REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO.89 OF 2009

KENNEDY ONYANGO NDINYA....................................APPELLANT

VERSUS

SHAJANAND HOLDING LIMITED..............................RESPONDENT

[BEING AN APPEAL FROM ORIGINAL JUDGMENT FROM KISUMU CHIEF MAGISTRATE'S COURT BY A. C. ONGINJO

(MRS) – P.M.

IN CMCCC NO.392 OF 2007

****

J U D G M E N T

The appellant's claim against the respondent was for general and special damages arising from an injury that he suffered in the course of his duties as an employee of the respondent. The claim was dismissed with costs which led to this appeal.

The unchallenged evidence before the trial court was that the appellant was a stone-loader employed by the respondent. On 23/5/07 he was, along with his colleagues, loading stones on a lorry under the supervision of the respondent's employee called Chandu. One of his colleagues threw a stone on the lorry in the process of loading it. The stone bounced back and hit his (appellant's) knee which got injured. He was treated at Nyanza General Hospital as an out-patient. He was treated with analgesics. The medical report (Exhibit 3) by Dr. David O. Olima (PW2) showed that he suffered soft tissue injury which had fully recovered by 19/10/07 when he was examined.

In the plaint dated 9/6/07, the appellant claimed that the accident and injury were due to the respondent's breach of statutory and/or common law duty. The particulars were failing to ensure his safety while engaged in the said work; failing to provide and maintain a safe working place; failing to take any or adequate precaution for his safety; exposing him to risk of damage or injury which it (the respondent) knew or ought to have known; failing to take care and/or precaution to avoid the accident; failing to provide and maintain appliances to enable the said work to be carried out safely; and failing to provide a safe system of work.

In the appellant's evidence in chief, he stated that he blamed the respondent for failing to give him tools to work. He named the tools to be wheelbarrows, gumboots and stones. When cross-examined, he stated as follows:

“We were both throwing stones in the lorry simultaneously with Odhiambo when stone he had thrown hit lorry and was deflected onto my knee. Gloves would not have prevented injury to the knee but it would help for other injuries. Wheelbarrow would have been used to bring stones closer. I was wearing slippers, industrial boots 2 inches above ankle. Industrial boots are used for safety but would not have helped in this case.”

The particulars of negligence did not indicate what kind of gear or appliances that the respondent failed to provide that would have saved him from the accident or injury. In evidence, he mentioned wheelbarrow, gloves and boots. He conceded that gloves and boots would not have prevented the incident or injury. A wheelbarrow would have been used to bring stones closer to the lorry. Then what? How were the stones going to be lifted onto the lorry? Did he request for a wheelbarrow from the respondent? The appellant did not say what institutions of loading they had been given, and whether what Odhiambo did went against such instructions. He did not say that the wheelbarrow was obviously necessary for the work at hand, or that a reasonable employer would recognise that it was needed for the work. He did not say that it was reasonably expected for the stone thrown by Odhiambo would bounce back and hit him.

In short, I agree with the lower court that liability on the part of the respondent was not proved. I dismiss the appeal with costs.

Dated, signed and delivered this 10th day of March, 2014.

A. O. MUCHELULE

J U D G E