REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI
CIVIL APPEAL NO 307 OF 2001

ELIJAH MWANGI KANOGA …… APPELLANT

VERSUS

SOCFINAF COMPANY LIMITED ……..…….. RESPONDENT

JUDGMENT

On October 16, 1997 the Appellant, then a mechanic in the employment of the Respondent, was inflating a tractor tyre, belonging to his employer, in the course of his duties, when the same exploded, causing him severe personal injuries. His suit for compensation in the lower court was dismissed, inter alia, on the grounds that he had not proved negligence on the part of his employers. The learned magistrate, Mrs. R. E. Ougo, said in part:

> ***"The issue in whether the defendant is negligent as alleged. In his evidence, when being cross - examined he told court that what happened was an accident and there is nothing the defendant could have done. It is quite clear that the Plaintiff chose to work with a defective tool … His evidence is that the inflating pump wa s not in good condition but the defendant's evidence is that there were other methods of inflating the tyre … I find that the Plaintiff was the author of his own misfortune."***

The above are essentially the reasons that guided the lower court in coming to the conclusion that the Respondent was not liable in negligence to the Appellant. Aggrieved by that decision, the Appellant has now appealed before this Court. In a needlessly wordy 11 paragraphs outlining the grounds of his appeal (which I find unnecessary to repeat here) he has submitted that his case in the lower court had been proved on a balance of probability.

The Record filed in this Court indicates that the Appellant presented to the Court below two witnesses, himself and his examining doctor, while the Respondent presented its General Workshop Manager, who was not actually present at the time of the accident. The facts, briefly, are that on the material date the Respondent brought one of its tractor tyres to be inflated. The Appellant began inflating the same using the inflation pump provided by his employer. The pump did not indicate the level of the pressure. It had a defect which the Appellant had reported previously to the Respondent, and in respect of which the Respondent had done absolutely nothing. The Respondent was fully aware that its employees had continued to use this defective gadget. Eventually it caused an explosion, injuring the Appellant.

If this is not negligence, this Court must wonder, what is? The lower court's finding that the Respondent chose to work with a defective gadget, ignores the fact that the employer chose to have its employee work with a defective gadget. Did the employee really have the choice of saying to his employer "no I will not do your work because this gadget is defective?" I think not.

The lower court's finding that the Appellant "failed to show what protective gadgets he needed, he has failed to show that the defendant failed to provide a safe working condition, the defendant told the court that there were other methods of inflating tyres," does not absolve the Respondent from its primary responsibility – of ensuring the safety of its employees, and it certainly failed that test in this case.

At common law an employer is under a duty to take reasonable care for the safety of his employees in all circumstances … so as not to expose them to unnecessary risk ***(See Halsbury's Laws of England, 4 th Edition, Volume 16, Paragraph 560).***

In ***Makala Mailu Mumende vs Nyali Gold & Country Club C. A. No 16 of 1998***, J Nyarangi J A stated inter alia that:

> ***"Just because an employee accepts to do a job which happens to be inherently dangerous is in my judgment no warrant or excuse for the employer to neglect to carry out his side of the bargain and ensure the existence of minimum reasonable measures of protection …"***

Winfield and Jolowicz on Tort by W. V. H. Rogers, 14 Edition, London Sweet & Maxwell at page 213 states inter alia:-

> ***"If a worker is injured just because no one has taken the trouble to provide him with an obviously necessary safety devise, it is sufficient and in general satisfactory to say that the employer has not fulfilled his duty."***
>
> ***Further, pages 215 – 216 states inter alia that :***
>
> ***"The employer must take reasonable care to provide his workers with the necessary Plant and equipment and is therefore liable if any accident is caused through the absence of some item of equipment ….. He must also take reasonable care to maintain the Plant and equipment in proper condition, and the more complex and dangerous that machinery, the more frequent must be the inspection."***

I am, therefore, satisfied that the Appellant proved his case on a balance of probability, and the finding by the lower court to the contrary is clearly in error, and against the weight of the evidence before that court. Having come to that conclusion, I find that the dismissal of the Appellant's case was unjustified.

As regards the quantum of damages, this Court has two possible options – to remit the case to the lower court for assessment, or to make an assessment based on the evidence and submissions.

As this is a six year old case where a litigant is awaiting justice, I find it inappropriate to cause further delays by remitting the case to the lower court.

I believe that will serve no useful purpose. Instead, I will adopt the quantum arrived at by the Learned Magistrate when she said as follows in her Judgment:

> ***"Had the Plaintiff proved his case I would have awarded hi m Kshs.250,000/= as general damages."***

I believe this is a fair award. None of the Counsels have indicated otherwise.

Accordingly, and for reasons outlined, I allow this appeal, set aside the lower court's order dismissing this suit with costs and substitute therefor a Judgment in his favour for Kshs.250,000/= general damages, and Kshs.6,500/= special damages (which were pleaded and proved) with costs and interest both here and in the court below.

Dated and delivered at Nairobi this 30th day of June, 2004.

ALNASHIR VISRAM

JUDGE