



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Civil Appeal 65 of 2005

VIJAY CHARDA t/a SUBCON DECORATORS..... APPELLANT

- Versus -

PATRICK KARISA MWARUMBA RESPONDENT

Coram: Before Hon. Justice L. Njagi

Mr. Chakera for Applicant

Court clerk - Ibrahim

J U D G M E N T

The appellant in this case, Vijay Charda t/a Subcon Contractors, was sued in the Resident Magistrate's Court, Mombasa. The suit arose out of an industrial accident at a construction site in consequence whereof the respondent claimed against the appellant general damages; special damages amounting to Kshs. 1,500/=; costs of the suit; and interest on both general and special damages.

After hearing the evidence of both parties and their respective witnesses, the learned trial magistrate found that the appellant was 80% to blame for the accident, and that the respondent was guilty of contributory negligence to the extent of 20%. He accordingly awarded Kshs. 90,000/= by way of damages subject to the contributory negligence. The appellant came to this court appealing against liability as well as the quantum of damages.

The undisputed facts of the case were that the respondent was a casual employee of the appellant. While working in that capacity on 30th April, 2003, the respondent was injured on the head by some hanging glass on a window pane. According to the medical evidence, he sustained wounds on the right side of the head eyebrows.

The appellant filed seven grounds of appeal. At the hearing of the appeal, however, his advocate, Mr. Mutubia, abandoned grounds 1 and 7 and argued grounds 2 to 6 together. In summary, he argued that the learned trial magistrate based his judgment on the evidence of the respondent alone, yet, that evidence did not prove negligence as required by law and therefore the respondent did not prove his case on a balance of probability. Secondly, he submitted that the respondent did not explain why he was not wearing protective gear which he was supposed to be wearing, yet this gear had been provided; therefore he was the author of his own misfortune.

Mr. Mutubia further submitted that the learned trial magistrate considered only the evidence of the respondent and did not consider that of the appellant. He also argued that by failing to demonstrate that he took precaution for his own safety, the respondent was fully to blame for the injuries sustained. Finally, he relied on LUCAS MWAKISHA v. MVITA CONSTRUCTION H.C.C.C. NO. 42 of 1989 (Mombasa); and NGARE RASHID v. KITALE SAW MILLS, H.C.C.C. NO. 628 of 1987 (Mombasa); and prayed that the appeal be allowed.

Opposing the appeal, Mr. Chidzipha for the respondent argued that the learned trial magistrate properly exercised his discretion in determining the issues raised and in assessing the quantum of damages. He further submitted that the particulars of negligence were not limited to the provision of the protection gear but also extended to lack of supervision as the supervisor was not at the scene at the time of the accident. Counsel argued that the appellant could not have put on the helmet as this had not been provided. He thereupon submitted that the learned trial magistrate did not err in law or fact in arriving at his decision.

As for the authorities relied upon by the appellant, Mr. Chidzipha submitted that they ought to be disregarded as they relate to situations in which the plaintiffs were the authors of their own misfortunes which he further submitted was not the case here. He therefore urged the court to dismiss the appeal.

In reply, Mr. Mutubia asserted that there was no issue of discretion and the magistrate was not supposed to exercise any discretion, but the plaintiff was supposed to prove negligence. He also maintained that protective gear was provided, and that this was the only issue of negligence which the magistrate considered. On that note, he urged the court to allow the appeal with costs in this court and the court below.

From the above submissions, the appellant's case is twofold – firstly that the trial court considered only the respondent's evidence and secondly, that the respondent did not prove negligence. With regard to the first issue, it is not correct to say that the trial magistrate considered only the respondent's evidence. In his judgment, he said, inter alia –

“The defendant personally gave evidence together with his supervisor as to the protection gear that is given to the employees of the defendant...”

He also said-

“However, there is no denial that the defendant provides the protective gear that is given to the employees of the defendant...”

It cannot be denied, therefore, that the learned trial magistrate in fact considered and evaluated the appellant's evidence, before he drew his conclusion. The allegation that the appellant's evidence was not considered, therefore, has no merit.

The respondent's case was rooted in the allegation that the appellant did not provide any safety gear and therefore the working conditions were not safe. His evidence along that line was countered by that of the appellant, who testified as DW1 and who stated as follows-

“The workers are always given and advised to wear the protective clothing. This is the general procedure. They wear the helmet, hand gloves, gumboots or industrial shoes...”

