



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

Civil Appeal 41 of 2006

VYATU LIMITED APPELLANT

VERSUS

PHILIP OPUL RESPONDENT

(Being an Appeal from Judgment of Honourable Mr. Ndubi Resident Magistrate delivered on 21st March 2006 in the original Maseno PMCC Number 194 of 2004

JUDGMENT

The appellant, Vyatu Limited, was the defendant in a personal injury claim instituted against itself by the respondent Philip Opul who was at the material time its employee. It was the respondent's contention that on the 13th June 2001, while in the course of his employment as a wire roller he was cut and injured by a wire. He attributed the injury to the appellant's negligence and/or breach of its statutory duty and instituted this suit claiming damages.

The suit was heard by a Resident Magistrate at the Maseno Court who entered judgment for the respondent against the appellant in the following terms:-

- (i) Liability 60% : 40%
- (ii) General Damages, 70,000/=
- (iii) Less 40% contribution 28,000/=

42,000/=

(Add) Special 1,500/=

Total 43,500/=

Being dissatisfied and aggrieved by the said judgment, the appellant filed this appeal on the basis of the grounds contained in the memorandum of appeal filed herein on the 24th April 2006.

The grounds are that:-

- (i) The learned Magistrate erred in law and in fact in finding that the appellant was 60% liable for the injuries sustained to the respondent while it is apparent the respondent never proved its case.**

(ii) **The learned Magistrate erred in law and in fact in failing to appreciate that the respondent never proved he was in the appellant's employment at the time of the accident.**

(iii) **The learned Magistrate erred in law and in 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.**

(iv) **The learned Magistrate disregarded totally the grossly conflicting evidence from the respondent's witnesses when arriving at his decision.**

(v) **The learned Magistrate disregarded totally the evidence from the respondent as it emanated from the cross – examination by the appellant.**

(vi) **The learned Magistrate erred in law and in fact by ignoring the authorities submitted by the appellant in its submission when arriving at his decision.**

The appellant therefore prays that this appeal be allowed in that the judgment of the lower court be set aside and the suit be dismissed with costs.

The appellant also prays for the costs of the appeal.

At the hearing of the appeal, the appellant was represented by learned Counsel M/s Oron while the respondent was represented by learned Counsel Mr. Omondi.

The appellant's counsel argued that there was ample evidence from the appellant's witnesses (DW1 and DW2) showing that the respondent was not on duty and was not injured on the material date.

Counsel also argued that the respondent did not attend hospital on the material date of the alleged accident since his name was not in the relevant out patient register and that the medical note book produced in court was not genuine. She (counsel) further argued that the respondent's name does not appear in the

N. S. S. F records and contends that there was no evidence to support the respondent's allegations. Therefore, the respondent's suit ought to have been dismissed by the lower court.

On his part, the respondent's counsel argued that the documents produced by the appellant were in its possession thereby allowing it room to make them in its favour. He said that the payment register did not even classify the respondent as an employee yet DW2 who authored the accident's register confirmed that the respondent was an employee of the appellant.

Counsel further argued that DW1 was in charge of casuals but was unable to tell their number at the material time. He said that there was nothing to show that the accidents register related to the appellant such that the learned Magistrate considered it unjust to rely on it. He contended that DW3 was not a document examiner to say that the medical note book (PEX 2) was not a genuine document. He urged this court to dismiss the appeal with costs.

This being a first appeal, the court is obliged to reconsider the evidence, re – evaluate it and arrive at its own conclusion 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 and Ephantus Mwangi & Another vs= Duncan Mwangi Wambugu [1982-88] I KLR 278*).**

Towards that end, the respondent's evidence was that on the material 13th June 2001 the respondent was on duty at the appellant's premises undertaking the task of straightening wires. He was pushing a long wire roll on a narrow slippery stairway when it snapped and injured him on the left arm. He received first aid and later went to the New Nyanza Provincial Hospital where he was treated and discharged. He was later examined by Dr. Nyamogo (PW2) who prepared a medical report (PEX3).

He was again examined by a Dr. Raburu who compiled a second medical report. He attributed the accident to the appellant's negligence and breach of statutory duty in building a narrow stairway. He therefore filed the present suit claiming damages from the appellant. **The appellant denied the allegations of negligence and breach of statutory duty made against itself by the respondents. Its supervisor Lukas Okoni Ouko (DW1) confirmed that the respondent had been employed as a general casual worker but contended that no accident occurred at the appellant's premises on the material date.**

He tendered in evidence a payment register (D. EX 7) which did not contain the respondent's name and stated that the respondent was not on duty on the material date.

The appellant's shop steward Elizabeth Akinyi (DW2) produced an accident's register (D.EX8) which did not reflect the name of the respondent.

