REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

-

Civil Appeal 152 of 2003

STATPACK INDUSTRIES …………………....………….. APPELLANT

VERSUS

JAMES MBITHI MUNYAO ……………………...……. RESPONDENT

(An Appeal from the Judgment of Hon. N. A. Owino, SRM in Milimani Commercial Courts Civil Suit No. 9220 of 2001 delivered on 18th July, 2002).

JUDGMENT

The Respondent was a casual but experienced worker with the Appellant. At the material time, on 18th September, 2001 while operating a core loading machine, the Respondent's dust coat interfered with the drive shaft switch, accidentally switching the same on, with the result that his left hand got caught in the machine, and he suffered injuries to the same. He brought an action in the lower court against his employer, the Appellant, alleging that the same was caused by the negligence and/or breach of duty of the Appellant, and outlined eight particulars of negligence, to which I shall return later in this Judgment. The Appellant, by its defence filed in the lower court on 7th December, 2001, denied any negligence and/or breach of contractual or statutory duty.

The lower court found for the Respondent, and awarded him Kshs.220,000/= in general damages, and Kshs.2,500/= in special damages. The learned Magistrate expressed as follows, in part:

> **"The plaintiff blames the defendant because the machine he was working on moved and crashed his hand. This was caused by the dust coat he was using. This negligence is properly pleaded under b, c, d, e, of paragraph 6 of the plaint. The plaintiff was by nature of what he was working as the work he was doing exposed to a risk of injury.**
>
> **However I do note that the plaintiff had experienced (sic) to work on this machine. He ought to have handled his dust coat in such a manner as to ensure that it does not interfere with the switch.**
>
> **For failing to do so, the plaintiff will take 20% of the blame while the defendant takes 80%."**

It is against this Judgment that the Appellant has appealed to this court, based on the following 17 grounds of appeal:

> ***"1. The learned Magistrate erred in entering judgment against the Appellant.***
>
> ***2. The learned Magistrate erred in considering and entering judgment against the***

Appellant on the foot of an allegation of negligence which had neither been pleaded nor fully particularised in the Plaint.

3. The learned Magistrate erred in accepting almost in its entirety the evidence of the Respondent that he had not been supplied with overalls, notwithstanding evidence to the contrary.

4. The learned Magistrate erred in holding that the Respondent's account of incident giving rise to this suit made out a case for negligence against the Appellant.

5. The learned Magistrate erred in ignoring most of the testimony adduced on behalf of the Appellant at the trial.

6. The learned Magistrate failed to appreciate the totality of the evidence before her and the submissions made on behalf of the Appellant.

7. The learned Magistrate erred in applying an erroneous standard of proof and failed to appreciate that the Respondent had failed to discharge the burden of proof placed upon him as a matter of law.

8. The learned Magistrate erred in failing to hold that the Respondent was wholly to blame for the accident giving rise to the proceedings.

9. The learned Magistrate erred in reaching a conclusion that was contrary to the evidence before her and the law.

10. The learned Magistrate erred in accepting without qualification the medical evidence advanced on behalf of the Plaintiff by PW 1.

11. The learned Magistrate erred in assessing general damages at Kshs.220,000/=.

12. The learned Magistrate erred in refusing to admit into evidence exhibits produced on behalf of the Defendant in Court.

13. The learned Magistrate erred in assessing the Plaintiff's contribution of the accident at 20% instead of 100%.

14. The learned Magistrate erred in failing to hold that the Plaintiff had failed to prove any defect in the dust coat and/or overall or any equipment provided by the Employer, as a causative factor to the injuries he sustained.

15. The learned Magistrate erred in failing to appreciate that the Defendant had taken all the required reasonable care expected as to negative negligence on its part.

16. The learned Magistrate erred in assessing and awarding special damages of in the sum of Kshs.2,500/= as pleaded without sufficient proof.

17. The learned Magistrate erred in not considering the submissions and authorities submitted on behalf of the Defendants."

In her submissions before this Court, Ms Lois Allela, Counsel for the Appellant, argued that none of the allegations of negligence outlined in the Plaint had actually been proved by way of evidence; that the Respondent had not pleaded that the Appellant was negligent by providing him (and the employees) dust coats, instead of overalls; that the Respondent himself was negligent in the way he handled his dust coat; that there was no causation between any of the acts or omissions of the Appellant, and the accident causing injuries; and finally that even if the Appellant was assumed to have breached its duty and failed

to provide overalls, there was no evidence led to show that the accident was a direct result of that breach of duty.

With regard to quantum, Ms Allela submitted that the award of Kshs.220,000/= for general damages was excessive, while special damages of Kshs.2,500/= had not been proved.

In reply, Mr Bosire, Counsel for the Respondent, argued that the injuries suffered by the Respondent were serious, not soft tissue, with a permanent disability of 5%. He relied on the case of ***Morris Mugambi vs Isaiah Gitiru*** ***(C A 138/2002 –*** Nairobi).

