REPUBLIC OF KENYA

IN THE COURT OF APPEAL KENYA ELDORET

CIVIL DIVISION

CIVIL APPEAL 7 OF 2003

CPC INDUSTRIAL PRODUCTS (K) LIMITED ……..…….. APPELLANT

VERSUS

SAMUEL KIRWA KOSGEI ……..……..…….. RESPONDENT

JUDGEMENT

This is an appeal from the judgement of Solomon Wamwayi Esq. Chief Magistrate in Eldoret Chief Magistrate's Court Civil Case No.13 of 2001 delivered on 15th January 2003. The appeal is based on four grounds – 1. That the learned trial magistrate erred in law and fact in holding the appellant negligent without any evidence in that regard. 2. That the learned trial magistrate erred in law and in fact in finding that the appellant was the employer of the respondent when there was evidence to the effect that he was an employee of Copan Agencies Limited (the third party). 3. That the learned trial magistrate erred in law and in fact in not finding the respondent negligent to any extent. 4. That the learned trial magistrate erred in law and fact in awarding damages which were inordinately high and/or excessive in the circumstances as to amount to an erroneous estimate of the loss suffered by the respondent.

At the hearing of the appeal, Mr. Kuloba for the appellant abandoned ground 4 on quantum of damages. He addressed me on liability. He submitted that the learned magistrate erred in finding the appellant liable. In paragraph 3 and 4 of the plaint, the respondent averred that he was an employee of the appellant. The appellant company denied this in their written statement of defence. It was for the respondent to produce the evidence of employment such as the register. He sought to rely on section 64, 65, 66 and67 of the Evidence Act (Cap.80). In his view, the respondent could not refer to the register without first producing the same. He sought to rely also on section 69 of the Evidence Act (Cap.80).

He submitted further that the appellant gave evidence on the employment of the respondent by the third party. DW1 produced a copy of the contract between the appellant and the third party who was a contractor, Messrs. Copan Agencies Limited. The respondent was an employee of Copan Agencies Limited. Clause 4(d) of the contract provided that the contractor was responsible for its employees, including taking insurance cover for them.

The appellants witnesses produced a list of all the appellant's employees, which did not include the name of the respondent. Therefore the respondent sued the wrong party. Though in the lower court the third party never entered appearance, the joining of the third party by the appellant was merely a caution by the appellant. It was not necessary for the appellant to look for the third party. The third party notice was only applicable in a situation of indemnity or contribution and only applied to situations of joint wrongdoing.

He sought to rely on Order 1 rule 14 of the Civil Procedure Rules and argued that it did not mean that the

third party became liable merely for failure to enter appearance. The respondent had to prove liability first against the appellant before enforcing the same against a third party. However, the court entered judgement against the appellant and the third party, while in fact' a third party could not be liable independently. He sought to rely on the book by Salmond on Tort 19th Edition page 544 to 550, on the liability of an independent contractor. He submitted that liability of an independent contractor was not vicarious liability. He also sought to rely on Order 1 rule 7 of the Civil Procedure Rules. He argued that the respondent should have sued the appellant and the third party.

The respondent instead chose to sue the wrong party. The appeal should therefore be allowed, judgement of the lower court be set aside, with costs to the appellant. Mr. Andambi for the respondent opposed the appeal. He submitted that the main issue was whether the respondent was an employee of the appellant. The evidence of PW2 was that the respondent was an employee of the appellant. This witness was a permanent employee of the appellant and was not cross-examined to cast doubt on his evidence. In civil cases, the proof required was on the balance of probabilities. The respondent did not require to bring any other evidence on his employment.

On the issue of the third party, he submitted that it was the appellant who brought in the third party. The supplementary record of appeal showed that the appellant actually sought judgment against the third party. Therefore the learned magistrate was justified in entering judgement against the third party. Mr. Kuloba in response submitted that the request for judgement against the third party was not brought according to the law. Also the evidence of PW1 and PW2 did not satisfy the requirements of sections 67, 68 and 69 of the Evidence Act (Cap.80). The proof on the balance of probabilities was not based on the number of witnesses who testified, but on the quality of the evidence tendered.

