



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 5 OF 2011

ELDORET STEEL MILLS LIMITED APPELLANT

VERSUS

DENNIS OUKO NYANG'ECHI RESPONDENT

(Being an appeal from the Judgment of Hon. Innocent Maisiba (Resident Magistrate) in Eldoret Chief Magistrate's Civil Case No. 320 of 2009 delivered on 19th February, 2010)

JUDGMENT

The Appellant was the Defendant in the suit before the trial court. He had been sued by the Respondent who was the Plaintiff for special and general damages, costs of the suit and interest thereon.

The Respondent was an employee of the Appellant. He sustained a cut wound on the right index finger in the cause of his employment. He blamed the Appellant for exposing him to risk and failing to provide him with a safe working environment.

The learned trial Magistrate entered liability for the Respondent at 100%. He then awarded general damages of Ksh. 80,000/= for pain, suffering and loss of amenities. Special damages were assessed at Ksh. 1,500/=. He was also awarded costs of the suit and interests thereon.

The Appellant was dissatisfied with the said judgment and preferred this appeal. It raised nine (9) grounds of appeal as per the Memorandum of Appeal dated 7th January, 2011. The same may be summarized into two.

(a) That the learned trial Magistrate erred in law and fact in holding the Appellant 100% liable.

(b) That the learned trial Magistrate erred in law and fact in awarding damages that were excessive in the circumstances.

The appeal was disposed of by way of filing written submissions. Those of the Appellant are dated 8th May, 2014 and were filed on the same date by M/s. Nyairo & Company Advocates. Counsel submitted that the Respondent did not tender any evidence that the Appellant was contractually obligated to provide the Respondent with protective clothing. That the failure to provide the protective clothings did not cause the accident. The court was referred to Section 107 of the Evidence Act which provides that;

“whoever desires any court to give judgment as to any legal right or liability

dependent on the existence of facts which he asserts must prove those facts exists.”

It was submitted that the trial court erred in not believing that there was no documentary evidence to show that the Appellant had supplied the Respondent with gloves when the same was produced in evidence.

It was also submitted that the Respondent failed to prove the causal link between the Appellant's negligence and the injury he suffered as was observed in the case of **STAT PACK INDUSTRIES LTD -VS- JAMES MBITHI MUNYAO (NBI, HCCA NO. 152 OF 2003)** in which it was observed that;

“It is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a casual link between someones negligence and his injury. The Plaintiff must adduce evidence from which a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone's negligence. An injury per se is not sufficient to hold someone liable.”

On quantum, the Appellant's counsel submitted that what was awarded was excessive in the circumstances and suggested that an award of between Ksh. 15,000/= and Ksh. 30,000/= would be adequate compensation. The following cases were referred to.

1. NAKURU HCCA. NO. 61 OF 2007

AMALGAMATED SAW MILLS LIMITED -VS- JOYCE MWIHAKI MACHARIA

2. KISII HCCA. NO. 214 OF 2006

SOUTH NYANZA SUGAR COMPANY LIMITED -VS- OMWANDO OMWANDO
(2011) @ KLR

3. NAKURU HCCA. NO. 152 OF 200 STAT PACK INDUSTRIES -VS- JAMES MBITHI MUNYAO

The Respondent's counsel, M/s. Nyambegera & Co. Advocates, vide their submissions dated 19th December, 2012 submitted that the Respondent proved his case on a balance of probabilities. They submitted that, under the common law the Plaintiff had established acts of omission on the part of the Appellant for its failure to provide protective apparel such as gloves. Further, the Appellant had also failed to provide the Respondent with a safe working environment and the plea of *volenti non fit injuria* could not apply. The court was referred to the case of **WILSONS AND CLYDE COAL CO. A.C, 79** in which it was held that ***“it ought to have been demonstrated that the machine was kept in a good working order and all reasonable precautions were taken to maintain them as such”***.

