



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Appeal 204 of 2002

(Being an appeal from the Judgment of Honourable Hon. N.O. ATEYA – S.P.M in Chief Magistrate’s Court, Nakuru, CMCC No.765 of 1998 dated the 26th November 2001)

SPIN KNIT LTDAPPELLANT

VERSUS

ALLOYS ADWERA RESPONDENT

JUDGMENT

The appellant in this matter was the defendant in Nakuru RMCC No.765 1998 whereby the respondent had instituted a suit on a claim of an industrial accident. The respondent sought compensation for injuries he alleged to have suffered on 10th day of November 1997 while working at the appellant’s factory. The respondent blamed the appellant for negligence which are particularized as follows: -

- a) *Not giving the plaintiff protective materials.*
- b) *Allowing the plaintiff to work in a dangerous place without warning him.*
- c) *Failing to provide the plaintiff with proper and safety system of work.*
- d) *Exposing the plaintiff in injury or damages he knew or ought to have known.*
- e) *Not guarding the machine as required.*
- f) *Spilling the oil all over which was slippery.*

g) In breach of contract of employment and the terms thereof.

As a result of the negligence, the respondent claimed to have suffered injuries to the neck, ribs and the chest.

The hearing of the matter was conducted in February 2000 and by a judgment delivered on 26th November 2001 the appellant was found liable for the injuries to the extent of 80% and general damages for pain suffering and loss of amenities in the sum of Kshs.100,000/- less 20% contribution thus leaving a sum of Kshs.80,000/- with costs and interest.

The appellant was dissatisfied with the above judgment and in their appeal they have raised six (6) grounds of appeal to wit:

- 1. That the learned trial magistrate erred in law in coming to a conclusion of the basis of scanty and contradictory evidence on material and crucial aspect of the suit.**
- 2. That the learned trial magistrate erred in law in arriving at a decision or liability not supported by evidence.**
- 3. That the learned trial magistrate erred in law by totally disregarding the defendant's evidence and submissions.**
- 4. That the learned trial magistrate erred in law by misapprehending principles of pleadings and provenance thereby shifting the burden of proof to the defendant.**
- 5. That the learned trial magistrate erred in law in finding that the plaintiff had proved his case on the balance of probability on the basis of the plaintiff's uncorroborated scanty and contradictory evidence.**
- 6. That the learned trial magistrate erred in law in making an award in general damages which is too high in the circumstances.**

In further arguments to support the above grounds, Counsel for the appellant submitted that the trial court erred in holding the appellant liable for the accident at 80% without proper evaluation of the evidence. Moreover, the judgment of the court did not comply with the mandatory provisions of **Order XX Rule 4 of the Civil Procedure Rules** as the learned magistrate failed to identify the issues for determination and give reasons for the decisions but merely reiterated the evidence given. Counsel for the appellant urged this court to give his client a reasoned judgment.

On the issue of causation and the duty of care, Counsel argued that the respondent failed to prove the negligence on the part of the appellant and in particular failed to show the link between the breach of duty on the part of the appellant and the injuries sustained by the respondent.

Lastly, it was argued that the court failed to take into consideration the defence evidence by their two witnesses which if it had been taken into account would disprove the claim by the respondent.

The appeal was opposed by the respondent. **Mr Ogeto** submitted that the respondent proved his case to the required standard and the trial court had no choice but to enter judgment in favour of the plaintiff. Counsel drew the attention of the court to the defence filed by the appellant wherein they denied liability and in the particulars of negligence alleged that the respondent had mounted a trailer and thereby exposed

himself to danger and therefore the appellant should be bound by their pleadings.

On the defence evidence, Counsel submitted that the records produced by the defence witnesses was of no probative value as they were kept by the appellants who deliberately refused to record the injuries which the respondent suffered on 10th November 1997.

The injuries suffered by the respondent were confirmed by the medical reports of Dr. Angelo D’Cunha, the appellant’s company doctor and by Dr. Kiamba both of whom classified the injuries suffered by the respondent as harm.

This being the first appeal, I have the mandate to re-evaluate the evidence before the trial court bearing in mind that this court has neither seen or heard the witnesses and therefore make due allowance for that.

Firstly, I wish to evaluate the findings of fact based on the evidence that was before the trial court and on the basis of the pleadings to establish whether the findings are based on sound principles of law.

Secondly, I have to establish whether the judgment is in compliance with the provisions of the law, while bearing in mind that this court can re-write the judgment. (*See Section 78 of the Civil Procedure Act*). The evidence upon which the judgment the subject matter of this appeal was based on was given by the respondent.

