



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO. 89 OF 2003

BRITISH AMERICAN TOBACCO (K) LTD APPELLANT

VERSUS

ELLY NYANDEGA NYAMISI RESPONDENT

JUDGMENT

Mr Elly Nyandega Nyamisi (the Respondent in this Appeal) was employed by the Appellant on 28th January, 1998 as a spray painter. Before that, he had worked in the same capacity with another company for more than fifteen years.

On 8th June, 1998, the Respondent was on duty. He and his colleagues were assigned duties to paint. The work involved painting at heights, in high ceilings. To facilitate that, the workers would use hydraulic ladders. On the material day, the Respondent was assigned to work with a colleague called Purity Wathuitu Irungu. Purity had been in the employment of the Appellant for a much longer period than the Respondent. As it were, the Respondent and Purity agreed that the Respondent would get into the cradle of the hydraulic ladder, while Purity would remain below to operate it. They commenced work, and at some point the ladder lost hold and tripped. The Respondent fell from a height and was injured. He blamed the Appellant for his injuries and sued it in the lower court seeking compensation.

In his Complaint, the Appellant alleged that his injuries were occasioned by the carelessness and negligence of the Appellant. The following were set out as the particulars of the Defendant's negligence:

- “(a) Providing an unqualified person to operate the hoist (the ladder)***
- (b) Providing a defective hoist***
- (c) Failing to provide a safety belt***
- (d) Failing to ensure that the hoist was skillfully and carefully raised***
- (e) Failing to provide skilled supervision***
- (f) Exposing the Plaintiff to danger***
- (g) Failing to abide by safety precautions.”***

The Respondent also relied on the doctrine of *Res Ipsa Loquitur* and the Factories Act.

In its defence to the action the Appellant denied that it was guilty of the negligence alleged and countered that the Respondent's injuries were caused or contributed to by his own negligence. The Appellant's position was that the Respondent had been briefed on safety requirements and provided with a safety manual but he ignored them leading to his injury. The Appellant further pleaded that the Respondent had used the ladder on several occasions prior to the accident yet he and his colleague did not fit it properly on the material day. In his testimony in the lower court, the Respondent said that he had not used the hoist (ladder) before the day he was injured. He trusted Purity to operate it as she had been in the employ of the Appellant for a longer period and knew how to operate the ladder. He was not provided with a safety belt to secure him in the ladder. When the ladder fell, he was thrown out of the cradle onto the ground and got injured. He also said that before they commenced the work, Purity had tested the ladder and it produced a "choking" noise. He, however, proceeded to work with it because Purity, who was his senior, and in charge, did not suggest that it was unsafe to do so. In his view, the accident was occasioned by the fact that the ladder was faulty and further that Purity was not qualified for the job. The injuries sustained by the Respondent are set out in the medical report of Dr Walter Jaoko which was produced as P Exhibit 5. According to Dr Jaoko, the Respondent sustained a fracture of the ilio-pubic eminence. At the time of examination the Respondent complained of pain in the right hip and inability to walk without support. In his opinion, the injuries predisposed the Respondent to post-traumatic osteoarthritis at the right hip joint later in life. That would present itself as recurrent pains at the hip joint preventing him from walking long distances or running. That would require on and off treatment with pain killers. He estimated total permanent disability as 15%.

The Appellant on its part called three witnesses in support of its defence. The first defence witness (DW 1) was Mr Eustace Kiiru. Mr Kiiru was a Senior Mechanical Technician with the Appellant at the time of the accident. He was the Respondent's supervisor. He told the court below that all the Appellant's employees are trained on safety procedures upon employment. When the Respondent was employed, he was trained in handling materials and tools and working from heights. All machines are inspected before use. He produced as D Exhibit 1 and D Exhibit 2 two forms confirming that the Respondent was taken through safety training. He also produced documents showing that Purity was qualified and had received on-job training.

DW 1 said that on the day before the accident, he had checked the ladder and confirmed that it was in good working order. He explained to the court that the ladder had four outriggers which must be set before it is put in use. The Respondent had been trained to use it. The outriggers had not been anchored and that is what probably caused the ladder to trip and fall with the Respondent. He blamed the Respondent for not following the safety procedures.