Mr Bosire made no submission on the issue of liability.

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 nor 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 her and that she has not acted on wrong principles in reaching her conclusion. Now, having warned myself of that, let me examine the relevant evidence before the lower court. Before I review the evidence adduced in the lower court, it is important to note the particulars of negligence relied upon by the Respondent in his Plaint. These are outlined in paragraph 6 of the Plaint as follows:

> ***(a) Failing to take any or any adequate precautions for the safety of the plaintiff while he was engaged in his work.***
>
> ***(b) Exposing the plaintiff to danger or injury to which they knew or ought to have known.***
>
> ***(c) Failing to provide or maintain adequate or suitable plant, tackle and appliances to enable the plaintiff carry out the said work safely.***
>
> ***(d) Failing to provide suitable measures to enable the plaintiff to carry out his work safely.***
>
> ***(e) Failing to provide or maintain a safe and proper system of work or to instruct its workmen including the plaintiff to follow the system.***
>
> ***(f) Failing to provide the plaintiff with safe and proper protective devices gloves.***
>
> ***(g) In breach of section 34 of the Factory's Act, the place in which the plaintiff had to work was not made and kept safe for him.***
>
> ***(h) Failure to warn the plaintiff of the dangers at his place of work.***

Now, in his evidence before the lower court, the Respondent stated that the button on his dust coat interfered with the drive shaft switch of the machine and accidentally turned it on. As a result his hand got caught in the machine, resulting in severe injury. According to him, if he had been provided with overalls, instead of a dust coat, this would not have happened. He does not explain why, especially when there was no evidence that the overalls had no buttons. His argument defeats logic. I cannot quite comprehend the basis on which the learned Magistrate came to the conclusion that the accident "was caused by the dust coat he was using". Dust coats do not, and cannot, by themselves cause accidents. If he had not buttoned up his dust coat, or if he wore it in any manner that it was bound to, or did, interfere with the machine, he cannot possibly blame anyone else. An employer's duty at common law is to take all reasonable steps to ensure the employee's safety. But he cannot baby-sit an employee. He is not expected to watch over the employee constantly. (See ***Woods vs Durable Suites Ltd*** ***(1953)*** 2 AER 391).

In any event, the Respondent had not pleaded in his Plaint that the Applicant was negligent by providing a dust coat instead of overalls. And this allegation should not have been the basis of a Judgment on liability.

Coming now to the more important issue of "causation", it is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily a result of someone's negligence. An injury per se is not sufficient to hold someone liable for the same.

Here, in this case, the Respondent did not lead any evidence to connect his injuries or accident to an act or omission on the part of the Appellant. The real cause of the accident was not established. The learned Magistrate ought to have asked herself, as I have repeatedly tried to ask myself, "so what exactly did the employer do or did not do that caused this accident?" And I cannot find the answer in the testimony adduced before the lower court.

In ***Wilsher vs Essex Area Health Authority*** ***(1988) 2 W. L. R. 557*** the House of Lords held that where a Plaintiff's injury could have been caused by six possible factors of which the defendant's negligence was only one, the onus was on the Plaintiff to establish "causation", and that, in that case he had failed to establish that the defendant's negligence was the cause of the accident. It is instructive to note that in the Wilsher case, the House of Lords noted that at least one of the factors of negligence could be attributed to the defendant. Here in this case before me, not a single element of negligence has been pleaded or proved against the Appellant, who took all reasonable steps to provide protective clothing, and to instruct employees on safety issues.

Similarly, in ***Cummings (or McWilliams) vs Sir Willian Arrol (1962) 1 AER 623*** the House of Lords held that even assuming the defendants were in breach of their duty in not providing a safety belt to their deceased employee, nevertheless they were not liable in damages **because their breach of duty was not the cause of the damage suffered.**

Likewise, I find that there was no evidence presented to the lower court to enable the court to draw a fair conclusion that the accident was caused by the negligence and/or breach of duty of care by the Appellant employer. Accordingly, this appeal must succeed.

Based on this finding, the issue of the quantum of damages does not arise. I would note, however, that based on the nature of the injuries suffered by the Respondent, the award of Kshs.220,000/= for general damages is manifestly and inordinately high. Based on the Court of Appeal decision in ***Stanley Maore vs Geoffrey Mwenda (***C A 147 of 2002 – Nyeri), I would have awarded no more than Kshs.100,000/= for general damages. Accordingly, and for reasons outlined, this appeal is allowed with costs to the Appellant, and the Judgment and decree of the lower court herein is set aside, and the Respondent's case in the lower court against the Appellant, is dismissed with costs.

Dated and delivered at Nairobi this 8th August, 2005.

ALNASHIR VISRAM

JUDGE