According to the respondent, he was employed on 7th October 1997 and on the material day, he was working on night shift where he was loading beams onto a machine but the building had many pot holes and oil had spilled all over the floor and as he lifted the beam he slid and fell onto the machine. He said he was injured by some metals protruding from the machine and he was given first aid and the next morning he went to the dispensary. At the dispensary he was referred to Dr. Patel who in turn referred him to the Provincial General Hospital Nakuru for an x-ray.

On the part of the appellant, they called two witnesses, **Catherine Chepchumba Too, DW 1**, a nurse who said that she attended the respondent at the dispensary on 13th November 1997 for complains of chest pain, difficult in breathing and coughing. The respondent was referred on the 16th November to see Dr. V.A. Patel as he complained that he had not improved.

Benson Menyase, DW 2 was a supervisor of the appellant at the material time he gave evidence and denied that any accident was reported on 10th November 1997. He told the trial court that the respondent reported for duty on 10th November 1997 at 2.30 p.m. and left at 10.00 p.m. On 11th November, the respondent worked on the night shift for 11½ hours and on 12th November 1997, he worked for 11½ hours for the night shift. The witness also gave a detailed account of how beams are moved in a trolley and stated that the respondent was supposed to push trolley and not to pull it. He explained that the buckrage is on the machine not on the beam and therefore one cannot fall on the buckrage while pulling or pushing the beam.

Based on the above evidence, the trial court ought to have evaluated the same and established whether the respondent had proved the particulars of negligence and the breach of duty on the part of the appellant.

The burden of prove of negligence rests with the plaintiff. The respondent had a duty to lead evidence that should connect his injuries or accident to an act or omission on the part of the appellant. (*See case of **Statpack Industries Vs James Mbithi Munyao Nairobi HCCA No.152 of 2003.***)

The plaintiff had a duty to prove the particulars of negligence on the part of the defendant. The particulars of negligence are pleaded.

The respondent did not show what kind of protective materials that he ought to have been given and how they would protect him. No evidence was led to show how the appellant failed to provide the respondent with warnings or a proper system of work. If there were potholes and oil spillings, why did the

respondent fail to avoid them, was the respondent forced to push the trolley on the potholes. The respondent also failed to lead evidence to show how the machine was defective. That was on the part of the respondent, when the respondent's case is considered against the defence evidence, I am not satisfied that the respondent had proved his case to the required standard. Evidence was led by the defence to show that there was no accident that was reported on 10th November 1997. The respondent was able to work on 11th and 12th November 1997 for full shifts and it was on 13th November 1997 when he visited the dispensary and complained of chest pains.

In the case of **Wilsher Vs Essex Area Health Authority 1 AllER 871** while considering the issue of negligence, causation, burden of prove and breach of duty just like in the present case the *house of Lords* held that;

“Where a plaintiff’s injury was attributable to a number of possible causes, one of which was the defendant’s negligence, the combination of the defendants breach of duty and the plaintiff’s injury did not give rise to a presumption that the defendant had caused the injury. Instead the burden remained on the plaintiff to prove the causative link between the defendant’s negligence and his injury, although that link could legitimately be referred from the evidence. Since the plaintiff’s retinal condition could have been caused by anyone of a number of different agents and it had not been proved that it was caused by the failure to prevent excess oxygen being given to him the plaintiff had not discharged the burden of proof as to causation.”

It was emphasized in the same decision that the plaintiff must prove

- (a) a breach of duty by the employer and
- (b) that such a breach caused the injury complained of.

In the case of **Cecilia W. Mwangi and Another Vs Ruth W. Mwangi C.A No.251 of 1996 Nyeri**, the Court of Appeal cited with approval the statement by *Lord Goddard C J* in the case of **Bonham Carter Vs Hyde Park Ltd [1948] 64 T.L.R 177** where it was held

“Plaintiff must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down particulars and, so to speak, throw them at the head of court, saying, ‘this is what I have lost’ I ask you give me these damages.”

I find in this present case, the respondent had a burden to proving his case and his scanty evidence did not establish the breach of statutory duty of care, and the negligence on the part of the employer’s which was the alleged cause of the injuries he suffered. Moreover, there is serious doubt of whether an accident occurred on 10th November 1997 and whether the treatment which was sought by the respondent was as a result of injuries or other causes.

The upshot of the above analysis is that the respondent’s case on the issue of liability should have failed, and on the issue of quantum since the plaintiff had suffered only soft tissue injuries, an award of Kshs.100,000/- where the degree of harm was classified as temporary disability of one week is manifestly and inordinately high. I would have awarded Kshs.60,000/- for general damages based on the Court of Appeal decision in **Stanley Maore Vs Geoffrey Mwenda (C.A 147 OF 2002 Nyeri)**.

For the reasons outlined above, this appeal is allowed with costs to the appellant. The judgment and decree of the lower court is set aside and the case is dismissed with costs.

It is so ordered.

Judgment read and signed at Nakuru on 13th October 2006.

MARTHA KOOME

JUDGE