A records information officer (DW3) indicated that the respondent's name was not reflected in the register of the 13th June 2001 kept at the New Nyanza Provincial Hospital. He said that the register showed that the respondent never attended the said hospital. He also said that the respondent's treatment book (P.EX2) did not belong to the hospital.

Basically, the respondent's employment as a casual worker by the appellant is not disputed.

The issue for determination is whether the respondent was on the material date involved in an accident while in the course of his employment and if so, whether the accident was due to the appellant's negligence and/or breach of statutory duty and if so, whether the respondent was entitled to damages and to what extent.

The appellant's contention is that there was no accident involving the respondent on that material date as he was not on duty. A payment register (D.EX 7) and an accident's register (D.EX8) were produced by the appellant to establish the fact.

However, the respondent (PW1) contended in his evidence that he was on duty and was injured on the material date. He said that he was given first aid by a fellow employee called Odhiambo and that the matter was reported to a supervisor called Mark. He said that he was not at the time of the accident provided with protective gear such as gloves.

The appellant's supervisor (DW1) did not overrule the existence of an employee called Odhiambo and a supervisor called Mark. He conceded that he was not the only supervisor and that he was not the only one present on the material date. He said that he normally handed over to a supervisor called Chrispine Ouma. The said Chrispine Ouma was not called to testify.

The supervisor (DW1) further stated that he was not able to tell the number of casual worker employed by the appellant and that the payment register (D.EX 7) was prepared by a secretary called Janet.

The said Janet was not called to testify. Instead, the appellant called Elizabeth Akinyi (DW2) to testify and produce a register (D.EX No. 8) to show that no accident occurred at the appellant's premises on the material date. She (DW2) said that she was responsible for any accident but did not say in what manner she was responsible and whether or not she was the one responsible for completing and filling in the register (D. EX 8). She did not even say that she was the one who actually completed the entries in the register.

The respondent's evidence that he was on duty on the material date and that he was injured in the process was not displaced by the appellant's evidence. It (respondent's, evidence) established on a balance of probabilities that the accident occurred and that the respondent was involved.

The trial magistrate was therefore entitled to believe the respondent in that regard and disregard

the appellant's evidence given by DW1, DW2 and DW3.

DW3 is not even the person who completed the hospital register showing that the respondent did not attend the New Nyanza Provincial Hospital on the material date. His evidence did not add any value to the alleged fact and his purporting to invalidate the respondent's medical record (PEX 2) was to say the least absurd.

There having occurred an accident on the material date involving the respondent while in the course of his employment, the next issue would be the question of liability.

The respondent's contention is that the appellant was responsible for the accident in as much as it failed to provide a proper stairway and also failed to provide the respondent with protective gear such as gloves.

The appellant as the respondent's employer was under a statutory duty to provide a safe working environment and protective garments to the respondent.

The respondent was in turn required to exercise care and attention in the performance of his duties and to use the protective garments supplied.

The appellant did not deny that the wire roll being pushed by the respondent at the time of the accident was to be moved through a stairway which was narrow.

However, the narrowness of the stairway would not by itself be a determinant factor in the causation of the accident as the respondent was expected to exercise reasonable care while pushing the wire roll along the stairs.

In any event, if the stairway was that narrow it is not possible that a large wire roll would move across it at all.

There is indication that the stairway was wide enough for a large wire roll to be moved along it.

There being no dispute to the plaintiff's allegation that the stairway was slippery it would follow that the appellant was in breach of its statutory obligation to provide a safe working environment unless of course it provided safety mechanism to prevent any accidental slip of the wire roll or the respondent.

The appellant may also have been in breach of the statutory obligation to provide protective garments given that the respondent sustained an extensive cut to the lower left arm as confirmed by Dr. Nyamogo (PW2) in his medical report (PEX 3).

The respondent said that he had not been provided with protective garments at the time but continued to discharge his obligations despite the risk involved. The fact was not denied by the appellant whose supervisor (DW1) stated that warning notices were pasted at the appellant's premises.

Pasting warning notices on the walls is not the same thing as providing protective garments. It only cautions the employees of the need to exercise proper care while performing their duties. It would appear that although the appellant may have been in breach of the statutory duty as indicated herein above, the respondent contributed to the breach by accepting to work without protective gear and by failing to exercise proper care while performing his duty. He was negligent and must shoulder part of the responsibility for the consequences of the accident.

This court would thus approve the trial court's finding on liability at the ratio of 60% against the appellant and 40% against the respondent.

The respondent would thus be entitled to damages from the appellant to the extent of its culpability.

The award made by the trial magistrate for general damages in the sum of Kshs. 42, 000/= and Kshs. 1,500/= special damages was reasonable and proper. It was arrived at after due consideration of the evidence on record and the submissions advanced during the trial.

In the end result, this appeal is devoid of merit and is hereby dismissed with costs to the respondent.

Dated, signed and delivered at Kisumu this 12th day of November 2008

J. R. KARANJA

JUDGE

JRK/aao