



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 13 OF 2015

CAPWELL INDUSTRIES LTD.....APPELLANT

- V E R S U S -

NERBERT NJUE NJUKIRESPONDENT

(Being an appeal from the judgement of the Honourable Magistrate delivered on 26th November at the Chief Magistrate's Court at Thika Civil Suit No. 202 of 2011)

JUDGEMENT

1. Nobert Njue Njuki, the respondent herein filed a compensatory suit against Capwell Industries Ltd, the appellant herein before the Chief Magistrate's Court, Thika. The respondent averred that on diverse dates between 15th June 2010 and 27th August 2010, he was in lawful course of employment with the appellant when due to the appellants, its servants, employees and or agents, the respondent inhaled dust/fumes from the drier machines and as a result of which he suffered from chest pains, experienced difficulties in breathing and in walking. The respondent listed the following particulars of negligence against the appellant *inter alia*:

- a. Failing to provide the plaintiff with a safe working environment.***
- b. Failing to provide the plaintiff with the necessary protective gadgets and especially nose and mouth masks.***
- c. Assigning the plaintiff a duty that was risky and failing to warn him of such risks.***
- d. Prompting the subject situation to happen.***
- e. The plaintiff shall rely on the doctrine of res ipsa loquitor.***

2. The suit proceeded for hearing before Hon. J. W. Onchuru. At the close of the case, the appellant closed its case without summoning witnesses to testify in support of the defence case.

3. The learned Ag. Principal magistrate eventually entered judgment in favour of the respondent and against the appellant.

4. The trial magistrate apportioned liability in the ratio of 80% - 20% as against the appellant and the respondent respectively. The respondent was awarded ksh.500,000/= less 20% as damages. The appellant was dissatisfied with the decision as this appeal.

5. On appeal, the appellant put forward the following grounds.

1. That the learned magistrate erred in law and in fact in finding that the defendant was 80% liable for the respondent's injuries in view of the evidence on record.

2. That the learned magistrate erred in law and in fact in his finding on liability and disregarded the defendant's evidence and submissions while arriving at his judgment.

3. That the learned magistrate misdirected himself in law and in fact in failing to note that the plaintiff failed to prove particulars of negligence pleaded in the plaint.

4. That the learned magistrate erred in law and in fact in holding that the plaintiff's injuries were as a result of effect of chemical sprayed by the defendant on date pleaded centrally to the evidence tendered by both parties attributing the injuries to other causes which the learned magistrate ignored in arriving at his judgment.

5. That the learned magistrate erred in law and in fact in holding that the plaintiff had strictly proved his allegations of negligence, breach of contract or statutory duty against the defendant yet the factual evidential materials and testimonies before him did not amount to the same nor support and justify such a holding.

6. That the learned magistrate erred and misdirected himself in law and in fact in his finding on liability taking into account the totality of evidence both oral and documentary before him.

7. That the learned magistrate erred in fact and ended up misdirecting himself in awarding exorbitant quantum of damages by failing to appreciate and be guided by the prevailing range of comparable awards on injuries of closely related nature.

8. That the learned magistrate erred in law and fact in making such a high award on damages of Kshs.500,000/= to show that the magistrate acted on a wrong principle of law and facts.

9. That the whole judgment on quantum and liability was against the weight of evidence before the court as the same was not proved on a balance of probability.

6. When this appeal came up for hearing learned counsels from both sides recorded a consent order to have the appeal disposed of by written submissions.

7. I have considered the rival written submissions. The appellant argued together grounds 1, 2, 3, 4, 5, 6 and 9 together and further grounds 7 and 8 together. The first set of grounds are grounds attacking the decision on liability. It is the submission of the appellant that there was no credible evidence to prove liability against it leave alone the 80% apportionment of liability. The appellant is of the view that there was no basis for the decision on liability. It is argued that the respondent had a pre-existing condition before he was employed by the appellant hence the appellant could not be held liable for a condition which he did not cause. The appellant further pointed out that the respondent did not plead breach of the terms of the contract and the statute. The appellant further argued that the respondent knew he was suffering from pneumonia any exposure to any dust and or chemicals would accelerate hence he was solely to blame. The appellant pointed out that the medical report produced indicated that the respondent suffered from pneumonia, a disease which was not work related. The appellant further referred to the medical report of Dr. A. O. Wandugu which indicated that the respondent had an allergy to industrial products and chemical injuries suffered were due to such allergy. It was also pointed out that the respondent had worked for more than 10 years without any complaint of ailment.

8. The respondent on the other hand faulted the appellant's submissions claiming that the evidence he tendered were never controverted by the appellant at the trial when the appellant failed to tender evidence hence the trial court properly exercised its discretion on the basis of the evidence tendered to determine liability.

9. I have on my part re-evaluated the case that was before the trial court after considering the rival submissions. The recorded evidence shows that the respondent testified and presented evidence of a single independent witness. The record further shows that the appellant closed its case without summoning witnesses to support its case. The respondent told the trial court that he was employed by the appellant as a general worker in 2001 and was stationed at the rice dyer. He stated that the rice is packed in sacks before Rentikill would treat the rice. The respondent further averred that Rentikill employees were issued protective gadgets to wit gumboots, gloves and overalls.

