(2) of the Magistrate Court's Act** which give the magistrate territorial jurisdiction throughout the country. He also relied on **HCCC No.143 of 1999 Mathias K. Sifuna vs Eastern Kitui Stores Ltd & 2 others** and the Case of **Masaku Ndonye vs Mbilini Farmers Cooperative Society** (Supra). Mr. Nzavi further submitted that the respondent's evidence on liability was not controverted. He maintained that the appellant's witness was not an eye witness to the incident and the court was therefore right to hold the appellant 100% liable as there was no evidence that any protective gear was provided to the respondent. Mr. Nzavi further submitted that the judgment of the trial magistrate was quite analytical and contained all the necessary considerations. He maintained that the medical reports were produced by consent of both parties and that no injustice was occasioned to any of the parties as a result of that admission. With regard to the damages awarded, he maintained that the same were within the limits for the injuries sustained by the respondent.

I have carefully reconsidered and evaluated the evidence which was adduced before the trial magistrate. I find that there was clear evidence that the respondent was at the material time employed by the appellant. I also find that the respondent sustained injuries at the appellant's premises during the course of his employment. The main issue was whether the injuries were caused by the appellant's negligence and or breach of employment contract or whether the respondent contributed to the accident. While the respondent contended that the appellant failed to provide him with protective clothing, the appellant's witness maintained that he had personally issued the respondent and others with gumboots and hand gloves. The appellant's witness had however, nothing to support his oral assertion that the respondent was issued with the protective clothing. In his judgment the trial magistrate who saw and assessed the demeanour of the witnesses chose to believe the respondent and not the appellant's witness. I find no reason to depart from this finding. Indeed, there would have been no reason for the respondent to remove the gumboots and risk injury to himself if he was indeed allocated the said gumboots. The risk of broken glasses was a risk that the appellant ought to have foreseen and taken action to avert by not only providing protective clothing but also ensuring a safe and conducive environment to avert injury from such incidents. On the other hand the appellant has failed to establish any negligence or contributory negligence on the part of the respondent. Accordingly, I find the appellant fully liable to the respondent for the accident.

As regards the issue of jurisdiction the appellant's registered offices are situated along the Mombasa/Namanga junction. The offices are administratively within Machakos District. While it would have been appropriate for the appellant to successfully insist on the suit proceeding in Machakos, the appellant did not pursue this avenue as he did not appeal against the ruling of the court in this regard nor did he make a serious attempt to have the suit transferred to Machakos. Moreover, under Section 3(2) of the Magistrate Courts Act, a resident magistrate has unlimited territorial jurisdiction. The fact that the suit proceeded in Kajiado is therefore a mere irregularity which does not vitiate the proceedings and nothing turns on that issue.

As concerns the quantum of damages the sum of Kshs.60,000/= which was awarded to the respondent was neither excessive nor based on wrong principles as to justify the intervention of this court. The upshot of the above is that I find no substance in this appeal. It is accordingly dismissed with costs.

Those shall be the orders of this court.

**Dated and delivered this 25<sup>th</sup> day of November, 2008**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Miss Kea for the appellant

Nzavi for the respondent