REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL APPEAL 701 OF 2003

SAMUEL MBUGUA MURIUKI.....APPELLANT

VERSUS

OLIVE FARM PRODUCTS LIMITED.....RESPONDENT

(An Appeal from the Judgment of Hon. E. A. Awino, SRM in Limuru

RMCC No. 23 of 2003 delivered on 26th September, 2003).

JUDGMENT

By a Plaint dated 30th January, 2003, and filed in the lower court on 31st January, 2003, the Appellant (Plaintiff in the lower court) claimed general and special damages from the Respondent, his employer, for injuries sustained by him in the course of his employment. He alleged, in his Plaint before the lower court, that a pipe fell on him during the course of his duties causing injuries to two of his fingers, and blamed his employer for not providing him a safe working place, and adequate protective gear. The Respondent denied these allegations saying that the Appellant brought the injuries onto himself through his own negligence, in not taking elementary precautions for his own safety. The lower court, after hearing three witnesses (one for the Plaintiff and two for the Defendant) agreed substantially with the Respondent employer, holding the Appellant 80% to blame for the accident. It is against that Judgment that the Appellant has preferred this appeal, outlining the following four grounds of appeal:

> ***1. The learned trial Magistrate erred in law and fact in holding that the Plaintiff was 80% to blame for the occurance (sic) of the accident without reasons for such apportionment of liability.***
>
> ***2. The learned trial Magistrate erred in law and fact in holding the Plaintiff 80% and Defendant 20% liable for the occurance (sic) of the accident when he knew or ought to have known that the evidence adduced showed that the accident arose due to the negligence and breach of statutory duty on the part of the Defendant.***
>
> ***3. The learned trial Magistrate erred in law and fact in that he apportioned liability in total disregard of the evidence adduced in favour of the Plaintiff and without considering that the evidence of DW 1 and DW 2 on liability contradicted each other on material particulars and thus arrived at a wrong conclusion on liability.***
>
> ***4. The learned trial Magistrate erred in law and fact in that he decided the issue of liability against the weight of evidence adduced and submissions made in favour of the Plaintiff.***

As is evident from the above grounds of appeal, and as Mr Muriithi, Counsel for the Appellant pointed out, only liability is in issue here – not quantum.

Mr Muriithi argued before this Court that there was no basis for holding the Appellant 80% liable for the accident; that the lower court had given no reasons for doing so; that the Appellant's account of how the accident happened had not been rebutted; and that the Appellant had been forced to do work that was ordinarily not his, without adequate manpower support and protective clothing.

Mr Kihara, Counsel for the Respondent, argued that the Appellant had indeed been provided with hand gloves but chose not to wear them; and that there was nothing the Respondent did that constituted negligence on its part. He cited the case of **Henry Nyabuto Nyachoti vs Spin Knit Ltd (Nakuru HCCA No. 1462 of 1993**) where the Court held the Plaintiff 90% to blame for the accident when he attempted to extract material from a moving machine roller without first turning the machine off.

This being a first appeal, it is my duty to assess and re evaluate the evidence before the lower court, bearing in mind that this court has neither seen or heard the witnesses and should, therefore, make allowance for the same. I must be sure that the findings of facts made by the learned magistrate are based properly on the evidence before him and that he has not acted on wrong principles in reaching his conclusion. Now, having warned myself of that, let me examine the relevant evidence before the lower court.

In explaining how the accident happened, the Appellant testified that he and three other colleagues had been assigned the task of moving an oil tank from the first to the second floor. In the process a pipe fell on his fingers injuring the same. He said he was not wearing hand gloves – that he had not been provided with any. All he was given was an overall which he was wearing at the material time.

As against the Appellant's testimony, the lower court heard from two witnesses presented by the Respondents. The Respondent's first witness, Charles Alex Njoroge, a Director of the Respondent Company, testified emphatically that the Appellant had indeed been provided with protective gloves, but chose not to wear them; that they had 60 employees (the appellant had been an employee since 1996); that cleaning and removal of oil tanks was a routine task and that they had never had such accidents in the past. The Respondent's second witness, Bernard Ouma, a fellow employee, who worked with the Appellant on the material day, testified that they were indeed provided with hand gloves, that he wore them, and that the Appellant chose not to wear the same.

Taking all this evidence into account, the lower court came to the following conclusion:

> ***"The Plaintiff in this case handled the pipe with his bear hands thereby exposing himself to risk and danger. It is my finding that he substantially contributed to his injuries. Considering that the Plaintiff was not working alone and that some others could also have been negligent, I would apportion liability at 80:20. The Plaintiff is to blame to the extent of 80% and the defendant to the extent of 20%."***

Having reviewed the evidence adduced before the lower court, and the findings made by the court, I have no reason to believe that the lower court made an error of principle in arriving at its decision. This is a case of two parties giving diametrically opposed accounts over the most material aspect of evidence that gave rise to the injuries – the protective gloves – whether the Appellant had access to the same and chose not to utilize them when handling the pipe.

The learned Magistrate had the benefit of seeing and hearing the witnesses, of testing their demeanour, and chose to believe the two Respondent's witnesses. I cannot fault him for so doing, and I do not find that I have any reason to interfere with that decision.

Accordingly, and for reasons cited, I dismiss this appeal with costs to the Respondent.

Dated and delivered at Nairobi this 21st day of June, 2005.

ALNASHIR VISRAM

JUDGE