10. On 15.06.2010, the respondent claimed he started experiencing breathing problems. He was taken to Mt. Sinai Hospital where he was diagnosed to be suffering from asthma. The respondent said that upon his discharge he was advised to change his place of work. He produced a letter as exhibit in evidence which his employer used to deploy him to the packing section where he stopped working when his illness persisted. When he came back to work the respondent discovered he had already been dismissed. The respondent produced in evidence the discharge summary and the outpatient card as exhibits in evidence. At the time of testifying before the trial court, the respondent stated that he had fully recovered. He blamed the appellant for his sickness because it had failed to issue him with protective gears. The respondent claimed in cross-examination that when he started getting sick he realized it is the dust that was affecting him. He said he started feeling unwell six months after he joined the appellant's employment since the company was not giving mask. Raphael Obwe (PW2) a clinical officer who examined the respondent at Mt. Sinai Hospital told the trial court that the respondent was admitted having chest problems. PW2 was of the view that the cause of the ailment were dust, allergies, cold and chemicals. PW2 admitted he heavily relied on the information given by the patient in forming the opinion that his ailment was caused by dust, cold and chemicals. I have examined the medical report prepared by Dr. A. O. Wandugu and produced as an exhibit in evidence and it is apparent that the aforesaid doctor stated that the respondent suffered chemical injuries to the lungs and a result of allergies to industrial products. The respondent also produced a medical report prepared by Dr. R. P Shah, a consultant surgeon. In his report, the consultant states that the respondent's work environment has caused no damage to his lungs or any other part of the body or mind. The consultant grounded his report on the basis that there were no x-rays or lung tests undertaken. He also pointed out that no specialist examined nor treated the respondent. He further stated that upon his examination he found no abnormality on the respondent's lungs. I have critically examined the manner the learned acting principal magistrate analysed the evidence presented before him. In pages 3 – 4 of his judgment the trial magistrate stated in part as follows:

The defendant in their submissions stated that the plaintiff's illness was not work related as the same was diagnosed as pneumonia but the chemicals only accelerated the disease. They referred the court to the medical report by Dr. R. P. Shah dated 19/1/2010 in which the doctor had indicated that the plaintiff had no problems with the lungs. The x ray done revealed that he had no chest problem.

I have considered the evidence adduced by the plaintiff and the submissions by the defendant. It is not in dispute that the plaintiff was an employee of the defendant company. The medical report by Dr. R. P. Shah clearly shows that there was the chemical effects in the diseases that he was suffering. From the evidence on record I do find that the plaintiff has on a balance of probability proved that he suffered harm while working for the defendant and that he was not provided with any protectives. However I will apportion liability at 80% to 20% in favour of the plaintiff as against the defendant. This is informed of the fact that the defendant had not provided the plaintiff with any protectives and that the plaintiff's illness was not solely as a result of the dust and chemicals from his work place. I thus enter judgment for the plaintiff against the defendant at 80% to 20%.

11. It is clear from the above excerpt that the learned Ag. Principal magistrate did not analyse the medical evidence in form of reports prepared by Dr. R. P. Shah vis-a-vis that of Dr. A. O. Wandugu. Both reports were produced by the respondent in support of his case. The reports are in direct contradiction. The question is, how did the learned Ag. Principal magistrate come to the conclusion that the respondent's ailment was caused by the work environment?

12. The reports clearly show that there was no evidence from an expert in such ailments presented in court. However, the trial magistrate apportioned liability on the basis that the appellant did not provide protective gears to the respondent. After a careful re-evaluation of the case that was before the trial court, I have come to the conclusion that though the respondent presented conflicting medical evidence, it might for this court to conclude that on a balance of probabilities, the respondent has established that it is possible that his ailment was caused by the work environment or in the alternative, his condition was worsened or accelerated by the work environment. In the circumstances the employer can only share 50% blame.

13. Consequently the appeal as against liability partially succeeds in that the order apportioning liability in the ratio of 80:20 is set aside and is substituted by an order apportioning liability in the ratio of 50:50.

14. In grounds 7 and 8, the appellant has complained that the award of ksh.500,000/= damages is excessive hence not commensurate with the injuries sustained. The appellant argued that the trial magistrate failed to take into account the nature of injuries, inflationary rate and the age of comparable awards. The respondent on the other hand was of the view that the award is neither low nor high.

15. I have on my part re-evaluated the submissions and the authorities cited in support of the award. It would appear from the medical report Dr. A. O. Wandugu that the respondent suffered lung damage leading to chronic bronchitis. In the case of **Philip Kiio Muoka vs= Salim R. Ahmed H.C.C.C. no. 1569 of 1995**, this court awarded a sum of ksh.300,000/= for near similar injuries. This was the most relevant authority in this appeal. The aforesaid decision was rendered in 1993 about 22 years ago. Taking into account the inflationary trends, I think the award of kshs.500,000/= in my view represented an accurate commensurate award. In the end I find no merit in the appeal as against quantum.

16. In the end and on the basis of the above reasons the appeal against liability partially succeeds. For the avoidance of doubt, the appeal is allowed as follows:

i. The order apportioning liability in the ration of 80:20 is set aside and is substituted with an order apportioning liability in the ration of 50:50.

ii. The award of kshs.500,000/= as general damages is upheld but the same is subjected to 50% liability. i.e

General damages	Ksh.500,000
less 50%	Ksh.250,000
Net amount	ksh.250,000/=

iii. Special damages Ksh.2000

Less 50%	ksh.1000
Net	ksh.1000

iv. Each party to meet its costs on appeal

v. The respondent is given costs of the suit based on 251,000/=

Dated, Signed and Delivered in open court this 11th day of November, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent