



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS

Civil Appeal 87 of 2007

TEX PLAST INDUSTRIES LIMITED.....APPELLANT

VERSUS

MWANGU MWALIMU MUASYA..... RESPONDENT

(Being an appeal from the judgment and decree of the Resident Magistrate Court at Limuru before Mr. A. Aminga (RM) delivered on the 16th January, 2007 in Limuru PMCC No. 227 of 2006)

JUDGMENT

1. This is an appeal arising from a judgment delivered by the Resident Magistrate Limuru on the 16th January, 2007 in Civil Case No. 227 of 2006. The parties in the suit in the lower Court were Mwangi Mwalimu Muasya, who is now the respondent in this appeal, and Tex Plast Industries Limited who is now the appellant.
2. The respondent, who was an employee of the appellant, sued the appellant for general and special damages for injuries suffered by the respondent during the course of his employment. The respondent maintained that he suffered his injuries as a result of the appellant's negligence, and/or breach of statutory duty, and/or breach of the contract of employment.
3. The appellant denied the respondent's claim. In particular, the appellant denied having employed the respondent or that it was negligent or in breach of any statutory duty or contractual terms or that the respondent suffered any injuries. The appellant further averred that if the respondent suffered any injuries, then the same was caused solely or largely by the respondent's negligence. The appellant maintained that it provided a safe working environment, with all the necessary safety equipments and protective gear. The

appellant further maintain that the work done by the respondents was inherently risky, and the injuries could therefore occur through no fault of the appellant. The respondent voluntarily knowing of the risk of injury consented to and undertook the work with the risk attendant thereto.

4. During the hearing of the suit in the lower Court, two witnesses testified for the respondent. These were: Dr. Cyprianus Okere and the respondent. Their evidence was briefly that the respondent was employed by the appellant as a casual worker. On the material day, he was on night duty. The work he was doing involved cutting polythene bags using a machine. The respondent was working as a machine operator. The conveyor belt had a problem and it kept coming off. The respondent was in the process of replacing the conveyor belt when another employee switched on the machine, and the respondent's hand was pulled by the conveyor belt causing a cut on his right index finger. The accident occurred at 10.00 p.m. The respondent received first aid. The next morning the respondent went to Salama Medical Clinic for treatment. Later, the respondent was examined by Dr. Cyprianus Okere who prepared a medical report which he produced in evidence.

5. The appellant also called two witnesses. These were: Alfrey Kinyungu and Jane Kikemboi. Both were employees of the appellant. Kinyungu produced an attendance sheet which showed that on the material date, the respondent was on night shift duty. Jane Kikemboi who was a supervisor on night shift duty on the material night, maintained that the respondent did not sustain any injury, nor did he report any injury. She maintained that there was no record at all of the respondent having suffered any injuries. She denied that the respondent reported the injury to her or that she declined to sign for such injury.

6. Written submissions were filed by counsel for each party, each urging the Court to find in favour of its client. In his judgment, the trial Magistrate found that the respondent was injured during the course of his employment, and that the injury was caused by the defective machine. The trial Magistrate found that the appellant failed to provide a safe working environment, and was therefore liable to the respondent. The respondent was contributorily negligent as he was aware of the state of the machine. The trial Magistrate apportioned liability at 80% against the appellant, the respondent bearing 20% contribution. The trial Magistrate further awarded general damages of Kshs.60,000/= and special damages of Kshs.3,000/= subject to contribution.

7. Being aggrieved with that judgment the appellant has lodged this appeal raising 14 grounds as follows:

(i) The learned Magistrate erred in fact and in law in wrongly deciding that the alleged accident subject matter of the suit happened at the appellant's premises involving the respondent in the absence of evidence to that effect and disregarding the evidence and submissions for the appellant in that regard.

(ii) The learned Magistrate erred in fact and in law in failing to frame the issues for determination properly or at all and thereby arrived at a wrong conclusion that the appellant was liable for the alleged injury to the respondent.

(iii) The learned Magistrate erred in fact and in law in disregarding the clear evidence of the appellant's supervisor on duty at the material time and thereby arrived at a wrong conclusion that the alleged incident subject matter of the suit took place.

(iv) The learned Magistrate erred in fact and in law in disregarding and not giving weight to the clear evidence of the appellant's supervisor on duty at the material time and who would have known of any accident involving the respondent and whose duty it was to report the accident and thereby arrived at a wrong conclusion in dismissing the position that the injury was not reported because the person recording the accident was different from the one reporting it.

(v) The learned Magistrate erred in law and fact in wrongly failing to frame the issues for trial and determination and evaluate them against the evidence in its totality and thereby arrived at the wrong conclusion that because the issue of the alleged defective conveyor belt was not addressed the defence was a mere denial and that the respondent was indeed injured while on duty.