This being a first appeal I have to evaluate the evidence on record and come to my own conclusions and to satisfy myself as to whether there might have been any failure of justice. At the hearing of the case, the respondent testified as PW1 and called one witness, PW2 (Reuben Tanui). It was the respondent's evidence that he was working as a casual labourer for the appellant. That their supervisor was a Mr. Wendo who was employed by the appellant. That on the material day of 16th October 2000 he was loading some drums belonging to the appellant, together with five other people. In the course of that work, one drum rolled and injured him on the forehead, chest and neck.

He was taken to Moi Referral and Teaching Hospital by one, Makumbi who was working for the appellant. He was treated and later examined by Dr. Aluda who prepared a medical report and charged him Kshs.1,500/= for the medical report. He produced the medical report as an exhibit No.2. He testified that he blamed the appellant for the injury because the appellant did not provide him with protective wear. That he had asked for a helmet from Mr. Wendo who responded that he would ask for the same from the plant manager. It was Mr. Wendo who told him and other co-workers to load the lorry with drums. Therefore he sought for general and special damages against the appellant.

He testified that following the accident, he felt dizzy when he stayed in the sun for long periods. Sometimes he felt headache. He had been working with the appellant in the year 2000, but he did not have an appointment letter. His name and the names of others were merely written in the register. He was aware that some contractors used to hire casuals. He knew Copan Agencies Limited and he used to wear an overall written Copan Agencies Limited. However, he did not know that Copan Agencies Limited had a contract with the appellant, to hire casuals. He was working for the appellant and not Copan Agencies Limited. His supervisor was Mr. Wendo.

PW2 Reuben Tanui testified that he worked for the appellant and was employed in 1991. He knew the respondent as a fellow worker, working with the appellant. That on 9th October 2000 the respondent was injured while working for the appellant. The supervisor was employed by the appellant. In cross-examination he stated that the accident occurred on 16th October 2000. On that day he was working as a machine operator. He was, however, employed as a house attendant. Mr. Wendo was not his supervisor. The machine was extended from the house.

The appellant called one witness, Mr. Paul Okwemba (DW1). He testified that he knew the respondent as

well as Copan Agencies Limited. Copan Agencies Limited was a company contracted to provide casual labour. There was an agreement signed between Copan Agencies Limited and the appellant in the month of July 2000. Copan Agencies Limited were to facilitate the movement of goods with the appellant. The agreement was in force on 16th October 2000. He produced a copy of the same agreement as exhibit D1. The appellant would at times employ special skilled labourers directly. He stated that he had a list of permanent workers employed by the appellant in October 2000. He produced the list as exhibit D2. The name of the respondent did not appear in that list. Therefore the respondent was not an employee of the appellant. In cross-examination he stated that he did not know whether on 16th October 2000 an accident involving the respondent occurred. He knew Reuben Tanui as a machine operator employed by the appellant. His name appeared in exhibit D2 as No.75. At the close of the evidence for the parties, counsel for the parties made written submissions to the learned magistrate. The learned magistrate found the appellant liable for the accident in negligence at 80% and found contributory negligence of 20% on account of the respondent. Now the appellant has appealed to this court challenging the liability. The appellant has argued, through his counsel, on vicarious liability, and entry and execution of judgement against the third party. Those were not part of the grounds of appeal.

I will start with the ground as to whether the respondent was an employee of the appellant. The learned magistrate did not make a specific finding on the issue that the respondent was so employed by the appellant. However, he made some findings on the conduct of the work and supervision. He stated at page J2 of the judgement – “The defendant did not call evidence to refute whether Wendo was an employee of the defendant or not and whether the said accident occurred within the precincts of the defendant company and that the agreement between the defend (sic) and a third party was not within the knowledge of the plaintiff. I also find that the plaintiff’s supervisor was one Wendo who at all material times was an employee of the defendant company. I do therefore hold that the plaintiff has correctly sued the defendant and the defendant has correctly taken out third party proceedings against Copan Agencies Limited.” The learned magistrate did not actually find that the respondent was an employee of the appellant. He found that the respondent was working for the appellant under the supervision of the appellant’s employees. The evidence on record by the respondent is that he used to work for the appellant. PW2 who was an employee of the appellant also stated so.