On quantum, counsel for the Respondent submitted that the sum of Ksh. 80,000/= awarded was reasonable and commensurate with the injuries the Respondent suffered. He referred to the cases of **GICHUKI -VS- TM -AM CONSTRUCTION GROUP (AFRICA) COURT OF APPEAL (NBI) CIVIL APPEAL NO. 152 OF 2001, JAMES GATIKU NDOLO -VS- DANIEL NG'ANG'A KANYI 2006 e KLR** and **PAMELA KILELO MAGHANGA -VS- D.I.M (2010) e KLR.**

This is the first appellate court whose duty is to re-evaluate the evidence on record and come up with its own conclusions, but bear in mind that it has neither seen nor heard the witnesses. See – **SUMARIA & ANOTHER -VS- ALIED INDUSTRIAL LIMITED (2007) 2 KLR, 1-9 (8), JABANE -VS- OLIENJA (1986) KLR, 661 AND MUKUBE -VS- NYAMURO (1983) KLR, 403. LIABILITY**

The Respondent was the only witness in the Plaintiff's case. He was PW1. He testified that on 4th April, 2008 he was working at Eldoret Steel Mills at the garage yard. As he was putting the metals together, a piece of metal fell on his 4th finger. He informed the manager who in turn informed the personnel manager. He was thereafter taken to Uasin Gishu District Hospital where he was treated.

The defence called two witnesses. DW1, Elijah Wanjofu testified that he worked with the Appellant Company as the incharge of the furnace department in which department the scrap yard fell. He stated that PW1 worked at the scrap yard department and his duty was to collect the scrap and put it into the basket. He confirmed that PW1 was on duty on 4th April, 2008. He stated that he had been provided with protective gears including gloves. The hand gloves were made of leather. He said he got injured when he had removed them as he had complained of sweating on his hands.

DW1 further testified that all staff members signed a register upon being issued with gloves. He identified the register which was kept by the personnel officer. For this reasons, he blamed PW1 for the injury he sustained.

DW2, Timona Nganda was a personnel officer with the Appellant company. He testified that he issued PW1 with strong leather gloves on 1st March, 2007. He stated that all staff members signed for protective gears issued to them and PW1 also signed upon being issued with the gloves.

DW2 then produced a protective-issue-book – a copy was retained by the court.

He stated that PW1 had instructions to wear gloves for his safety. He indicated that PW1 had removed the gloves when he got injured and was therefore to blame for the injury.

Having summarized the evidence as above, it is trite that he who alleges a fact must prove the same. The Appellant alleged breach of statutory and common law duty by his employer (Appellant) to him. Specifically, he alluded that he got injured because the employer did not provide protective gloves to him.

It is also trite that an employer owes the employee the duty of care. Such duty must be within foreseeable situations. See the case of **GACHAGUA SAWMILLS LIMITED -VS- ANTONY OJIAMBO OLADI (2011) e KLR, HIGH COURT AT NAKURU CIVIL APPEAL NO. 160 OF 2005**, Ouko, J. stated as follows:-

“Having found as a common ground that the respondent was injured in the course of his duty and that in such situations general damages may be awarded, the next issue for determination is whether the appellant was in breach of its statutory duty and/or contract of employment.

At paragraph 560 of Halisbury's Law of England, 4th Edition, Vol. 16, it is stated, inter alia that:

“At common law an employer is under the duty to take reasonable care for the safety of his employees in all the circumstances so as not to expose them to unnecessary risk.”

(Emphasis supplied)

See also statutory duty on the employer under Section 34 of the **Factories Act** and also the decision in **MAKALA MAKUMUMENDE V. NYALI GOLF & COUNTRY CLUB C.A. NO. 16 OF 1989**. In the latter, the court explained that:

“Just because an employee accepts to do a job which happens to be inherently dangerous is, in my judgment, no warrant or excuse for the employer to neglect to carry out his side of the bargain and ensure the existence of minimum reasonable measures of protection.

The necessity is the greater for an employer to protect his employee from danger after a warning following a potentially dangerous incident during which no injuries are sustained.”

