REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL 153 OF 2009

FREDRICK OTIENO AKONG'O.....PLAINTIFF

VERSUS

UNITED MILLERS LTD.....DEFENDANT

J U D G M E N T

The appellant has appealed against the judgment of the trial court citing the following grounds:-

(a) That there was an error in principle to wit failure on the part of the trial magistrate, to appreciate the relevance and applicability of the statutory/common law duty of care owed by employers towards their employees.

(b) That there was a grave omission committed by the trial magistrate in failing to appreciate and/or in disregarding in toto, the applicability of the doctrine of vicarious liability to the circumstances of this case.

(c) That there was an error in law in the learned trial magistrate allowing extraneous factors/issues not otherwise pleaded and/or adduced in evidence, to influence his decision.

(d) That the quantum of damages which would have been awarded, was extremely low as to constitute an erroneous estimate of the quantum awardable.

The appellant's case briefly is that on the 21-1-2003 he was working at the respondent's premises. His work involved putting maize into the machine. While in his duties an employee who was sweeping caused the broom with a metallic holder to fall onto the appellant. The appellant sustained injury on his left eye.

According to the report by doctor Nyamogo he sustained a cut to the left supraorbital region. Interestingly, the respondent's doctor one doctor Otieno opined that the appellant sustained bruises to his right leg. His report dated 3-2-2006 does not mention any injury to the eye.

The case was closed without the respondent tendering any evidence to counteract that of the appellant.

The trial court however dismissed the appellant's case hence this appeal. The main issue to determine and which forms the gist of the appellant's case is the question of negligence. The trial court found that the appellant did not establish any negligence on the part of the defendant.

It went further to state that the appellant did not plead negligence on the part of the respondent's employee especially the one who had control of the broom.

I have carefully perused the proceedings as well as the pleading at the lower court. What I do not find in dispute is that the appellant was an employee of the respondent whether casual or otherwise. It is also not in dispute that he was injured on the material day. The LD 104 form (exhibit 4) say as much.

The cause of the accident is indicated as **"one cleaner was working at maize mill receiving section with a broom mounted on a wooden pole, the wooden pole slipped due to lack of attention on part of cleaner and fell on Fredrick Otieno who was not looking where he was going at that time".**

The particulars of the injuries were "bruises below the left eye. The report was prepared by the respondent who did not object to its production. On being cross examined the appellant told the court: **"we were working as a group. There was a worker who stood on top of united millers vehicle and sweeping roof. This was a cleaner and I knew him physically. I do not know what happened with cleaner but the broom dropped and its metallic handle hit my left eye".**

From the above quotation therefore, I do find that the cause of the appellant injuries was the cleaner who for some reason did not handle the broom well and let it off his hands and the metallic part of the broom hit the appellant. Was the appellant therefore negligent?

I am not convinced that he was negligent. First of all he was working and carrying on the task he had been entrusted to do. Out of nowhere an object which was not under his control came from nowhere and hit him on the left side of his eye. How was he therefore negligent, yet the broom was in control of someone else?

If for instance the object came from the machine he was in control of and caused the injuries then I would have thought otherwise.

It has been submitted by the respondent that the appellant on cross examination admitted that objects do not fall from the roof of the mill. While this admission is correct, the object that hit the appellant did not come from the roof but from a cleaner who was in control of a broom.

The respondent did not call any witness and perhaps it would have been interesting to hear from the cleaner of what happened to the broom. How did the metallic part come out of it and hit the appellant? Was it a deliberate act and therefore a criminal offence as envisaged by the trial magistrate?

Failure to call any witness therefore goes against the appellant's assertion that the appellant was negligent in causing the said accident.

The trial court argued that the appellant did not plead and prove any negligence against the respondent or its employee or servants. I beg to disagree.

My reading of the plaint and the proceedings especially the evidence shows clearly that the appellant attributed negligence on the respondent more so the cleaner.

The cleaner was working for the respondent. The respondent is thus vicariously liable for the acts of the cleaner. **"Vicarious liability**" has been defined by Black's Law Dictionary 8th Edition as **"liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties".**

My finding therefore is that the appellant in his evidence was able to establish that indeed the cleaner who was in actual control of the broom negligently handled the same that the metallic part dropped and hit the appellant causing him the injury.

In the case of **Starpack Industries –VS- James Mbithi Munyao (Nairobi HCCC APP No. 152 of 2003** (unreported) Visram J as he was had this to say about causation.

"Coming now to the more important issue of 'causation' it is trite law that the burden of proof of

any fact or allegation is on the plaintiff. He must prove a causal link between someone's negligence and his injury. The plaintiff must adduce evidence from which on 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".

I do find that by the cleaner who was the respondent's employee failing to control the broom which was under his control, the appellant was injured.

The other issue raised by the appellant is that the respondent did not provide him with the necessary protective gears and tools that would have mitigated his injuries. He said **"I blame company for the accident because I was not issued with goggles and helmet which could have prevented or even minimized injuries. The company does not issue protective gear".**

The trial court stated that the appellant did not state what he required. This again I fault, for in the above quoted piece of testimony the appellant was clear on what he wanted.

In an ordinary working factory environment it is within our labour laws, rules and regulation that part of the working gear for the employees include helmet and goggles. I do not find this assertion to be unreasonable. Presumably, if the appellant had both the injuries would have been minimized.

It was held in the case of **Makalu Mailu Mumende –VS- Nyali Golf & County Club- Mombasa CA. C. APP No. 16 of 1999** that **"The question is not whether a helmet would have protected the plaintiff from the injury to the apex of the head but whether the helmet could reasonably be regarded as capable of minimizing the injury to the head".**

I think that the situation at hand fall within the above authority envisaged by the eminent Judges of Appeal. There is nothing to show that the appellant was provided with a helmet or goggles by the respondent.

I do in the premises find that failure to provide the two lents credence to the fact that the respondent acted negligently towards its employee.

Having come to the above conclusion I do turn now to the issue of quantum. The trial court awarded the sums of Kshs. 60,000/= to the appellant. I have perused the authorities relied on by the parties herein. The injury by the time the appellant was being examined had healed.

There was no evidence to support his assertion that his vision had been impaired. He was a cyclist, meaning that his eyesight was proper.

Consequently, I shall sustain the general damages awarded to the appellant as well as the special damages. The upshot of this is that the appeal is allowed as follows:-

(a) The trial court's judgment is hereby set aside.

(b) The appellant is hereby awarded the sum of Kshs. 60,000/= as general damages and Kshs. 1500/= as special damages making a grand total of Kshs. 61,500/=.

(c) The appellant shall have interest from the date of judgment herein.

(d) The costs of this appeal as well as in the lower court to the appellant.

Orders accordingly.

Dated, signed and delivered at Kisumu this 13th day of July, 2012.

H.K. CHEMITEI
JUDGE

In the presence of:

…….for the appellant

……..for the respondent

HKC/va