

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NO. 30 OF 2000

MEGA SPIN LIMITED.....APPELLANT

VERSUS

SAMUEL JUMA MUTUMAMU.....RESPONDENT

JUDGMENT

The Appellant, Mega Spin Limited, was sued by the Respondent, Samuel Juma Mutumamu on account of injuries that he alleged to have sustained while at his place of employment in the Appellant's factory. In his Complaint, the Respondent averred that on the 12th of February 1997 in the course of his employment while he was putting roller into a machine, he slipped and fell from the wooden ladder that he was walking on in order to reach the machine as a result of which he sustained blunt injuries to his back and right shoulder and soft tissue injuries to his chest. The Respondent stated in his Complaint that the Appellant was liable in damages as it has breach the contractual duty of care to him and further, was guilty of negligence. The Respondent stated that the Appellant was negligent in that, inter alia, it exposed the Respondent to risk of injury by not providing a safe working environment. The Appellant when served with the Complaint duly entered appearance and filed its defence. It was the Appellant's defence that the alleged Industrial accident did not occur nor was the Respondent injured on the day he alleged that the industrial accident had occurred.

The Appellant and the Respondent tendered oral evidence each in support of its rival position. The case in the Lower Court was heard by the Learned Resident Magistrate Miss E. Ominde. The judgment was however written and delivered by Mrs. S. Muketi, the then Senior Resident Magistrate, Miss E. Ominde having been transferred from the station. In the said judgment, the then Learned Senior Resident Magistrate found the Appellant liable for the injuries that the Respondent had sustained while at his place of employment. She awarded the Respondent the sum of Kshs 82,000/= as damages. She also awarded the Respondent costs of the suit. The Appellant was aggrieved by the said judgment of the Learned Senior Resident Magistrate and has appealed to this Court.

In its Memorandum of Appeal, the Appellant has stated that the Learned trial Magistrate erred in reaching her judgment without applying the standard of proof required. The Appellant was further aggrieved by the fact that the trial Magistrate did not consider the evidence that was adduced by the Appellant to the effect that the Respondent could not possibly have sustained the injuries within the Appellant's premises. The Appellant was further aggrieved that the trial Magistrate did not give reasons for her decision.

In his Submissions before Court, Mr Orege, Learned Counsel for the Appellant submitted that the Respondent's evidence could not possibly be credible as the roller that allegedly pressed on him weighed more than one hundred kilogrammes and could not be carried by one person. Mr Orege further submitted that if indeed the Respondent was injured by the roller as he claimed, then his injuries would have been more severe. Learned Counsel for the Appellant further submitted that nobody saw the Respondent being injured on the particular day that he alleges to have been injured. Mr Orege further submitted that there was contradiction on the injuries that the Respondent allegedly sustained.

He submitted that although the Respondent claims that he was injured on the right shoulder, the hospital medical card does not mention the fact that the Respondent had been injured on the shoulder. It was the Appellant's submission that this contradiction touched on the credibility of the witness. The Appellant further submitted that it was improbable that the Respondent could have been injured at his place of work without his colleagues being aware of the facts. The Appellant further submitted that the evidence of the Respondent was not corroborated and further that the Magistrate who wrote the judgment

did not have an opportunity of gauging the demeanour of the witnesses as they testified as she did not take the evidence during the hearing of the case. The Appellant submitted that the Appeal ought to be allowed with costs.

Mrs Odeny, Learned Counsel for the Respondent opposed the Appeal. She submitted that the Respondent had proved his case on a balance of probabilities. She further submitted that it was not disputed that the Respondent was employed by the Appellant. Mrs Odeny submitted that the fact that the Respondent sustained less severe injuries is no indicator that the Respondent had not been injured in the course of his employment. Mrs Odeny further submitted that the evidence that was adduced by the Respondent was credible and not contradictory. It was her submission that the evidence adduced by the Appellant's witnesses was the evidence that was contradictory. The Respondent urged this Court to dismiss the Appeal with costs to the Respondent.

