



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Appeal 79 of 2000

(An appeal from the judgment of Stella M. Muketi (Mrs) Senior Resident Magistrate in CMCC No. 943 of 1999 dated 22nd June, 2000)

TIMSALES LIMITED.....APPELLANT

VERSUS

STEPHEN GACHIE.....RESPONDENT

JUDGMENT

The respondent filed a suit against the appellant in the lower court and alleged that on 18/4/99 while he was engaged by the appellant as a casual worker, the appellant negligently provided him with an unsafe system of work as a result of which a sharp blade of a machine he was using came into contact with his left hand thereby inflicting him a cut wound on the left thumb. He also blamed the appellant for breach of statutory duty. He claimed general and special damages as a result of the injury which he suffered.

The appellant filed a defence and denied that on 18/4/99 the respondent was in its employment and further denied all the particulars of negligence and breach of statutory duty. It averred that if at all the alleged accident occurred, it was wholly caused by the negligence of the respondent.

At the hearing, the respondent stated that on the material day he was working at the appellant's flash door making section, splitting timber using a saw-flash saw. He said that the same was defective but he did not know that it was. He said that saw dust fell on his eyes and he lost concentration and in the process he was hit on the left thumb and he told his supervisor, a Mr. Kamau but he was given first aid by a store keeper known as Sam.

He later went home but he did not go to Hospital the same day as he had no money and his supervisor had told him that there was no money. The following day he was given light duties. On 20th April, 1999 he went to Elburgon Nyayo Hospital and he produced General Out-patient Record as P. Exhibit 1. On 27th April, 1999 he went to see Dr. Obed Omuyoma who examined him and prepared a medical report at a cost of Kshs.2500/-. He blamed the appellant for the occurrence of the said accident and said that if the saw had been fenced he would not have been injured. He also said he had not been provided with goggles and gloves. In cross examination, he said that the sawing machine was also defective although he admitted that he did not plead that in his plaint.

The appellant also called one defence witness, Geoffrey Kamau who said that he was the respondent's supervisor and on the material day, the respondent did not report to him about any accident. He said that when a person was injured he was supposed to report to the supervisor who would give him first aid then note the same in the accident book and allow the injured person to go to hospital. The witness produced a muster roll to prove that on the 18th of April, 1999 the respondent worked for 8 hours and on 19th April,

1999 he worked from 3 p.m. to 11 p.m. However, on 20th and 21st April, 1999 the respondent did not go to work. He said that he did not show up for 5 days and the appellant sacked him. In cross examination, the witness said that the accident book had not been produced in court. He said that the respondent could not have been injured and continued working for 2 days. He also admitted that he knew a store keeper known as Sam who, according to the respondent, is the one who had administered first aid on him.

The medical report that was produced by the respondent showed that he suffered a cut wound on the left thumb and severe soft tissue injuries on the same thumb. There was no permanent disability that was noted. The appellant had the respondent re-examined by Mr. Angelo D’cunha, a consultant surgeon and according to his medical report dated 29th October, 1999, he stated that the respondent suffered a cut wound of the distal phalanx of the left thumb and as a result, he had loss of sensation to light touch and pin-prick sensation over the tip of the left thumb distal to the cut wound. He awarded a permanent disability of 0.25%. The trial court found the appellant liable at 90% and held the respondent to have contributed 10% of the liability and assessed general damages at Kshs.90,000/- on 100% basis and awarded special damages of Kshs.2500/-.

The appellant was aggrieved by the said judgment and in its memorandum of appeal raised five grounds of appeal as follows:-

1. That the learned magistrate erred in law in coming to conclusions on liability which are not founded on the evidence adduced in court.
2. That the learned magistrate erred in law and fact in totally ignoring credible evidence of the defendant.
3. That the learned magistrate erred in law and fact in finding that the scanty evidence of the plaintiff proved his case on a balance of probabilities.
4. That the learned trial magistrate erred in law in making an award of general damages which is excessively high in respect of a single cut pleaded.
5. That the judgment is manifestly unreasonable.

Mr. Kisila for the appellant argued grounds 1, 2, 3 and 5 together and ground number 4 separately. Regarding ground number 4, he submitted that the entire judgment did not conform to the provisions of Order XX Rule 4 in that it did not contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision. In particular, counsel took issue with the manner in which general damages were assessed saying that the respondent suffered a cut wound on the left thumb only which had healed well and stated that soft tissue injuries which were shown in the report by Dr. Omuyoma had not been pleaded and neither were they indicated in the respondents General Out Patient Record that was produced as P. Exhibit 1.

Mr. Kisila further submitted that the award on general damages was too high and excessive and stated that awards are supposed to be made with moderation. He cited the Court of Appeal decision in **CECILIAH W. MWANGI VS RUTH W. MWANGI** Civil Appeal No. 251 of 1996 (unreported) where their Lordships delivered themselves as follows:-

“It has been quite often pointed out by this court that awards of damages must be within limits set by decided cases and also within limits that Kenyans can afford. Large awards inevitably are passed on to members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs of insurance cover or increased fees.”

