REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT ELDORET

Civil Appeal 27 of 2004

EVERBRIGHT BAKERS:...APPELLANT

VERSUS

ABIUD MAGADA LUGASILU:...RESPONDENT

JUDGEMENT

This is an appeal from the judgement of V. Wandera Senior Resident Magistrate at Eldoret delivered on 27.12.2004 in Eldoret SPM.CC.NO.1043 OF 2003. In this industrial accident suit, the Learned Magistrate found the Appellant liable for negligence and awarded general damages for pain suffering and loss of amenities in the sum of Kshs.100,000/=, special damages in the sum of Shs.1500/=, costs and interest.

During the trial the plaintiff testified that while baking bread on 8th August,2000 at the Defendant's bakery premises where he was employed, a container holding 50 grams of dough slipped from the trolley and hit him on the left ear and shoulder. As a result, he sustained several injuries. He said that the floor was uneven and had pot-holes making the trolley he was pushing unbalanced. In his evidence he said that the trolley hit uneven ground or floor causing it to wobble and the tins fell on him causing injury.

In the plaint filed by the plaintiff, he gave the particulars of the negligence on the Defendant's part as follows:-

a) Failing to take all reasonable precautions for the safety of the plaintiff.

b) Failing to provide a safe appropriate system of work.

c) Failing to give proper precaution.

d) Failing to maintain adequate and suitable plant.

The Defendant did not call any witnesses in defence at the trial despite being granted numerous adjournment and opportunities. The Appellant in this appeal abandoned three of the grounds in the Memorandum of Appeal and proceeded with two, which are as follows:-

1) That the Learned trial magistrate erred in law and in fact in holding the defendant negligent in the absence of any evidence to that effect.

2) That the Learned magistrate erred in law and in fact in shifting the burden of proof to the defendant

contrary to the law.

I have considered the memorandum of Appeal, the judgement, proceedings and submissions by counsel. The plaintiff was pushing a trolley loaded with 50 gram tins containing dough. The dough was being moved to the heater before it was finally baked in the oven. He said that the rear wheel of the trolley entered the a pot-hole. He pushed the trolley slowly in an effort to avoid the pot hole, but the rear-wheel entered the pot-hole. From the said evidence, it is clear that the plaintiff knew of the condition of the floor in the premises. It is for this reason that he was being careful and pushing the trolley slowly. During cross-examination the plaintiff stated that he had worked for another bakery for six years before joining the Defendant for whom he worked for two years. He said that he knew how to perform his duties in the bakery since he was an experienced worker.

In this case, the main issues that arise are that of duty of care and burden of proof. In Halsbury's, laws of England, 4th Edition Reissue it is stated at paragraph 662 (p. 476) as follows:-

"**The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal connection must be established**."

In this case the contractual relationship between the Appellant and the respondent as employer and employee creates a duty of care. The employer is in land, inter alia, required to take all reasonable precautions for the safety of the employer, to provide a safe appropriate system of work and not to expose the employee to unreasonable risk.

In the present case, there is no claim or allegation that the trolley or tins in which dough was put were defective. The claim here is that the bakery floor was uneven and had what is referred to as "pot-holes". Due to this condition the trolley on which the dough containers were stacked wobble upon being pushed. In this case one of the rear-wheels of the trolley got into a pot-hole thereby affecting the balance of the trolley. As a result one of the metal tins fell off the trolley and fell on him.

It is my view that it was the duty of the Appellant as an employer to provide a safe and working trolley. There was no problem with the trolley in this case. Since the trolley carried the metal tins and containers of dough, for it to move, it had to be pushed. It was necessary that the premises floor was even. Any damaged concrete or surface over which the trolley was pushed had to be repaired. The trolley moved on wheels and any unevenness, roughness or "pot-holes" on the floor arising from damage or wear and tear, could create imbalance on the trolley is steadiness and movement.

The duty of employers to provide their workmen with a safe place of work was explained by **GODDARD L.J. IN NAISMITH –V- LONDON FILM PRODUCTIONS LTD** **(1939) 1 ALL E.R.794 AT 798** to be:-

" **not merely to warn against unusual damages known to them .... but also to make the place of employment.............as safe as the exercise of the reasonable skill and care would permit".**

In my view the uneven or "**pot-holed"** floor could easily and reasonably have been removed by a new concrete or cement floor. Such improvement cannot be said to be expensive as lead to closure of the bakery. The maintenance exercise could have been done over the week ends, public holidays, or at night. It could also have been done in patches if the bakery operated 24 hours. In any case, even a closure of one or two days was worth sacrificing for the safety of the workers. Having regard to the nature of the place and the work involved, it was essential that the floor was smooth and even. It was no answer that the Respondent was an experienced worker or that he had not complained about the floor. In any case in his testimony the Respondent stated that he had informed his employer of the state of disrepair of the floor. Nothing was done. This was a hazard solely created or permitted by the employer's omission.

On the basis of the foregoing, I do hereby find and hold that the trial court did not err in Law or fact in holding that the Defendant was negligent. The Defendant did not call any evidence to rebut the evidence of the plaintiff which on a prima facie basis could sustain the issue of liability. I think the evidence went beyond a prima facie case and the Learned Magistrate decided on a balance ambulance of probability.

I disagree that the trial magistrate shifted the burden of proof to the Defendant as contended by the Appellant. The Plaintiff duly discharged his duty to the required standard, if not more. There was no attempt at rebuttal by the calling of any defence witness.

The case of **WITHERS –V- PERRY CHAIN & CO. LTD 1(1961) 3 AII E.R. 676** is not relevant to the facts of this case. This case was not one of safe system of work but one in respect of safe place of work. Supervision or experience as a baker could not remove the risk posed by the damaged floor when using the trolley.

In conclusion, I find that the appeal herein has no merits and the same is dismissed with costs to the Respondent.

DATED AND DELIVERED AT ELDORET ON THIS 8TH DAY OF NOVEMBER,2006.

M.K. IBRAHIM

JUDGE.