REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

CIVIL APPEAL NO. 97 OF 2001

JOASH NDEGE …….. APPELLANT

Versus

TEXTONIC LIMITED …….. RESPONDENT

J U D G M E N T

This is an appeal against the judgment of Miss. F.N. Muchemi delivered on the 1st August 2001 in Mombasa CMCC No. 2952 of 1999 in which she held the Appellant wholly liable and awarded the Respondent a sum of Sh. 90,000/= for the injuries he suffered on the 15th March 1999 while working for the Appellant. The Appellant listed five grounds of appeal which can be summarized into three, namely:-

1. That the trial magistrate erred in admitting and considering evidence on matters that were not pleaded.

2. That the trial magistrate erred in holding the Appellant 100% liable when she should have found that the Respondent was the author of his own misfortune or that he contributed to it and accordingly apportioned liability.

3. That the trial magistrate erred in taking into account injuries which the Respondent did not suffer and awarding him a sum of Sh. 90,000/= which was inordinately high in the circumstances.

On the first ground of Appeal Miss. Osino for the Appellant, citing the Court of Appeal decision in **Kenya Commercial Bank Limited Vs Mwanzau Mbaluka & Another Civil Appeal No. 274 of 1997** (unreported), submitted that the trial magistrate erred in allowing the Respondent to testify that he had not been provided with appropriate safety apparel when the same was not pleaded. Mr. Omwenga, counsel for the Respondent countered that by arguing that the Respondent had pleaded in paragraph 6(a) of the plaint that the Appellant had failed to provide a safe system of work.

In the said **appeal No. 274 of 1997 KCB Vs Mbaluka & Another** Kenya Commercial Bank Limited had sold the property of the first respondent therein, which had been charged to it, and recovered part of the amount due to it. In a suit for the balance the trial judge held that a proper statutory notice of sale had not been given under section 74 of the Registered Land Act. That issue was not pleaded and no evidence was adduced on it. Applying the authority in the case of Gandy Vs Caspair (1956) EACA 139 the Court of Appeal held that:-

"The trial judge, by raising and determining the suit on an issue which was neither pleaded nor evidence adduced on thereby introduced a new cause of action against the appellant. He clearly went astray and his judgment cannot be left to stand on that account".

That authority is clearly distinguishable from the facts in this appeal. As already stated in that authority the issue of the statutory notice of sale was neither pleaded nor raised in evidence during the trial. In this appeal the Respondent pleaded in paragraph 6 of the plaint that the accident occurred due to the negligence on the part of the Appellant in failing to provide a proper system of work and evidence was adduced on the Appellant's failure to provide enough helmets for its workers. Although I think the Respondent should have been more specific in pleading the particulars of the Appellant's negligence I am nevertheless satisfied that the issue of failure to provide enough helmets was covered by paragraph 6 of the plaint and specifically testified on without any objection from the Appellant. Even if it is held that the issue was not covered in that pleading evidence having been on the authority of Nkalubo Vs Kibirige [1973] EA 102 and Odd Joba Vs Mubia [1970] EA 476 the trial magistrate was entitled to frame issues and decide on it as long as that evidence did not raise a new cause of action. None was raised. Consequently the first ground of appeal fails.

The second ground of appeal was on liability. It was submitted for the Appellant that the two helmets provided to be used in turns by the four employees were sufficient as only two people could work in the bore hole at any one time; that the Respondent having failed to wear a helmet when he went into the pit he was to blame for the injury he suffered and that he should have been held wholly or at least partly liable.

In response counsel for the Respondent submitted that there was no basis at all for apportioning any liability to the Respondent. He cited the cases of **Makala Mailu Mumende Vs Nyali and Country Club Civil Appeal No. 16 of 1989 (CA) and Richard Ambogo Raden Vs Kenya Meat Commission HCCC No. 490 of 1984.** The latter authority is not quite on the point but the former in which held that a watchman should be supplied with a helmet is.

In this appeal the Respondent was working at a bore hole drilling site. He was required to go down into the pit from which pieces of stone were being lifted and were likely to drop back into as happened thus injuring him. The supply of helmets to workers was therefore a must and the Appellant appreciated that but he did not supply enough. The fact that he supplied all workers with helmets immediately after the accident as the Respondent testified reinforces this view. True one did not need to wear a helmet when one was not in the pit but it is inhygienic to require two employees to share one helmet as immediately after use by one it would wet with sweat. The Respondent cannot therefore be blamed for not wearing it. In the circumstance I find no basis for apportioning any liability to the Respondent and the second ground of appeal must also fail.

The final ground of appeal was that the trial magistrate took into account injuries which the Respondent did not suffer and awarded an excessive sum of Sh. 90,000/= . It is true that the Respondent did not suffer any concussion or fracture of the skull as the magistrate found. As Dr. Hermant Patel testified he only suffered a contused wound on the back of the head. But I do not think that the sum of Sh. 90,000/= that the trial magistrate awarded in this case was excessive even for a contused would only. If the Respondent had suffered a fracture of the head and concussion the sum could definitely have been far on the lower side. In the case of **Stephen Macharia Vs Emmanuel, J.K. Gathoni Nairobi HCCC No. 2340 of 1987** decided on the 20th September 1990 the plaintiff suffered similar but slightly more serious injuries and was awarded Sh. 100,000/=. I therefore do not find an award of Sh. 90,000/= for a contused wound on the head made on the 1st August 2001, more than ten years later, to be excessive to warrant interfering with it and this ground must also fail.

The upshot the foregoing is that I find no merit in this appeal. The same is dismissed with costs

to the Respondent. DATED this 16th day of July 2004.

D.K. Maraga

Ag. JUDGE