Similar sentiments were also expressed by the same court in **MBAKA NGURU & ANOTHER VS JAMES GEORGE RAKWAR**, Civil Appeal No. 133 of 1998 (unreported).

Counsel submitted that if liability was proved as against the appellant, an award of Kshs.10,000/- to

Kshs.20,000/- would have sufficed. He sought to rely on two judgments by Ang'awa J. in **LOISE NYAMBEKI OYUGI VS OMAR HAJI HASSAN** HCCC No. 4150 of 1991 at Nairobi (unreported) and **EVANSON BABU NJIRU VS PAUL NYAMOTENYI** Civil Case No. 778 of 1991 at Nairobi (unreported) where the plaintiffs therein suffered soft tissue injuries and were each awarded Kshs.20,000/- based on full liability.

Regarding liability, Mr. Kisila submitted that the respondent did not prove that the machine which he was using was defective but only said that dust fell on his eyes and he lost concentration. He never suffered any injury to his eyes and no negligence was imputed on the part of the appellant.

Mr. Kisila also submitted that the learned trial magistrate did not give any due attention to the defence evidence. He said that the respondent did not prove any case of negligence on the part of the appellant. Counsel urged the court to allow the appeal and exercise its discretion as given under Section 78 of the Civil Procedure Act.

Mr. Githiru for the respondent opposed the appeal saying that it had no merits at all. He said that the learned trial magistrate complied with the requirements of Order XX of the Civil Procedure Rules and that the award of Kshs.90,000/- for general damages was reasonable. Further, the injuries as sustained by the respondent were well stated in the two medical reports produced by both sides, Mr. Githiru submitted. He added that there was sufficient evidence to show that the respondent was cut by a saw due to the appellant's negligence and breach of statutory duty in that the saw was not guarded. Counsel further submitted that the evidence of DW1 did not rebut the respondent's evidence at all in that the accident book was not produced. He added that the respondent had given a good explanation as to why he did not go to the hospital immediately after the accident. Mr. Githiru said that the appellant had departed from its pleadings in the defence where it stated that the respondent was not its employee but the evidence of DW1 confirmed that the respondent was indeed employed by the appellant at the material time. Counsel urged the court to dismiss the appeal in its entirety.

Having summarised the case before the trial court and the rival arguments that were made before this court, I will start by considering the learned magistrate's findings on the issue of liability. The learned trial magistrate in her one page judgment did not at all state the reasons as to why she found the appellant to be 90% liable for the occurrence of the accident. It merely said that the respondent should have been more careful then proceeded to apportion liability. The same can also be said of the assessment of general damages. I agree with Mr. Kisila that the said judgment did not comply with the mandatory requirements of Order XX Rule 4 of the Civil Procedure Rules. I hereby set aside the said judgment and now proceed to consider the entire case afresh based on the pleadings and evidence that was tendered before the trial court with a view to determining the case finally.

On the issue of liability, Mr. Kisila submitted that the respondent did not prove negligence on the part of the appellant and he heavily relied on a passage to be found at page 203 of the book "**WINFIELD AND JOLOWICZ ON TORT**" 13th edition which is as follows:-

“At common law the employer’s duty is a duty of care and it follows that the burden of proving negligence rests with the plaintiff workman throughout the case. It has even been said that if he alleges a failure to provide a reasonably safe system of working the plaintiff must plead, and therefore prove, what the proper system was and in what relevant respect it was not observed. It is true that the severity of this particular burden has been somewhat reduced, but it remains clear that for a workman merely to prove the circumstances of his accident will normally be insufficient. Where a statutory duty applies, on the other hand, the employer’s duty is often absolute, so that no question of negligence arises at all, and even where it is qualified by such words as “so far as reasonably practicable” it is for the employer to prove that it was not reasonably practicable to avoid the breach. It follows that the existence of a relevant statutory duty will almost invariably ease the task of the workman in establishing his employer’s liability.”

The particulars of negligence that were listed down by the respondent are as follows:-

- (a) Failure to take any adequate precautions for the safety of the plaintiff while engaged in his duty.
- (b) Exposing the plaintiff to risk of injury or damage of which they knew or ought to have known.
- (c) Failing to provide and maintain a safe and proper system of work and to give proper instructions to its workmen including the plaintiff on how to follow that system.
- (d) Failure to observe the term of the contract of employment thereby exposing the plaintiff to a risk of damage of which they knew or ought to have known.
- (e) Failure to provide the plaintiff with proper and safety apparel e.g. gum boots, gloves etc.
- (f) Res ipse loquitur.