I have read the proceedings and the judgment of the Lower Court. I have also read the documentary evidence that was adduced in the lower. I have considered the rival submissions made by the counsel for the Appellant and the counsel for the Respondent. This being a first Appeal, this Court is mandated to consider the Appeal by way of a retrial. In discharging its mandate, the High Court is not bound to follow the trial Courts' findings of fact if it appears either that she failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally. In reaching its decision the Appellate Court has to put into mind that it did not have the opportunity of seeing the witnesses as they testified and therefore could not be expected to make any finding as to demeanour of the witnesses. (See **Selle & Anor –versus- Associated Motor Boat Company Ltd & Anor [1968] E.A. 123**). In the instant Appeal the issue for determination by this Court is whether the Respondent proved his case against the Appellant on a balance of probabilities. The other issue for determination is whether the Appellant was liable to pay damages for the injuries that the Respondent sustained.

According to his testimony, the Respondent testified that he was instructed to return the rollers to the machine by his supervisor. It was his evidence that as he was walking on a ladder, the ladder broke as a consequence of which he was hit on the back by the roller and injured on the shoulder and chest. He was given first aid and on the same day went to the Provincial General Hospital where he was treated and discharged. He produced the medical treatment papers as Exhibit No. 1. The Respondent was later examined by Dr. Maurice P. Siminyu who wrote a medical report a month after the accident. The medical report was produced as Exhibit No. 2. The injuries sustained by the Respondent were assessed as blunt injury to the back, blunt injury to the right shoulder and soft tissue to the chest. The Doctor was of the opinion that although at the time of examination the Respondent was experiencing chest pain and backache on exertion, his condition would improve with time.

The Appellant did cross-examine the Respondent to try and discredit his evidence. The Respondent was emphatic that he was injured in the course of his employment. The Appellant called three witnesses whose evidence was to the effect that no such accident took place on the material day nor was the Respondent injured at his place of work.

I have re-evaluated the said evidence on record. It is not in dispute that the Appellant has injured. The question which the Appellant is urging this Court to determine in its favour is that the Respondent was injured elsewhere and not within the Appellant's premises. I have anxiously considered the contradictory evidence that was adduced by the Appellant and the Respondent. To my mind, the only way that the said contradictory evidence can be resolved is by reference to the documentary evidence that was produced in Court. The medical card that was produced by the Respondent as Exhibit No. 1 indicates that the Respondent was attended on the same day that he was injured. In the narration that he gave to the doctor he stated that he was injured by a roller while at his place of work. His evidence did not change. What he told the doctor is what he told the Court. There was no suggestion either on cross-examination by the Appellant or in evidence adduced by the Appellant in its defence that the said medical card was contrived or faked.

In the premises therefore I do find that the evidence adduced by the Respondent is more plausible

compared to the evidence that was adduced by the Appellant. On a balance of probabilities, I do find that the Respondent did prove that he was at his place of work where he was injured. The Appellant denied that the Respondent was injured at its premises. I do further find that the Respondent did establish that the Appellant was liable to him in damages for breach of duty of care. The Appellant did not provide a safe working environment for the Respondent as a consequence of which the Respondent was injured. The Respondent was injured when the ladder he was using broke. The Appellant was required in law to ensure that the implements that the Respondent was using in the course of his employment was in a good working condition. This requirement is mandatory. In the event that an employee is injured, like what happened in the instant case, then the employer would be found to be strictly liable.

In the premises therefore it is the finding of this Court that the Respondent proved his case against the Appellant. The Appeal herein lacks merit. The same is dismissed with costs to the Respondent. The Appellant did not challenge the quantum of damages that was assessed by the trial Court in its Appeal to this Court. I will consequently not interfere with it.

It is so ordered.

DATED at NAKURU this 20th day of September, 2004.

L. KIMARU

AG. JUDGE