The second witness called to support the Appellant's defence (DW 2) was Mr John Maua Wagathige. He was employed by the Appellant at the material time as a Maintenance Engineer. His duties included the maintenance of the Appellant's plant and the machinery within the Plant. He said that the ladder which was being used by the Respondent was inspected and maintained daily. The ladder was not defective. He produced as D Exhibit 8 a copy of a Certificate of Inspection to prove that. When he was called at the scene of the accident, he found that the outriggers of the ladder had not been anchored as required. According to him that is what caused the accident. On cross-examination, he stated that the ladder was last inspected on 18th October, 1997.

The last defence witness called on behalf of the Appellant (DW 3) was Alphonse Mwangangi Kamela. He was the Environment, Health and Safety Manager of the Appellant at the material time. When called at the scene of the accident he found that the outriggers of the ladder had not been anchored before use as required. He took photos of the ladder to prove that fact. Those photos were produced as D Exhibit 10A and D Exhibit 10B. He maintained, like the other witnesses called on behalf of the Appellant, that the failure to secure the ladder with the outriggers was the cause of the accident.

After hearing the witnesses which were called before it, the lower court found for the Respondent and awarded him General Damages of Kshs.200,000/= and Special Damages for Kshs.2,500/= as well as interest on those amounts and costs. How did the court deliver itself in doing so?

The Trial Magistrate found as a fact that the hydraulic ladder system was not properly fixed before use, and that was indeed the cause of the accident. That fact was not in dispute as both sides provided testimony to that effect. The Magistrate could not find fault with the Respondent because there was no evidence that he had used the ladder previously.

The lower court was guided on the question of quantum by the written submissions of the Appellant (the Respondent did not file any). In the written submissions filed on behalf of the Appellant by its Advocates it was suggested that an award of Kshs.150,000/= would be fair compensation for the Respondent's pain, suffering and loss of amenities. However, in both authorities cited by the Appellant's Advocates on quantum, the court had awarded Kshs.200,000/= as general damages.

The Appellant's argument was that in those cases, the Plaintiffs had sustained multiple injuries unlike in the case leading to this Appeal.

The Appellant was aggrieved by the decision of the lower court and filed this appeal. The Appeal is based on 9 Grounds set out in the Memorandum of Appeal as follows:

- “1. The learned Magistrate failed to appreciate that the Plaintiff had not proved his case on a balance of probabilities as required and that the Plaintiff had not adduced evidence to prove the particulars of negligence set out in the Plaintiff's case.”***
- 2. The learned trial Magistrate erred by holding that it was the onus of the Defendant to call the Plaintiff's co-worker (... Purity) as a witness to disprove the claim of negligence. The learned magistrate failed to appreciate that the burden of proof was on the Plaintiff to call Purity to prove that the Defendant or its employee was negligent.***
- 3. The learned trial Magistrate erred by holding that the Defendant was vicariously liable for the actions of the Defendant's employee while there was insufficient evidence to support the Plaintiff's case. 4. The learned trial Magistrate erred by failing to take into account the fact that the Plaintiff had failed to follow the Defendant's safety rules and express instructions on how he was to position and operate the hydraulic hoist and that it was as a result of his actions, that the accident occurred.***
- 5. The learned trial Magistrate did not take into consideration the evidence of the Defendant to the effect that the Plaintiff had received safety training and in particular “on the job training” which included ‘work at Height’ especially on the operation and storage of the hydraulic hoist. The magistrate failed to appreciate that the Plaintiff had used the hydraulic hoist before on previous occasions.***
- 6. The learned trial Magistrate failed to appreciate that it was the Plaintiff's duty to position the outriggers of the hydraulic lift before he used it. The magistrate failed to appreciate Purity's role in the use of the machine.***
- 7. Without prejudice to the foregoing, the learned Magistrate failed to appreciate that the Defendant had taken all reasonable steps to prevent the accident. In addition, the magistrate failed to appreciate that this was a common law action in negligence and not a workman's compensation claim. Thus, the test was one of reasonable care and not a claim of strict liability.***
- 8. Further and without prejudice to the foregoing, the learned trial magistrate failed to take into account the Defendant's submissions that the Plaintiff was guilty of contributory negligence.***
- 9. The learned trial Magistrate's award for general damages was manifestly excessive going by the nature of the Plaintiff's injuries.”***

Mr Muthui argued the Appeal for the Appellant while Mr Mukumi argued it on behalf of the Respondent.

Mr Muthui did not argue the Grounds of the Appeal in any particular order. He argued that the lower court's findings were wrong. He further argued that the evidence in the lower court showed that the Respondent and Purity were both trained at the job and that it was Purity who had improperly operated the ladder. In his view, the Respondent did not lead sufficient evidence to establish negligence on the part of the Appellant.

Mr Muthui referred to the case of *Woods vs Durable Suites Limited (1953) 2 All ER 391* and argued that the Appellant had taken all reasonable steps to ensure the Respondent's security: it could not be expected to watch constantly.

Referring to the seventh and ninth editions of *Charlesworth & Percy on Negligence*, Mr Muthui argued that it was the responsibility of the Respondent to establish the Appellant's negligence before he could be entitled to Judgment.

On quantum of damages, Mr Muthui argued that the injuries sustained by the Respondent were minor and could not warrant an award of Kshs.200,000/=. In his view, an award of Kshs.150,000/= would have been adequate. Supporting the lower court's findings, Mr Mukumi, on his part, argued that the Respondent had proved his case in the lower court on a balance set in law to entitle him to Judgment. He submitted that the Appellant did not call any eye witnesses to controvert the Respondent's case.

I have carefully perused the record of the lower court and considered the rival submissions of Counsel for the contending parties and I do not see any reasonable ground to interfere with the decision of the lower court.

It is agreed and settled law that he who alleges must prove. In our jurisdiction, a claimant in a civil matter is only required to establish his claim on a balance of probability. The Respondent's claim in the lower court was plain and simple. He said that while using a ladder provided by his employer (the Appellant), the ladder tripped while it was being operated by his colleague and he fell and was injured. He relied on the doctrine of "res ipsa loquitur". Mr Muthui even conceded before me that evidence showed that the accident was occasioned by improper operation of the ladder by the Respondent's colleague.

Although the Appellant may indeed have trained its employees on safety procedures only the Respondent gave to the court a first hand account of what happened. It is obvious that the Appellant's other employees, other than Purity were present when the accident happened but for some undisclosed reason, none of them was called to tell the court what exactly happened. Not even Purity, who would have been a key witness for the Defendant, was called. The Appellant has argued, in Ground 2 of the Memorandum of Appeal, that the onus was on the Plaintiff (Respondent) to call Purity as a witness. I do not think so. He established his case on a balance of probability and relied on the doctrine of res ipsa loquitur. The burden then shifted on the Defendant to call Purity, who was its employee. The Respondent told the court below that he had not used this equipment previously. This fact was not controverted by DW 1 who was the Respondent's supervisor (see his Report D Exhibit 7). In that same report he categorically stated, consistent with the Respondent's version, that Purity is the one who had operated the ladder before. Even though they were trained on safety, between the two of them, Purity is the one who knew how to operate the ladder and at the material time she operated it improperly and caused the Respondent to be injured. As Purity was the Appellant's employee, the Appellant must be held vicariously liable for her negligence committed during the cause of that employment.

As to quantum of damages, I do not think that the award of the lower court is inordinately excessive as to amount to unjust compensation. The Appellant suggested to the trial Magistrate that an award of Kshs.150,000/= would be just. However in the authorities cited by its Counsel, the court had awarded Kshs.200,000/=. Having considered the authorities, I do not think that the award made by the lower court can be said to be excessive by any standards.

I am in total agreement with the lower court's findings and I hereby uphold its decision on both liability and quantum.

In fairness to Counsel who obviously took great trouble to research and come up with numerous authorities, I must say that I have read all those authorities and I have no doubt that each of them set out the correct position in law but I do not think that any of them would have changed the decision I have come to. In the result, I dismiss this appeal with costs to the Respondent.

Dated and delivered at Nairobi this 19th day of October, 2004.

ALNASHIR VISRAM

JUDGE