Again, the Court of Appeal in MWANYALE -VS- SAID T/A JOMVU TOTAL SERVICE STATION, while quoting Halsbury's Laws of England stated as follows:-

“It is an implied term of the contract of employment at common law, that an employee takes upon himself risks necessary incidental to his employment. Apart from the employer's duty to take reasonable care, an employee cannot call upon his employer, merely upon the ground of relation of employer and employee to compensate him for any injury which he may sustain in the course of his employment in consequence of the dangerous character of the work upon which he is engaged. The employer is not liable to the employee for damages suffered outside the course of his employment. The employer does not warrant the safety of the employee's working condition nor is he an insurer of his employee's safety, the exercise of due care and skill suffices.”

In the instant case, DW1 testified that he issued the Respondent with strong protective gloves on 1st March, 2007. D. Exhibit 1 (a) was the “*protective Issue Book*”. At page 1 is a list of names of people. Column 1 bears date, column 2 are the names, column 3 is the purpose of the list and column 4 is the signature of the recipient. The purpose is clearly shown as “*hand gloves*”. The Respondent's name appears as having been issued with the hand gloves and signed upon receiving them. Against his name is letter 'S' which DW2 stated stood for 'strong' gloves. The date for issuance is 6th January, 2008 and according to DW2 they are issued once a year unless a staff requisitions for new ones if the ones he has get worn out.

The accident herein occurred on 4th April, 2008 only three (3) months after PW1 had been issued with the hand gloves. There is no evidence that what he was issued with had worn or had requisitioned for a new pair and had not been provided with it. PW1 also failed to dislodge the defence case that the gloves were not actually issued to him or that he did not sign for receipt of the same as shown in D. Exhibit 1 (a).

In that regard, it is my view that the Appellant had exercised due care in ensuring that the Respondent worked in a safe system. By issuing him with gloves, it knew that his work would likely cause an injury and to caution him from any foreseeable injury, the gloves were given to him.

PW1 did testify that he got injured because he had no gloves. The Appellant having demonstrated that it had issued the gloves to him, then the conclusion I make is that PW1 must have removed the gloves for reasons best known to himself. Besides, the authenticity of the glove issuance register was not challenged. He thus exposed himself to the injury and could only blame himself for what befell him. He was the author of his own misfortune. He was negligent in not taking charge of his own safety.

Back to the judgment, in dismissing the Appellant's case and upholding the defence case that the Appellant had not provided the Respondent with gloves, the learned trial Magistrate stated as follows:-

“The defendant's witness was Elijah Wanjofu. He confirmed that the Plaintiff got injured under him but that he had been provided with gloves but he did not use them that day. He did not provide documentary evidence to show he had supplied the gloves”.

Clearly, the learned trial Magistrate totally closed his eyes to the evidence of DW2, Timona Nganda who was the Appellant's personnel officer. He also made no mention of D. Exhibit 1 (a) which showed that PW1 had been issued with the hand gloves. He thus arrived at a finding that the Appellant was 100% liable based on partial evaluation of the evidence on record. That was a total misdirection on his part. Had he taken into account the evidence of DW2, it is my view that he

would have arrived at a different finding – and found that the Appellant was not at all to blame for accident.

From the foregoing, it follows that this appeal on liability must succeed. That being the case, it serves no purpose to delve into the issue of quantum. For record purposes, had the appeal on liability not succeeded, taking into account the injuries the Respondent suffered, the inflationary trends and relevant authorities, I would have considered an award Ksh. 50,000/= as adequate compensation for pain, suffering and loss of amenities.

In the end, this appeal succeeds in its entirety. I set aside the entire judgment of the learned trial Magistrate. Costs of both the trial court and this appeal shall be payable by the Respondent.

It is so ordered.

DATED and DELIVERED at ELDORET this 12th day of November, 2014.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

Ms. Khayo for the Appellant

Miss Mwanguli holding brief for Onkani for the Respondent