REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 770 OF 2007

BARRACK OFULO OTIENO ……...……APPELLANT

VERSUS

INSTARECT LIMITED ……..RESPONDENT

(Being an appeal from the decision of Hon. Ms. Maina Principal Magistrate given on 30th August, 2007 in CMCCC No. 10553 of 2005)

JUDGMENT

The appellant was injured in the cause of his employment with the respondent. He brought this suit against the respondent for damages arising from the said injuries. His claim was denied by the respondent. In the lower court only the appellant gave evidence and the respondent called only one witness. In its judgment the lower court dismissed the appellant's suit leading to the present appeal.

The brief facts as are evident from the record are that, the appellant was employed by the respondent as an electrician. On the date he is said to have been injured, he was assigned duties at a residence of the respondent's client to replace a defective battery. To do so, he had to use a ladder.

The evidence is that he was driven to the premises by the respondent's witness and left to perform his duties. The ladder he was using slipped on a wet floor causing him to fall. In the process, the battery fell on his right foot injuring the right middle toe. The injuries were confirmed by the doctor who examined him and the medical report presented in evidence.

The respondent however placed the blame on the appellant on the basis that he had done such a job before, and in any case the respondent did not supply the ladder that the appellant was using. In dismissing the appellant's suit, the learned trial magistrate had the following to say,

> ***"I have considered the evidence and submissions by both sides carefully and my finding is that the plaintiff has not proved negligence against the defendant. First of all the plaintiff has not proved that the ladder that he was working with was provided by the defendant let alone that it was defective.***
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> ***He did not tell us where he got the ladder from but from DW 1 was emphatic that the ladder was not provided by the company. Secondly he knew the floor was slippery. In his own words it was a tiled with ceramic material. He had done that kind of work before and he very well knew that he would require a helper. He nevertheless went and climbed the ladder knowing very well that he was exposing himself to a risk. The battery that he claimed to be 7 or 10 Kgs was exhibited in court and surprisingly it's just a small battery that could easily fit in his hand. He must have been careless to cause it to fall to the extent that it injured him the way it did. It is trite that there is no liability***

without fault and in this case I fail to see how the defendant was at fault. I would and hereby dismiss the plaintiff's claim with costs to the defendant."

It is clear from the extract above, the respondent knew or ought to have known the appellant would need a ladder to perform his duties. It is immaterial who provided the ladder. It was incumbent upon the respondent to ensure proper equipment was provided for that purpose. If that be the case, the respondent should also have provided someone to assist the appellant in the performance of his duties.

I agree with the citation of the case of **Clifford Vs Charles & Sons Limited (1951) ALL ER 72.** The common law duty of care requires that an employer is not merely required to provide a safe system of work but to ensure that employees complied with that system of work. – See also **Tridev Vs Charles Wekesa Kasembeli (2005) e KLR.**

On the other hand, the appellant ought to have known he will require assistance. He also ought to have noticed that the floor was wet yet he did not ask DW1 to assist him or to provide someone to that effect. He had five years experience in that work. He did not decline to perform the duties despite the risk. In the instant case, I find that both parties were equally to blame.

The injuries sustained by the appellant were not seriously denied by the respondent. In fact the medical reports were admitted in evidence by consent. The lower court stated that had the appellant succeeded, an award of Kshs. 120,000/= would have been reasonable and adequate compensation for injury sustained by the appellant.

I have looked at the report dated 25th April, 2005 by Dr. P.M. Wambugu. This was just about six months from the date the appellant was injured on 25th October, 2004. There is another report by Dr. Timothy Kagoda Byakika dated 4th October, 2016 which is about two years from the date the appellant was injured.

The fracture to the toe had healed well with slight pain which would ease with time. There was partial permanent disability of 2%.

From the authorities cited I agree a sum of Kshs. 120,000/= would be adequate compensation. Having found that both parties were to blame for the injuries sustained by the appellant, he shall be entitled to Kshs. 60,000/= general damages for pain suffering and loss of amenities. Proved special damages amounted to Kshs. 1,500/= which shall also be reduced by 50% leaving a balance of kshs. 750/=.

In the end this appeal is allowed and the judgment of the lower court set aside in its entirety. There shall be judgment for the appellant in the sum of Kshs. 60,000/= general damages plus Kshs. 750/= special damages. The appellant shall also have the costs plus interest at court rates which shall also be reduced by 50%.

Dated, signed and delivered at Nairobi this 6th Day of April 2017.

A. MBOGHOLI MSAGHA

JUDGE