REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

Civil Appeal 149 of 2000

STEVEN ONDULU RABATCH …….…….. APPELLANT

-VERSUS

ELDORET STEEL MILLS LIMITED …….……..…….. RESPONDENT

(Being an appeal from the Judgement of L. W. Gitari , Esq.,

Principal Magistrate in Eldoret CMCC. No. 939 of 1999
Delivered on 24th November 2000)

JUDGEMENT

This is an appeal from the judgement of Ms. Lucy W. Gitari Principal Magistrate in Eldoret CMCC. No. 939 of 1999, which was delivered on 24th November 2000. After the hearing of the case the learned magistrate dismissed the appellant's suit with costs to the respondent. The appellant (who was the plaintiff in the lower court) has preferred an appeal to this court against the decision of the learned magistrate. The appellant through his counsel Messrs. Kitiwa and Company Advocates filed a Memorandum of Appeal listing 8 grounds of appeal. The grounds are that –

1. The learned magistrate erred in law and in fact in dismissing the appellant's suit.

2. The learned magistrate erred in law and in fact in finding that the appellant did not prove his case on a balance of probabilities.

3. The learned magistrate erred in law and in fact in considering other extraneous matters in her judgement.

4. The learned magistrate erred both in law and fact by failing to find the respondent 100% liable or at all.

5. The learned magistrate erred in law in misapprehending the appellant's concrete evidence by not finding in the appellant's favour.

6. The learned trial magistrate erred both in law and fact in relying on matters not pleaded and the maxim of volenti non fit injuria.

7. The learned trial magistrate erred in law and fact on (sic) relying on evidence that was not adduced.

8. The learned trial magistrate was biased.

At the hearing of the appeal, Mr. Kitiwa for the appellant submitted that the appellant was employed by the respondent as a loader. On 22nd April 1988, the appellant was on duty loading steel plates together with other employees of the respondent. There were a total of four employees working. The appellant was holding the front part of the load. In the process of lifting, the other employees suddenly and without notice, released the metals and consequently the appellant's back was injured. The other employees released the metal plates because the said metal plates were too heavy. The said employees had complained to the supervisor that they needed more employees to lift the loads, but they were told to carry on with the work without any increase in the number of the employees.

He submitted that normally there should have been at least twenty employees working together in that kind of assignment. The respondent failed to provide enough workforce. This exposed the appellant to a risk of injury. The respondent should have provided alternative means for lifting the metal plates such as a crane. Though the appellant urged the lower court to find the respondent liable, the court did not do that.

He submitted further that the respondent's witness, who was DW1, admitted in evidence that the appellant was on duty on that day, that the appellant was injured on duty, and that there was a shortage of employees. That the respondent's employee also admitted that some employees could put down the metal plates before others. This, in the view of Mr. Kitiwa was what happened in this case. Therefore, the learned magistrate should have found the respondent negligent and 100% liable.

He further submitted that the trial magistrate considered extraneous matters in her judgement, which were not raised in the defence. She was also biased in choosing to believe the respondent's evidence. She relied on the doctrine of volenti non fit injuria, which was neither pleaded by the respondent nor was it raised in the defence. That showed that the learned trial magistrate was biased. She erred in law and in fact in dismissing the appellant's case without considering the evidence on merits.

Mr. Tuiyott for the respondent, submitted that the appellant did not show how heavy the subject load was. He did not establish the weight of the load. The respondent had, through its witness, stated that the metal plate weighed a total of 50 kilograms. That was the load that the appellant and others were asked to carry. There was also a dispute on the number of employees who were assigned the job. The appellant stated that there were a total of four employees. The defence evidence was that there were a total of six employees assigned to the job. The defence also named those six employees in evidence, which was a more believable version. If the load was divided equally among six employees, each employee would proportionately be carrying a weight of 10 kilograms. If it was divided proportionately among four employees, each would be carrying a weight of 12.5 kilograms. The circumstances of the operation were such that a crane was not necessary as the load was not heavy. The appellant also did not give the names of the co-workers who allegedly released the load.

On the issue of the trial magistrate considering extraneous matters, he sought to rely on the case of **Odd Jobs –vs- Mubia [1970] EA 476.** He submitted that a court could determine an issue if the court considered that that issue had been left to it for its decision. Though a plea of *volenti non fit injuria* was not taken up by the defence, it became an issue for determination when it was raised by the defence in their submissions. The fact that the learned magistrate mentioned the doctrine of *volenti non fit injuria* did not mean that she was biased. Also, the fact hat the magistrate said that the appellant should have sought compensation under the Workmen's Compensation Act did not mean she was biased. On the contrary, that showed that the learned magistrate was alert to the issues before her.

I have considered submissions of both counsel in this appeal. I will start by considering the ground of appeal that the learned magistrate erred in finding that the appellant did not prove his case on the balance of probabilities.

On the proof of the case of negligence by the appellant, the learned trial magistrate had this to say in her judgement –

> **"I have considered all the evidence adduced. The plaintiff stated that he was doing the work of lifting some metals when he sustained an injury on his back. The plaintiff did**

not produce any contract of employment to show what measures the defendant was supposed to take to secure the safety of the plaintiff. The plaintiff was doing his lawful work of lifting metals. I find that the plaintiff has not proved the defendant negligent."