The register produced as Exhibit D2 was for permanent employees of the appellant. The respondent was a casual employee. Therefore even if the respondent was an employee of the appellant, his name would not appear in the register, as he was a casual employee. It is apparent from the evidence on record, that the respondent was engaged by Copan Agencies Limited. However, it is quite clear to me that the place of work was the premises of the appellant; the work was assigned by an employee of the appellant, Mr. Wendo; and the supervision of the work was also done by the same employee of the appellant. In those circumstances, I find and agree with the learned magistrate that the respondent worked for the appellant, though he was engaged or employed by Copan Agencies Limited.

On the first ground of appeal as to whether the learned magistrate erred in holding that the appellant was negligent without any evidence in that regard, the burden was on the appellant to establish negligence against the appellant on the balance of probabilities. He testified that he was assigned the work of loading drums by an employee of the appellant Mr. Wendo in the premises of the appellant. Mr. Wendo was also the supervisor of the work. The respondent testified that he was not provided with a helmet. That he asked Mr. Wendo, an employee of the appellant, for the same. That Mr. Wendo stated that he would have to get the helmet from the plant manager.

Mr. Wendo never came to testify in court. No explanation was given as to why he did not come to testify. The witness for the appellant, Paul Okwemba dwelt on evidence of the contract between the appellant and Compan Agencies Limited and never mentioned the issues raised by the respondent relating to Mr. Wendo’s involvement in assigning and supervising the work. I agree with the learned magistrate’s finding that the appellant was negligent, on the evidence on record. Even if the respondent was actually an employee of Copan Agencies Limited, the appellant would not escape liability. Their supervisor Mr. Wendo was the one who assigned the work. The work was in the premises of the appellant, and he was the one who said that he would obtain a helmet from the Plant Manager.

In that event, strictly speaking, Messrs. Copan Agencies Limited were not an independent contractor. The common law position on the liability of a principal for the negligence of an independent contractor as stated in the book by Salmond on Torts 19th Edition, page 544 paragraph 184 does not apply to our present case. The work was neither assigned nor supervised by Copan Agencies Limited. The appellant was primarily liable in negligence as the one who assigned and supervised the work. The agreement between Copan Agencies Limited and the appellant that was produced in court has a number of clauses. Clause 4 (d) states –

"4 (d) That the CONTRACTOR will be legally responsible for all his workers welfare including salary payments, mandatory insurances, uniforms, protective apparatus, transport, meals etc". Clause 6 (e) of the agreement states – "46(e) That the CONTRACTOR will meet the COMPANY safety requirements by making sure that his employees are provided with uniforms and protective apparatus e.g. glasses, helmets, respirators, gloves, etc as provided in the safety contract manual".

Nowhere in the agreement is it stated that the contractor will assign work or supervise the employees. The evidence on record is that the work of loading drums was carried out in the premises of the appellant, assigned by employees of the appellant and also supervised by an employee of the appellant. There is no evidence that the respondent was aware of the terms of the agreement between the appellant and Copan Agencies Limited. Be that as it may, since the appellant was assigning and supervising the work he cannot escape from liability. They should not have allowed a worker who did not have protective clothing to engage in the work.

I now turn to the ground that the learned magistrate erred in not finding the respondent negligent to any extent. From the contents of the judgment the learned magistrate found the respondent 20% contributory negligent. This ground of appeal therefore has to fail. It has no merits. For the above reasons, I dismiss this appeal and uphold the decision of the learned magistrate. I order that the costs of the appeal will be to the respondent.

Dated and delivered at Eldoret this 6th day of July 2005.

George Dulu

Ag. Judge

In the Presence of: Mr. Kipnyekwei for the respondent