This evidence was not contradicted in any material particular. Instead it was supported by DW2, Kitura Tito, who was the supervisor. He said in his evidence in chief –

“... I am a supervisor there. In the company, there is the protective gear. The plaintiff did not have the helmet. The gear consists of the helmet, gloves and gumboots. There is a warning that before going to work one must collect the protective gear. On that day the plaintiff only had gumboots. If he had a helmet he could not have been injured... The plaintiff is to blame.”

In cross examination, he said that it was a must for a worker to ask for the protective gear.

From this evidence, I agree with the finding of the trial magistrate that there was no denial that the appellant provided the protective gear in order to ensure safety within the working environment. That being the case, and if it was mandatory for a worker to ask for the protective gear, then the management ought to have attached such great importance to the wearing of that gear that they themselves should have ensured the no employee would be allowed to work without wearing it. With the lower court having found, with which finding this court agrees, that the appellant provided the protective gear, then it was incumbent upon the plaintiff to demonstrate the circumstances under which he chanced not to be wearing that gear. The reason he gave in his evidence in chief that he blamed the appellant because there was no safety clothing he had given out cannot stand. DW2 said that the respondent was wearing only gumboots on the fateful day. This shows that the appellant had indeed provided the protective gear. Since the protective gear was provided for, the respondent should have accessed it for his own good. It was erroneous for him not to do so.

The appellant sought to exonerate himself from liability by testifying that there was always someone to supervise, and that he had a warning in the office advising employees to take the protective clothes. In my view, it is not enough to place such a warning exclusively in the office. A copy ought to be posted conspicuously at the site where the actual work is going on. It should also be in a language which all the workers understand, including the casuals. The supervisor should also ensure that such a warning is honoured, not in breach, but in observance. That was not done in this case. I therefore agree with the lower court that each of the parties hereto was guilty of some negligence.

Having found that each party was to blame, the next issue is the apportionment of the blame. This is not an easy task, since there is no objective test. It is all a matter of opinion. The trial court held that the appellant was 80% to blame for the accident, and that the respondent contributed 20% to the causation of the accident. The question is – who is more culpable than the other? In order to answer this question, I find it prudent to revisit the causation of the accident. On the evidence on record, the respondent stated in cross examination that he was injured by some hanging glass and that he had seen it. He admitted that if he had looked up, he would not have been injured. Having known of the existence of the glass above his head, the respondent owed it to himself to avoid the injury upon himself. The proximate cause of the accident was not the lack of the helmet. It was the respondent's bodily movement which caused him to hit the glass of whose existence he had foreknowledge. If he had a helmet on. He would probably not have been injured. He sustained the injury because he had no helmet.

Given the frailties of human nature, it was equally foreseeable to the appellant that an employee might forego wearing the protective gear, thereby exposing himself to the risk of injury. This is where the supervisor's role comes in – to ensure, inter alia, that all the employees are properly dressed in the protective gear in order to avert the risk of injury. But in this case, having noted, according to his own evidence, that the appellant was dressed only in gumboots without a helmet, the supervisor should have taken steps to ensure that the respondent was also wearing a helmet in order to avoid the risk of injury. But he did not do so, thereby rendering himself a contributory to the accident.

As an adult of sound mind, one has a natural instinct to protect oneself against the elements even before the others come to one's aid. In that light, it was the respondent's bounden duty to take precautions against injury to himself by wearing the protective gear. The respondent's statement that they had no safety clothing cannot be taken seriously seeing especially that the supervisor's uncontroverted evidence was that at the material time, the respondent was wearing only gumboots without a helmet. If no safety clothing was provided, the respondent would not have been wearing the gumboots.

For the above reasons, I find that the respondent was two thirds to blame for the accident, and that the appellant was one third culpable. As noted at the beginning of this opinion, the appellant's counsel withdrew ground 7 of the appeal, which ground had alleged that the general damages awarded were exorbitant. Since these are no longer challenged, they will remain at Kshs. 90,000/= to be apportioned as between the parties so that the respondent will get only 1/3 of that sum which represents the employer's contribution to the accident.

The appellant will also have two thirds of the costs in this court and the court below.

Dated and delivered at Mombasa this 19th day of October, 2007.

L. NJAGI

JUDGE