



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT MOMBASA
APPEAL NUMBER 1 OF 2015

BETWEEN

RASHID ALI FAKI..... APPELLANT

VERSUS

A.O. SAID TRANSPORTERS.....RESPONDENT

[An Appeal from the Judgment delivered by Hon. L.T. Lewa dated 17th March 2014, delivered in Mombasa S.R.M.C.C. Number 990 of 2013]

BETWEEN

RASHID ALI FAKI..... PLAINTIFF

VERSUS

A.O. SAID TRANSPORTERS DEFENDANT

Rika J

Court Assistant: Benjamin Kombe

M. Ananda & Company Advocates for the Appellant

Ameli Inyangu & Partners, Advocates for the Respondent

JUDGMENT

1. The Appellant filed a Claim against the Respondent, through a Plaint dated 16th May 2012, at the Senior Resident Magistrate's Court Mombasa. He stated he was employed as a Turn Boy. He accompanied the Driver to a garage at a place called Corner Port within Mombasa. This was on 11th

January 2012. A part of the Oil Truck assigned the Driver and the Appellant, required welding. During welding, the part which was being welded became very hot. The vapor burnt the Appellant. He claimed to have suffered 30% body surface area burns. He blamed the Respondent for the accident and the injuries. He sued the Respondent for general damages, special damages and costs.

2. The Court dismissed the Claim in its totality, finding the Appellant failed to prove his case on the balance of probability.

3. The Appellant lodged his Appeal registered at the High Court Mombasa, as Civil Appeal Number 39 of 2014. The Appeal was transferred to the current Court on the basis of jurisdiction, and registered as Appeal Number 1 of 2015. Parties agreed to have the Appeal considered and determined on the strength of their submissions.

Grounds of Appeal

4. The Appellant advances the following Grounds of Appeal:

- a. The Trial Court erred by failing to accept the Appellant's evidence on the balance of probability.
- b. The Trial Court erred by not apportioning liability on the Respondent.
- c. The Trial Court erred in finding the Appellant's duties did not include motor vehicle inspection.
- d. The Trial Court erred in finding the Appellant was not entitled to protective clothing in the course of his turn boy duties.
- e. The Trial Court erred in failing to find the Driver's instructions to the Appellant to attend to the welding, did not give rise to vicarious liability against the Respondent.
- f. The Trial Court erred in finding the Truck ought to have been repaired at the Respondent's Bamburi Yard where it was alleged a safe working environment existed.
- g. The Trial Court erred in relying on the evidence of the Respondent's Transport Manager.
- h. The Trial Court erred in finding the Driver was not in a supervisory role to the Turn Boy.
- i. The Trial Court erred in finding the Appellant was responsible for his own actions while the accident occurred in the course of duty.

Appellant's Submissions

5. The Appellant begins his argument by firing a broadside at the Trial Court, charging that the Trial Magistrate became a Defence Advocate in analyzing the evidence, and not a Court of Justice. It is submitted that the Trial Court developed its own theories which prejudiced the Appellant's case.

6. It was not a correct finding that the Appellant was the author of his own misfortune. He was not the Driver, and did not direct where the Motor Vehicle should be taken for emergency repair. If it was the policy of the Respondent that the Truck should have been driven to its Yard for repair, and the Driver drove it to another place for repair, it was wrong to blame the Appellant who was merely a Turn Boy, acting on the instructions of the Driver.

7. The Truck was in an emergency situation. It was impracticable to have it driven to the Respondent's Yard. The conclusion that the Appellant had 5 years as a Turn Boy, and therefore experienced enough to avoid the accident was wrong. It was a farfetched theory.

8. The Trial Court found the Appellant was not a welder, and there was no purpose in availing to him protective clothes. This was a mis-direction as the Factories Act Cap 514 of the Laws of Kenya required the Appellant to be provided with protective clothing.

9. Citing the case of *Limpus v. London General Omnibus Co Limited [1882] 1 H & C 526*, the Appellant argues that where a Workman does an authorized act, in an unauthorized but not prohibited way, the Employer would be liable for such act. Where a Servant is acting within the scope of his employment, and in so acting does something negligent or wrongful, the Employer is liable even through the acts done, may be the very reverse of that which the Servant was actually to do. The law casts upon

the Master liability. It was no defence for the Respondent to allege its policy did not require the Driver to take the Truck for welding at another garage, instead of the Respondent's own Yard.

