REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Appeal 51 of 2005

(Being an appeal from the judgment of the Resident Magistrate {A. M. MONGARE} dated 25th day of February 2005 in Nakuru Chief Magistrate's Court Civil Case No. 332 of 2003)

NAKURU INDUSTRIES LIMITED…………...……………APPELLANT

VERSUS

SAMUEL SAFINA KAPULE…………...……...………..RESPONDENT

JUDGMENT

By a judgment pronounced by the learned Resident Magistrate in Nakuru CMCC No. 332 of 2003 the appellant was found liable for damages at the ratio of 70% while the respondent was to bear 30% liability. Judgment was entered for the respondent for Kshs 106,750/= with costs and interest. Being aggrieved by the said judgment the appellant has appealed and listed several grounds of appeal. During the hearing of this appeal the grounds were consolidated and argued together.

Firstly the judgment of the trial court was faulted for failing to comply with the provisions of Order XX rule 4 of the Civil Procedure Rules. It was argued that the trial court did not give a concise statement of issues and did not give reasons for the judgment. On the evidence that was adduced before the trial court, counsel submitted that the respondent failed to prove that the injuries he sustained was through electrocution. There was contradiction in his evidence and it is not clear from the evidence which hospital treated the respondent. Further the discharge summary was also not produced in evidence and the medical report by Dr. Omuyoma does not indicate that the injuries suffered by the respondent were as a result of electrocution. Lastly it was the contention of the counsel for the appellant that the award of damages given by the trial court is excessive and unrealistic. The court relied and based its judgment on an irrelevant authority in the case of Harrison Peter Odek vs J. Lyons & Co. Limited HCCC No. 3736 of 1989 Nairobi.

This appeal was opposed by counsel for the respondent. He supported the decision by the trial court and argued that the judgment clearly states the evidence and gives the reasons for the findings and while doing so, the defence evidence was taken into account. The evidence by the respondent was properly evaluated by the court and the respondent proved on a balance of probability that he was injured while in the cause of his employment. He was admitted in hospital and discharged after one day and the assessment of damages by the trial court cannot be interfered with by the appellate court merely because the appellate court would have assessed the damages differently.

This being a first appeal, this court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent decision while bearing in mind that it never saw the witnesses testify and make due allowance for that. The principles to be followed by the first appellate court have been settled in several decisions and one such leading authority is the case of Peter vs. Sundy (1958) E.A. page 429:

"*It is a strong thing for an appellate court to defer from the finding, on a question of fact, of the Judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate*

court has, indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion."

Bearing in mind the above principles this court can rewrite the judgment and thus the submission that the trial magistrate's judgment falls short of the provisions of Order XX rule 4 is inconsequential. The principal issue for determination is whether the respondent proved his case to the required standard. From the proceedings, before the trial court, the plaintiff testified that on 26th June 1997 he was working with the Nakuru Industries Limited. He was allocated the duties of cleaning the floor with a machine. There was an electric fault which he reported to an electrician who rectified the anomaly but within two minutes there was a short circuit and the respondent was injured on the head and neck. He was taken to the Provincial General Hospital where he said he was admitted for a day. He was examined by Dr. Omuyoma and he produced the medical report which showed that the respondent suffered some injuries which he classified as harm. The respondent also relied on the evidence of Silas Ndungu Muchemi, who worked with the records at the Provincial General Hospital. He produced the file which showed that the respondent was admitted in the hospital on the 26th June 1998 and he was discharged on 27th June 1998.

The case for the appellant was presented by Shadrack Ole Mosesi a security officer. He denied in total that the respondent was working with the Nakuru Industries in 1998 and he produced a letter showing that the respondent was employed in July 1999. He however admitted that people used to be employed as casuals and that the medical reports of the company clinic showed that somebody with the name similar to the respondent was treated on 28th June 1998 and it was not possible for an outsider to be treated in the company clinic. James Otiende DW2 also denied that the respondent was working with the Nakuru Industries in 1997. It is on the basis of the above evidence that the trial court arrived at the above decision. On the issue of liability the trial court found that both parties were liable and apportioned liability at 70:30.

What is crucial is to determine whether there was evidence to support this finding. It is clear from the respondent's pleadings that he blamed the appellant for failing to provide a safe system of work. The respondent testified that the unsafe system of work was a defective cleaning machine which caused electrical short circuiting and caused him the injury. The respondent's evidence was accepted by the trial court. It is the trial court that had a greater advantage of assessing the demeanor of the witnesses. The appellant's witnesses testified that the respondent was not an employee at the material time. DW1 was cross-examined extensively and what comes across is that the defence evidence was not candid. I find no error in the conclusion that the respondent had proved his case to the required standard. The small discrepancies found in the record especially whether the respondent was treated first at the company clinic and then at the Provincial General Hospital are not of any material significance. The trial court that heard the witnesses believed the evidence of the respondent which was not seriously challenged by the defence. On the assessment of damages it is undesirable to interfere with the trial court's discretion. Unless it can be proved that the trial court proceeded on the wrong principles of the law and awarded damages that were inordinately high or inordinately low as to amount to an entirely wrong estimate for the amount awarded.

I have considered all the submissions and proceedings before the trial court and having analyzed the entire evidence I come to the inescapable conclusion that this appeal lacks merit. The trial court was guided by decided cases and taking into account the inflation I see no justification in interfering with the trial court's discretion. The decision of the trial court is hereby upheld and the appeal is dismissed with costs to the respondent.

Judgment read and signed this 9th day November 2007

M. KOOME

JUDGE