Under particulars of breach of statutory duty that the respondent listed down are as follows:-

- (i) Failure to maintain the requisite safety standards in the saw mill.
- (ii) Failure to fence off the sharp parts of the machine.

I have closely examined the evidence of the respondent regarding how the accident occurred and the same does not seem to establish the particulars of negligence as listed above. This is what the respondent said:-

“I was splitting timber. I was using a saw flash-saw. I did not know that the machine was defective. Saw dust fell in my eyes and I lost concentration and I was hit on the left thumb.”

And regarding the alleged breach of statutory duty he testified as follows:-

“I blame my employer. If the saw was guarded I could not have been injured. I had not been given goggles and gloves”.

Even though the issue of the sewing machine having been defective had not been pleaded, the respondent said that the same was defective but he did not tell the court the nature of the defect, if any. If at all the machine was defective and such defect was what had caused the injury, that ought to have been pleaded specifically and proved sufficiently. Even assuming that the respondent was asked by the appellant to use a defective machine, that *per se* cannot cause an accident, an accident can be caused by many factors. A causal link between the machine’s defectiveness and the occurrence of the accident must be established by showing for example that due to the defects, the machine malfunctioned and that malfunction is what caused or led to the injury of the plaintiff. A defect may otherwise exist in a machine but the same may not trigger off an accident. An analogy may be drawn in the case of a motor vehicle which is inspected after an accident and found to have had a pre-accident defect in that its indicators and wipers were not working but the driver of the same may not be blameworthy if another motorist whose car is in tiptop condition veers off the road due to speeding and hits the defective vehicle which is at the time parked off the road.

In the instant matter, the respondent, apart from failing to plead about the defectiveness of the machine and stating the particulars thereof did not state what caused dust to enter into his eyes thus causing him to lose concentration. Did the entry of dust in his eyes have anything to do with the alleged defectiveness of the machine? If so, what was it? This was a very important issue which the respondent’s counsel should have carefully led his client into establishing. The respondent said that after dust entered into his eyes he lost concentration and was hit on the left thumb. How did that happen? Did he perhaps close his eyes due to the dust and then begin to grope about in the dark and thereby caused his left thumb to come into contact with the sharp part of the flash saw? Was the work place ordinarily dusty? If so, was the respondent entitled to goggles to protect his eyes from the dust? What about gloves, were they required to be supplied to the respondent? These are just a few of the issues which ought to have been dealt with properly by the respondent in order to establish his claim.

I find that the respondent did not prove the particulars of negligence which he listed down in his plaint. His evidence was so brief and scanty that it was insufficient to establish that the appellant owed him a duty of care, that it breached that duty and that it was that breach that caused an injury. If he pleaded that the employer did not provide a safe system of work, he was duty bound to plead and prove what the proper system of work was and the relevant respects in which it was not observed.

While from the evidence of the respondent I am satisfied that he suffered a cut to his left thumb, I find that he did not prove that the same was due to any negligence or breach of statutory duty on the part of the appellant. Not every industrial injury is caused by negligence of an employer and unless a relevant statute imputes strict liability on the part of an employer, claimants must know that they must plead their cases properly and prove negligence and/or breach of statutory duty on the part of the employer sufficiently. A court of law will not just award damages to a litigant because it is sympathetic to him due to an injury which he may have received in his place of work and in the course of duty if he was under an obligation to prove negligence and/or breach of statutory duty and he failed to do so. An exception may be in a case where the circumstances under which the accident occurred are such that the doctrine of *res ipsa loquitur* can be drawn.

The respondent blamed the appellant for not having “*guarded*” the saw which he was using. I believe he meant fencing it off when he talked of “*guarding*”. If that is the case, I do not know how the appellant could have fenced off a saw which the respondent was using to split timber and if at all that was supposed to have been done, no pleading was made or evidence led to that effect. In *EAVES VS MORRIS MOTORS* [1961] 2 Q.B. 385 it was held that the requirement that the fencing be secure does not mean that it must protect the workman against every possible kind of injury as there is no duty to guard against an unforeseeable danger such as might be caused by a machine going wrong in a way which could not be reasonably anticipated.

All in all, I find that the respondent did not prove that the injury to his left thumb was caused by the appellant’s negligence and/or breach of statutory duty as alleged. Having reached that finding, I do not have to proceed to consider the issue of damages which would only have been necessary if the respondent had succeeded in improving liability on the part of the appellant.

In the circumstances, I must therefore allow the appeal, set aside the entire judgment of the trial court and substitute the same with an order of dismissal of the respondent’s case. The appellant will have the costs of the appeal as well as costs in the lower court.

DATED, SIGNED AND DELIVERED at Nakuru this 14th day of November, 2005.

D. MUSINGA

JUDGE

Judgment delivered in the presence of Mr. Kisila for the applicant and Miss Chebon for the respondent.

D. MUSINGA

JUDGE