10. Further authority is to be found in ***the Nakuru High Court Civil Appeal Number 38 of 1995 between Sokoro Saw Mills Limited v. Bernard Muthimbi Njenga***, where the Court stated that the duty of the Employer to provide a safe place of work to the Employee, comprises “*not merely to warn the Employee against unusual dangers known to them...but also make the place of employment as safe as the exercise of reasonable skill and care would permit.*”

11. Other judicial authorities relied on by the Appellant in his submissions include ***Mombasa High Court Civil Suit Number 209 of 2007 between Amani Kufaa Bakari v. Wananchi Marine Products Kenya Limited; Nairobi High Court Civil Case Number 6212 of 1990 between Peter Abuya v. Vipingo Estate Limited; and Mombasa High Court Civil Case Number 594 of 1995 between Julius Chala Katunda v. Ligna Limited***. In these decisions the Court held that Employers have a duty to supply Employees with a safe working environment, train the Employees on their roles, and rebut claims of negligence. The Respondent did not rebut the allegation that it was negligent. The Appellant demonstrated the hot vapor suddenly burst from the tanker, injuring the Appellant.

12. The Appellant's Grounds of Appeal, though appearing expansive, are condensed into the above brief submissions. The Appellant asks the Court to allow the Appeal, and grant General Damages at Kshs. 1,000,000, plus special damages and costs.

Respondent's Submissions

13. The Respondent submits that the Appellant was a Turn Boy. His job description comprised loading and offloading of goods. The Trial Court correctly found there was no obligation on the part of the Respondent, to provide the Turn Boy with protective apparel meant to be worn by Welders. The Appellant was not a Welder. Further, the Respondent had a designated garage at Bamburi. Its Welders there were provided with protective apparel.

14. ***Salmond on the Law of Torts, 17th Edition***, states:

“ A master is not responsible for the negligence or other wrongful act of the servant simply because it is committed at the time the servant is engaged on his master's business. It must be committed in the course of that business so as to form part of it, and not merely coincident in time with it.”

15. From the evidence of PW1 and DW1, it was clear the Appellant was not engaged to operate the faulty Truck. He engaged in the acts leading to the accident, of his own volition. If the Truck had faults, the Appellant and the Driver had instructions to call for help from the Respondent's Bamburi Offices, or move the Truck to the Bamburi garage for remedial action. The Appellant did not possess any skills to operate the Truck, and assumed the risk voluntarily, by climbing on top of the Truck to point out the defects which required welding. For him to succeed in his Claim, he needed to show he was injured in the course of duties he was assigned to, or expected to perform. He did not discharge this burden. If he had stuck to loading and off-loading, he would not have been involved in the accident.

16. ***Winfield and Jolowicz on Tort, 13th Edition at page 2003***, defines Employer's liability, and Employee's burden of proof, to comprise:

“.....a duty of care, and it follows that the burden of proving negligence rests with the Plaintiff Workman throughout the case. It has even been said if he alleges failure to provide a reasonable safe system of working, the Plaintiff must plead and therefore prove what the proper system was, and in what way it was not observed.”

The Claimant did not prove to the Court why he needed protective apparel, to perform a job he was not instructed to perform.

17. An Employer's duty, as held in *Nairobi High Court Civil Case Number 152 of 2005 between Stat Pack Industries v. James Mbithi Munyao*, is to take all reasonable steps to ensure the Employee's safety, but he cannot babysit an Employee. He is not expected to watch the Employee constantly. The Employer has no obligation to follow the activities of the Employee, even where the Employee has decided to go outside the scope of his employment. The Respondent urges the Court to dismiss the Appeal, with costs to the Respondent.

The Court Finds:-

18. The Appellant's Submissions are quite distasteful in their characterization of the Trial Magistrate. The Appellant states the Trial Magistrate turned into a Defence Advocate, rather than maintain her role as a Seat of Justice. This is not apparent in the Judgment written by the Learned Magistrate. She is lucid in her evaluation of evidence, in her application of the law, and Judgment. We may not always agree as Lawyers, but we need to engage in our legal discourse, with honour and mutual respect.

19. That said, the facts giving rise to the Appeal are largely not contentious. The Appellant was employed by the Respondent as a Turn Boy. He was designated by the Respondent on the 11th day of 2012, to accompany the Driver in the Respondent's Oil Tanker registration KAU 456 A, to transport super petrol. After delivering the petrol to Kobil Depot in Changamwe, the Appellant and his Driver were to return the Tanker to the Respondent's Yard at Bamburi. They instead detoured to a place called Corner Port Reitz within Mombasa, to have a part of the Tanker welded.

20. While there, the Appellant was asked by his Driver to climb on top of the Tanker, and point out to the Welder, the specific place which needed to be welded. He obliged, and remained on top of the Tanker, as the Welder went about his job. Very hot fumes emanated from the Tanker, injuring the Appellant.

