



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO 580 OF 2002

**ROCKMASTERS LIMITED ..... APPELLANT**

**VERSUS**

**MICHAEL MUNGAI ..... RESPONDENT**

(An appeal from the decree of Hon. Mr. Shem Kebong'o RM in

Gatundu RMCC No 346 of 2001 delivered on 24th September, 2002)

**JUDGMENT**

By a Plaintiff dated 26th July, 2001 filed in the lower court, the Plaintiff (Respondent in this appeal) claimed damages for injuries sustained by him when he was loading stones onto his employer, the Appellant's lorry, allegedly in the normal course of his duties. The Respondent denied that the Appellant suffered any injury in the course of his duties. The trial court found for the Respondent and awarded him damages of Kshs.66,000/=. It is against that Judgment that this appeal has been preferred. Counsel for the Appellant, Mr Gachimo, pointed out that only liability was in issue, not quantum. He submitted that the Respondent did not prove his case on a balance of probability in that he did not show how the Appellant was negligent, whether indeed a duty of care was owed, and if so, how that had been breached. He argued that evidence showed that the Appellant's job duties were to pump diesel, and if, instead he was loading stones onto the lorry, he was on a "frolic" of his own. He further argued that the Respondent had not established the date and time of injury, as, according to the Appellant's witnesses, no such accident took place, as alleged, on the material date.

Mr Muturi, Counsel for the Respondent, submitted, correctly in my view, that the issues before the Court were whether the Respondent was on duty at the material time, whether he was injured in the course of his duties, whether the employer owed him a duty of care, and whether there was a breach of such duty resulting in injuries. As this is the first Appellate court, I am duty bound to peruse, analyze and re-evaluate the evidence on record, keeping in mind always that it was the lower court that had the advantage of testing the demeanour of witnesses. Bearing all that in mind, and having perused the evidence adduced before the lower court, I am satisfied, as was the trial magistrate that the Respondent was injured in the course of his duties while loading stones onto the Appellant's lorry.

It is not in dispute that the Respondent was indeed an employee of the Appellant, and was on duty at the material time. He says that indeed his job was to pump diesel, but that he was called upon to load stones at that time. The Appellant denies this. The trial court chose to believe him, and I have no reason to interfere with that decision. The appellant's counsel argued that the Respondent was on a "frolic" of his own when he left his pumping duties to load stones, almost suggesting that the Respondent actually enjoyed doing so. His argument, to say the least, is rather preposterous. Why would an employee

voluntarily, and without being asked to do so, walk away from his relatively easy pumping duties to load stones? It is more probable that he was assigned those duties, and I confirm the magistrate's finding that he was carrying out his duties when loading stones.

Now, was the Appellant negligent in any manner giving rise to the accident? Was there a duty owed? Was that duty breached? The record of evidence shows that as he was loading one of the stones came rolling down and landed on his toe, causing injuries. He was not wearing any protective gear, such as gum boots. He had not been provided with any such protective gear.

**Winfield and Jolowicz on Tort** by **W V H Rogers**, 14 Edition, London Sweet and Maxwell at page 213 states inter alia:-

***“If a worker is injured just because no one has taken the trouble to provide him with an obviously necessary safety device, it is sufficient and in general satisfactory to say that the employer has not fulfilled its duty.”***

Further, pages 215 – 216 states inter alia that:

***“the employer must take reasonable care to provide his workers with the necessary plant and equipment and is therefore liable if any accident is caused through the absence of some item of equipment ...”***

The employer is expected take all reasonable steps to ensure the employee's safety. In this case, the employer/appellant failed in that duty and is fully liable for the injuries sustained by the Respondent.

As the quantum of damages awarded is not in issue, I hereby affirm the decision of the lower court, and dismiss this appeal with costs to the Respondent.

Dated and delivered at Nairobi this 9th day of February, 2005.

**ALNASHIR VISRAM**

**JUDGE**