



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**Civil Appeal 34 of 2002**

**AFRO SPIN LIMITED..... APPELLANT**

**VERSUS**

**PETER WAGUMO OBIERO..... RESPONDENT**

**JUDGMENT**

This appeal arises from the decision of the learned trial magistrate, Hellen Wasilwa Senior Resident Magistrate (as she then was) in CMCC No.2061 OF 1999. In that suit, the respondent (the plaintiff therein) had alleged that he was at all material times employed by the appellant (the defendant therein). In the plaint, he did not state what his designation was but he stated that he was exposed to dusty, filthy and unhealthy conditions arising from the operations of the respondent's cotton spinning machine. The plaint further stated that in or around the year 1995, the plaintiff was examined and confirmed to be ailing from an occupational chest ailment; asthma. It was alleged that the said ailment had been caused by the appellant's negligence in the way it maintained, secured and/or ventilated the place he was working. It was also alleged that the ailment was caused by the appellant's breach of its statutory duties under Section 51 and 52 of the Factories Act. The particulars of negligence and breach of the statutory duties were stated. The respondent further alleged that as a result of his medical condition he had to leave his employment at the age of 56 years and therefore claimed general and special damages, future medical expenses and costs of the suit.

In its defence, the appellant denied the respondent's claim and in particular all the particulars of negligence attributed to it as well as particulars of breach of statutory duties under the Factories Act. It said that the respondent attained the statutory retirement age of 55 years and therefore he had no cause of action against the appellant for loss of future earnings.

During the hearing, the respondent testified and did not call any other witness. He said that he started working for the appellant in January, 1992 as a machine operator and the machine was used for reeling thread for sewing clothes. He said that the place where the machine was kept would be cleaned once in every two months. Prior to his joining the appellant, he had worked in another company for 20 years as a mechanic. He said that he started experiencing chest pains in 1993 and when he went to see a Doctor, he recommended that he be removed from the section he was working in to another section which had no dust. He was however not transferred as per the said letter of recommendation, he claimed. He said that he continued to attend hospital for treatment and his last attendance was in December 1995 although he was testifying on 11th February 2000.

The respondent said that the place he used to work in was dusty and he used to be given a small mask to cover his nose only, rather than a big one which could cover both the mouth and the nose. He produced a

medical report by Dr. Wellington Kiamba which was done on 11th February, 2000, the same day the respondent testified in court. The medical report gave a history of the respondent's ailment and the Doctor said that he suffered from chronic bronchitis and asthma and in his opinion it was as a result of being exposed to dust. The appellant called two witnesses. The first one said that the respondent was working as a cleaner and there were other 30 people working in the same section as the respondent.

He admitted that the place was filthy and dirty but the company provided masks, ear plugs and gloves to all the workers in the section. He said that the place was a cotton industry and cotton fluff was always flying about. He said that he had been working for the appellant since 1990 and he had not suffered any respiratory ailment. The second defence witness was the appellant's group personnel manager. He said that the respondent was employed as a sweeper and his services were terminated in 1998. He further stated that the respondent had never complained that he had occupational asthma. He also stated that in the appellant's premises there were equipment which was sucking in fluffs and their employees had been supplied with protective clothing.

The trial court stated in its judgment that the place where the respondent was working in was dusty and filthy and therefore unsafe. The learned trial magistrate further held that the appellant was in breach of its statutory duty under the Factories Act in failing to provide a safe working environment for the respondent. The trial court proceeded to make an award of Kshs.280,000/- as general damages and Kshs.2,300 as special damages.

The appellant was aggrieved by the said decision and preferred this appeal against the findings of the learned trial magistrate with regard to both liability and quantum of damages. The first three grounds of appeal related to liability and were argued together by Mr. Kisila, the appellant's learned counsel. Ground 4 was a curious one: It stated that the learned trial magistrate erred in law in proceeding to try a case when it had been brought to her attention that the respondent had died in the course of the proceedings. I will dispose of this ground right away. The above statement was raised from the bar by the appellant's counsel. He did not provide any documentary proof to that effect for example a Death Certificate. No evidence was led to that effect by the defence witnesses. The respondent's counsel responded by stating that he was not aware of his client's demise and as far as he knew, his client was alive. In the circumstances, the trial magistrate rightly decided to proceed with the hearing. The respondent had already testified and there was no obligation on his part to attend court when the defence case was coming up for hearing. Since the appellant's counsel was the one who was alleging that the respondent had died, he was duty bound to prove that allegation and in the absence of such proof, the trial magistrate could not suddenly suspend the hearing. During the hearing of the appeal, the appellant's counsel repeated that allegation but again he did not produce any documentary proof thereof. In my view, the appellant, having failed to prove its aforesaid contention should not have raised that ground of appeal and I find that the trial magistrate did not err in proceeding to hear the defence case. The last ground of appeal was as against the damages that were awarded.