The burden of proof is always on a plaintiff to establish his case against a defendant on a balance of probabilities. The appellant (who was the plaintiff at the trial) alleged in his pleadings that he was working for the respondent (who was the defendant). He testified and stated so in his evidence. He testified that he was injured because of a heavy load of metal, which was released too early by co-workers. The respondent in evidence (through DW1 Alphonse Mbae who was the supervisor of loading section) did not challenge that the appellant was at work. He challenged the number of employees and the weight of the metal plates. He stated that the metal plates weighed a total of 50 kilograms. He also stated that the appellant was pulling a metal plate when he got injured. The learned magistrate appears to have considered that in order to prove negligence of the respondent, the appellant should have produced a contract to show what measures the respondent was supposed to take to secure the safety of the appellant. With due respect, I am of the view that that was an error on the part of the learned magistrate.

Once it is established that there is a relationship of an employer and employee, the common law duty of care of an employer towards his employee arises. At common law, an employer is not merely required to provide a safe system of work but to ensure that the employees comply with that safe system of work. **(see the case of Mghosi –vs- Gaya Engineering Works [1981] KLR 164 – per Kneller .J. as he then was)**. Providing a safe system of work would require supervision by the employer to ensure that no employee is injured on duty. Of course an employee can be found contributory negligent, if he carelessly carries out his work or ignores instruction on safety given by the employer.

In our present case, the evidence by the appellant was that the load was too heavy and was released abruptly by the fellow employees. The witness for the respondent (DW1) testified that the load was not heavy that the metal plates only weighed 50 kilogrammes. However, he said that the plaintiff was pulling the metal from within other metal plates. He testified that the number of employees assigned to work was six instead of the four mentioned by the appellant. He testified that it was possible for fellow workers to drop the load abruptly. www.kenyalaw.org Steven Ondulu Rabatch v Eldoret Steel Mills Limited [2005] eKLR 7 There is no evidence that the appellant was given instructions by the respondent not to pull the metal rod.

There is no evidence that the respondent, or DW1 as the loading supervisor, gave instructions on safety to the respondent and co-workers. In my view, even a load of 50 kilograms can injure somebody if it is released abruptly and without notice by co-workers. Taking into account the circumstances of this case and the evidence on record, I am of the view that the appellant proved a case of negligence against the respondent who was his employer on the balance of probabilities. With due respect, I am of the view that the learned magistrate erred in imposing an obligation on the appellant to produce a written contract to prove the safety measures to be taken by the respondent. I am of the view that the appellant on the balance of probability, established that the respondent never established a safe system of work nor ensured compliance.

I now turn to the issue on whether the learned magistrate relied on extraneous issues. The learned magistrate relied on the unpleaded doctrine of volenti non fit injuria in the case. On that issue, the learned trial magistrate had this to say in the judgement –

"The plaintiff had accepted to be a loader. As such as submitted by counsel for the defendant the plaintiff sustained the injury while bending down to lift a heavy metal on his own volition. I agree that his action constitutes *volenti non-fit injuria.*"

From the record, the doctrine of *volenti non-fit injuria* was never pleaded nor was it canvassed in evidence. It arose in submissions of counsel for the respondent. The situations where an issue, which is not pleaded, can be considered by the court were highlighted in the case of **Vyas Industries –vs- Diocese of Meru [1982] KLR 114.** In that case the Court of Appeal cited with approval the decision of the Court of Appeal of East Africa in the case of **Odd Jobs –vs- Mubia [1970] EA 476**, as follows –

“a) a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue had been left to court for decision;

b) on the facts the issue had been left for decision by the court as the advocate for the appellant led evidence and addressed the court on it.”

From the above reasoning of the Court, it is clear to me that two things have to be satisfied before a court can base its decision on an unpleaded issue. Firstly, evidence has to be led on that issue during trial. Secondly, the issue has to be addressed to the court. In our present case no evidence was led at the hearing on the application of the doctrine of *volenti non fit injuria* in examination in chief. No question on the same was asked in cross-examination by either side. Therefore in my view, and with due respect to the learned trial magistrate erred in applying the doctrine of *volenti non fit injuria* in her decision. That issue, not having been raised in the evidence, could not become an issue simply because one of the counsel raised it in submissions. It should have been raised in evidence, so that the other party could be able to challenge it, if he chose to do so.

To conclude, I find no contributory negligence on the part of the appellant. Whether one is to rely on the version of the appellant that other employees suddenly released the metals, or the version of the respondent that the appellant was pulling a metal plate from other metal plates when he got injured, to me does not make a difference. There is no evidence the appellant carried his work carelessly or against specific instructions of the respondent. In those circumstances, with due respect, I also differ with the findings of the learned trial magistrate and find that the respondent was negligent and liable to the tune of 100% for the occurrence of the accident.

I was not asked in this appeal to assess damages and will not do so. The learned trial magistrate did not do any estimation of damages awardable in case the appellant was successful. The powers of an appellate court are enumerated in section 78 of the Civil Procedure Act (Cap.21). Section 78 (1) © allows an appellate court to frame issues and refer some for trial. Having decided that the respondent is liable in negligence, I refer the issue of assessment of damages for trial before a magistrate of competent jurisdiction at Eldoret. For the above reasons I allow the appeal, make a finding that the respondent is liable in negligence and order that the case be placed before a magistrate with competent jurisdiction at Eldoret to determine the quantum of damages. I award costs to the appellant.

Dated and delivered at Eldoret this 1st day of August 2005.

George Dulu

Ag. Judge

In the Presence of: Mutei h/b for Kitiwa for appellant

Omondi h/b for Tuiyott for respondent