REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI LAW COURTS)

CIVIL APPEAL 761 OF 2006

BHUPCO TEXTILE MILLS LTD……..…APPELLANT

VERSUS

CONSTANTINE OKELLO OFUNY…..RESPONDENT

J U D G M E N T

1. Bhupco Textiles Mills Ltd (hereinafter referred to as the appellant), is dissatisfied with the judgment of the Resident Magistrate at Kandara, delivered in CMCC No.19 of 2000. In the judgment, the Resident Magistrate awarded to Constantine Okello Ofunya, (hereinafter referred to as the respondent), general damages of Kshs.65,000/= and special damages of Kshs.2,000/=.

2. The appellant has filed a memorandum of appeal raising 9 grounds as follows:

(i) That the learned trial magistrate erred in law and fact in failing to consider the pleadings of the appellant and the respondent and the law applicable in totality in making the findings in the case.

(ii) That the learned magistrate erred in law and fact in finding and holding the appellant liable in negligence to the extent of 100%.

(iii) That the learned trial magistrate erred in law and fact in failing to consider the evidence of the appellant and the respondent in totality.

(iv) That the learned trial magistrate erred in law and fact in assessing damages in the sum of Kshs.65,000/=.

(v) That the learned trial magistrate erred in law in disregarding the evidence of the defendant's witnesses without proper cause.

(vi) That the learned trial magistrate erred in believing the uncorroborated evidence of the plaintiff, which was in any event insufficient.

(vii) That the learned trial magistrate erred in law and fact by taking into consideration an issue of fact that was not raised in evidence.

(viii) That the learned trial magistrate erred in law in failing to consider the defendant's submissions.

(ix) That the appellant craves the eave to add, amend, alter or omit any ground or grounds of appeal at or before the hearing.

3. I have carefully reconsidered and evaluated the evidence which was adduced before the lower court. I have also considered the submissions made before me by counsel for each party. The respondent's claim as was evident from his plaint, was for damages for injuries allegedly suffered by him as a result of negligence and/or breach of duty, or breach of contract on the part of the appellant or its servants/agents/employees. The respondent, who testified in support of his case, stated that that he was injured during the course of his duties as an employee of the appellant. At the material time the respondent was fitting a bearing on a humidifier machine suspended on top of a roof. The respondent explained that there was inadequate light and someone had to hold a portable lamp to enable him see what he was doing. It was in the process that a metal shaft entered his eyes and injured him. The respondent blamed the appellant for failing to provide him with goggles and a helmet.

4. In its statement of defence, the appellant denied that the respondent was injured or that he suffered any injuries as a result of the appellant's negligence. The appellant claimed that if the respondent suffered any injuries then the same was caused by the respondent's own negligence. In support of its defence the appellant called two witnesses. These were, Daniel Kungu Ngige (Daniel), and Tanju Mohammed (Tanju).

5. Daniel explained that on the material day he was working with the respondent. The respondent was fixing bearings and he (i.e. Daniel), was holding a lamp to enable the respondent to see. He explained that something entered the respondent's eye. Daniel explained that there were protective clothing given to workers, but the workers had to ask for them.

6. Tanju, who is an engineer in the company, testified that the respondent was working in the workshop. He explained that the company provided tools and protective clothing. He maintained that it was for the employee to go and request for whatever he required. He explained that on the material day, there were four pairs of goggles and two pairs of helmets available, but that the respondent did not ask for them.

7. From the evidence that was adduced before the trial magistrate, it was not disputed that the respondent was working for the appellant, and that he was injured during the course of his employment, when something entered into his eye. It was also apparent that the work the respondent had to do required him to look up, as he fitted the bearing. Further, it is evident that the respondent was not wearing any protective clothing. In particular, the respondent was not wearing any eye goggle which could have protected him from injury to his eye.

8. I find that the appellant being an employer of the respondent, the appellant was under a duty to provide protective clothing to the respondent. The appellant's evidence was that the protective clothing was available to the respondent upon request. However, even assuming that to be the position, it was not enough for the appellant to have the protective clothing somewhere in its stores. The duty was for the appellant to provide the protective clothing and ensure that the safety precaution of using the protective clothing is observed.

9. In this case, there was no evidence adduced before the trial magistrate that the appellant actually gave the respondent any eye goggle, or had put any mechanism in place to ensure that the workers did not work without using eye goggles. Moreover, it is evident that the respondent had to look up towards the roof to fit the bearing. The danger of foreign particles entering into the eye as the respondent looked up and worked on the bearing, was therefore reasonably foreseeable. I find therefore, that the trial magistrate was right in coming to the conclusion that the appellant was negligent and fully liable to the respondent for the injuries suffered by the respondent.

10. With regard to the appeal against the assessment of general damages made by the trial magistrate, it

is trite law that an appellate court will only interfere with an assessment made by the trial court, where such assessment has taken into account an irrelevant factor, or left out a relevant factor, or is so high as to be excessive or so low as to be an erroneous estimate of the damage. ***(Kemfro Africa Ltd t/a Meru Express Services 1976 & Another vs Lubia & Another [1988] KLR 30)***.

11. In this case, the two medical reports which were produced in evidence showed that the respondent suffered an inflammation on the right eye which resulted in irritation of the cornea. The injuries were basically temporal in nature. In this case, in arriving at the figure of Kshs.65,000/= the trial magistrate considered the authorities which were cited to him and also took into account the element of inflation. Counsel for the appellant submitted that a sum of Kshs.50,000/= would have been adequate compensation to the respondent. However, there is nothing to show that the sum of Kshs.65,000/= which was awarded to the respondent was either based on wrong principles or was so high or low as to justify the intervention of this court.

12. For the above reasons, I find no merit in this appeal and therefore dismiss it with costs.

Those shall be the orders of this court.

Dated and delivered this 6th day of May, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Miss Njihia for the appellant

Advocate for the respondent absent

Erick – Court clerk