In arguing the first three grounds that related to liability, Mr. Kisila submitted that the respondent had to prove that the appellant owed him a duty of care, that there was breach of that duty and that such breach was what caused his ailment. He further submitted that there was no evidence by the respondent that his ailment started in 1995 and referred to plaintiff exhibit 1 which was dated 12th November 1993 and which showed that the

respondent had by then suffered chronic cough for one and a half years which meant that the ailment started around May 1992. The plaint did not indicate when the respondent started working for the appellant although in his evidence he stated that he was employed by the appellant in January, 1992.

The main issue which has to be determined in this matter is whether the respondent's ailment as diagnosed by his Doctor, was caused by any negligence on the part of the appellant or breach of statutory duty as alleged. Doctor Kiamba stated in his medical report that the respondent suffered from chronic bronchitis and asthma as a result of being exposed to dust. The medical report does not show the date when the respondent was examined. It is however dated 11/2/2000, the very same date when the respondent testified in court and produced the same. The report showed that the respondent was 61 years

old and yet on the same day when the respondent testified he stated he was 58 years old. The Doctor's statement must have been based on the history and information that was given to him by the appellant. According to the history of the ailment as given to the Doctor by the respondent, he developed chest pains in 1993 and in 1994 a Doctor recommended that he should be moved to another department where he was not exposed to dust. However, according to P. Exhibit 1, the said note was written on 12th November 1993 and not 1994, and it showed that he had had that chronic cough one and a half years earlier. The appellant's personnel manager said that the respondent had never complained that he had occupational asthma.

In my view, the plaintiff's medical report was a document that was hurriedly prepared for the sole purpose of producing the same during the trial and apart from the inconsistent medical history which was given to the Doctor by the respondent, the report does not show that the Doctor had any access to the respondent's medical notes upon which he could have based his findings and neither does he state what made him conclude that the respondent's condition was as a result of exposure to dust. P. Exhibit 1 is also not conclusive as to what may have caused the respondent's ailment or the exact period when it set in. The period of one and a half years must have been stated by the respondent.

In the absence of any proper documentary evidence which could have established the cause and genesis of the respondent's ailment, I now turn to his pleadings in the plaint and his testimony in court. He alleged that his sickness was due to the appellant's negligence in the way in which it maintained or ventilated its premises where he was working in. There was evidence tendered by both sides to show that the place was dusty but that was an occupational hazard of the job which the respondent was undertaking. Dust and cotton fluff cannot be eliminated in a cloth making enterprise and there was no evidence that there was inadequate ventilation provided by the appellant. The respondent alleged that the kind of mask that was supplied to him and the other workers was not sufficient because it was not big enough to cover the mouth as well. No professional evidence was led to prove that the mask as provided was inadequate and that the absence of such kind of a mask, if at all it was necessary, was a likely cause of inhaling dust by the respondent. But more important, the respondent had a duty to prove that the dust and fluff levels in the appellant's premises were beyond the acceptable limits in such an enterprise and therefore by exposing him to such high levels of dust and fluff was what caused his sickness and not otherwise.

Exposure to dust and cotton fluff per se cannot amount to an act of negligence or breach of statutory duty, it is exposure to unacceptable injurious levels of dust or fumes or other impurities which amounts to breach of statutory duty as per the Factories Act Cap 514 Laws of Kenya. The respondent should first have proved that the appellant exposed him to such high levels of dust and fluff that are unacceptable in a factory such as that of the appellant and having shown that proceed to establish that it is that exposure which caused his ailment. A causal link between the exposure level and the respondent's sickness was not established. It was not shown that the respondent's sickness could have been caused by his work only, it is common knowledge that bronchitis and asthma can be caused by many other factors. In **WILSHER VS ESSEX AREA HEALTH AUTHORITY** (1988) 2 WLR 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.

In the absence of evidence by an occupational health specialist, the respondent's evidence and the medical report by Dr. Kiamba were totally insufficient to prove the respondent's case. I find that there was insufficient evidence upon which the learned trial magistrate could have concluded that the conditions in the respondent's work place caused his ailment. I therefore allow the appeal and set aside the judgment of the trial court and order the respondent to bear the costs of the appeal as well as the costs in the subordinate

**court.**

DATED, SIGNED AND DELIVERED at Nakuru this 1st day of November, 2005.

**D. MUSINGA**

**JUDGE**

**1/11/2005**

Ruling delivered in the presence of Mr. Kisila for the appellant and Mr. Musembi for the respondent

**.D. MUSINGA**

**JUDGE**

**1/11/05**