- (vi) The learned Magistrate erred in law and fact in finding that the issue of the alleged defective conveyor belt was not addressed by the appellant and thereby wrongly shifted the burden of proof to the appellant.
- (vii) The learned Magistrate erred in law and fact in disregarding and not giving weight to the clear evidence of the appellant's supervisor on duty at the material time and who would have known of any accident involving the respondent and whose duty it was to report the accident and without basis arrived at a wrong conclusion that if the supervisor ignored the accident the same would not be recorded.
- (viii) The learned Magistrate erred in law and fact in wrongly failing to evaluate the evidence in its totality and to consider the submissions by the defendant (the appellant herein) and thereby arrived at the wrong conclusion on liability.
- (ix) The learned Magistrate erred in law and fact in wrongly evaluating the evidence of the witnesses for the defendant (the appellant herein) and thereby arrived at a wrong conclusion on the occurrence of the alleged accident subject matter of the suit.
- (x) The learned Magistrate erred in law and fact in not considering the obvious inconsistencies in the respondent's evidence thereby wrongly arrived at the wrong conclusion that the alleged accident occurred and the plaintiff was injured in the course of duty.
- (xi) The learned Magistrate erred in law and fact in not finding that the plaintiff had not adduced any or any sufficient evidence on occurrence of the alleged accident and disregarding the clear evidence of the appellant that the alleged accident did not occur at all.
- (xii) The learned Magistrate erred in law and fact in not considering the respondent's evidence that indicated the respondent as the author of his misfortune and thereby wrongly arrived at a wrong conclusion in the apportionment of liability.
- (xiii) The learned Magistrate erred in law and fact in failing to evaluate the evidence in its totality and thereby arrived at a wrong conclusion on the occurrence and causation of the alleged accident subject matter of the suit.
- (xiv) The learned Magistrate's assessment and award of general damages was made without proper basis and was excessive and so inordinately high as to be an erroneous estimate of the compensation to which the respondent would be entitled.

8. Mr. Mwaniki who appeared for the appellant, argued the appeal on 4 grounds as follows:

- (i) That there was improper consideration of the totality of the evidence
- (ii) That the Court did not properly frame the issues and therefore misdirected itself in finding the appellant to blame thereby shifting the burden of proof
- (iii) That the Court did not address itself properly to the issue of contribution and therefore arrived at a wrong conclusion in apportionment of liability.
- (iv) That the assessment of damages was erroneous and excessive in the circumstances.

9. Mr. Mwaniki submitted that the Court did not give full weight to the evidence of the appellant's witnesses. He maintained that the Court did not consider the totality of the respondent's evidence, as the same lacked credibility and was inconsistent. Counsel pointed out that there were inconsistencies on the respondent's evidence, which he maintained were not dealt with. Counsel maintained that the Court did not properly address the material issue which was whether there was an accident causing injury, and whether the same was caused by the appellant. It was maintained that there was no reply to the claim of contributory negligence which was pleaded by the appellant against the respondent. The respondent was

therefore deemed to have accepted that fact and the Court therefore ought to have apportioned liability at 50:50%. With regard to quantum it was submitted that award of Kshs.50,000/= was excessive.

10. Mr. Opiyo who appeared for the respondent urged the Court to review the evidence and arrive at its own conclusion. He maintained that the lower Court had discretion to apportion liability. He argued that the damages of Kshs.40,000/= which were proposed by the appellant's counsel were on the lower side as the element of inflation was not taken into account. The Court was urged not to disturb the finding of the lower Court as that Court had the benefit of assessing the demeanor of the witnesses.

11. I have carefully reconsidered and evaluated the evidence which was adduced before the trial Court. I have also considered submissions made before the lower Court, the judgment of the trial Magistrate and the submissions made before this Court viz-a-viz the grounds stated in the memorandum of appeal. It is evident that in this case there were two versions. The appellant's version which was that the respondent was not injured at its place of employment and the respondent's version which was that the respondent was injured during the course of his employment, as a result of the appellant's negligence and/or breach of statutory duty. The trial Magistrate believed and accepted the evidence of the respondent that he was indeed injured during the course of his employment and that the accident was substantially caused by the negligence of the appellant in failing to provide a safe working system. As an appellate Court, I would be hesitant to interfere with the findings of facts made by the trial Court given the fact that the trial Magistrate was in a better position to assess the demeanor of the witnesses and the significance of their evidence. Moreover, the appellant demonstrated that it was not worthy of belief. For instance it denied in the plaint that the respondent was its employee only for its witnesses to contradict the defence by confirming that the respondent was at the material time, working for the appellant. Further, the respondent explained that at the time he was injured she reported to the appellant's witness Jane, who asked one of the workers called Matibo to give the respondent first aid. Essentially it was the word of the respondent against that of the appellant. I have no reason to fault the trial Magistrate for believing the respondent and rejecting the evidence of the appellant.

12. It is apparent that the respondent was injured because of the defective machine which was being used by the appellant. The appellant must take responsibility for the accident given that it employed a working system which was not safe, by using a defective machine. The trial Magistrate took note of the appellant's defence and accepted the appellant's contention that the respondent was contributorily negligent in using the machine knowing its state. In apportioning liability at 80:20%, the trial Magistrate exercised his discretion and cannot be faulted.

13. On the issue of quantum, the trial Magistrate assessed damages at Kshs.60,000/= for damages which included two lacerations on the right index finger. The injuries were relatively minor, nevertheless, assessing damages is an issue of discretion. In a case such as this, where the appellant itself proposed a sum of Kshs.40,000/= as general damages, it cannot be stated that the award of Kshs.60,000/= made by the trial Magistrate was so inordinately high or low as to warrant the intervention of this Court.

14. For the above reasons, I find no merit in this appeal and do therefore dismiss it in its entirety.

Dated and delivered this 4th day of November, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Ngira holding brief for Mwaniki for the appellant

Advocate for the respondent, absent

Eric, court clerk