21. The Appellant suffered 30 % body surface area burns on the upper body, and permanent partial disability.

22. The Questions arising from these facts were whether the activities of the Appellant leading to his injury, were within his scope of employment; and whether the Employer could be held liable in damages for the injuries sustained by the Appellant. Did the Trial Court give the correct answer to these questions? These broadly are the issues raised by the Appeal.

23. The Trial Court concluded in favour of the Respondent finding:

- The Appellant and the Driver took the Tanker for welding to Corner Port Reitz, without the authorization and instructions of the Respondent.
- The Appellant's and the Driver's conduct went against the Respondent Company's policy and regulations. These did not allow the Company Vehicles to be taken out of the Company's Yard for repairs, unless while out in far flung areas such as Nairobi or North Eastern Region.
- The Respondent's garage was well equipped with protective apparels.
- The Appellant was neither a Mechanic, nor a Welder.
- He had worked for 5 years, and ought to have known the risk his conduct exposed him to.
- The Driver and the Appellant had independent roles and tasks, and none was in a supervisory role so as to issue instructions to the other, binding on the Respondent.

24. The Trial Court dismissed the Claim in its totality, noting that had it not done so, it would have granted general damages at Kshs. 600,000 and Kshs. 2,000 in special damages.

25. The Trial Court appears to have endorsed the defence of *volenti non fit injuria*, holding at page 95 of the Record of Appeal that "*the accident was well caused and authored by the Plaintiff himself.*"

26. This defence is premised on the principle that to one who volunteers, no harm is done. It must be shown that the Plaintiff engaged in the conduct leading to his injury freely, and had full knowledge of the circumstances. In the words of the Court in *Dann v. Hamilton [1939] 1 KB 509*, the Plaintiff's conduct

must be shown to be so extreme and glaring, that it was equivalent to intermeddling with an unexploded bomb, or walking on the edge of an unfenced cliff.

27. The Appellant did climb on top of the Tanker, pointed to the Welder the part that needed to be welded, and stayed put on top of the Tanker, while the welding went on. The Tanker had just deposited highly flammable super petrol at Kobil Depot in Changamwe. Any reasonable person, with minimal knowledge of petroleum products, would be expected to know the slightest application of fire to petrol, or its residue, would result in a fire incident. The Claimant had worked for 5 years, and ought to have known he would be injured if he stayed at the top of the Tanker as it was welded. He is said to have moved closer to the centre of the action, even closer than the Welder did. He was quite negligent. The Trial Court correctly found his conduct discordant with that of a sensible man.

28. The Trial Court did not however, adequately examine whether the Appellant was in the course of his employment, and whether the accident was closely related to an authorized act, before absolving the Respondent from any liability. Courts have moved from merely applying the common law concept of *volenti not fit injuria* which readily absolves Employers from all liability. Courts have moved in the direction of carefully considering apportionment of liability, by examining the mutuality of obligations in an employment relationship.

29. There is a significant difference between an Employee who causes an accident and injury to self or to others, through "*a frolic of his own*" and an Employee who does so through "*a detour.*" The first relates to an Employee who acts completely in his own capacity, rather than following the instructions of the Employer. The Employee takes a major departure from the instructions given by the Employer. He takes such departure for his own benefit. If there occurs an accident and injuries ensue to the Employee or 3rd Parties during such a frolic, the Employer cannot be held liable.

30. This is not so in cases of detour. This involves minor departures by the Employee from the instructions of the Employer. In detouring, the Employee's conduct must remain within the scope of employment. This means the Employee's conduct must be of a kind the Employee was hired to perform; occurs substantively within the prescribed time and space; and at least in part conduct purposed on serving the Employer.

31. In this respect, this Court differs with the Trial Court in finding that the Appellant was entirely at fault, and that the Respondent could not be called upon to shoulder part of the liability. The Appellant and the Driver, in taking the Tanker to Corner Port Reitz instead of the Respondent's Bamburi Yard, made a detour rather than engage in a frolic of their own. The Trial Court approached liability as through the Appellant and the Driver were involved in a frolic of their own, when the accident occurred. They were not.

32. They had been instructed to deliver fuel to Kobil Depot in Changamwe, which they did. They were under instructions, which they did not stick to, to call their Service Van or have the Tanker moved to the Bamburi Yard in event of any breakdown. They were still within the scope of their instructions to deliver the fuel and return to base, when they detoured. The accident occurred within the time and the journey map given by the Respondent. There was never dispute that the Tanker suffered some form of defect, and needed welding. The welding though done in a Garage outside Bamburi was meant to benefit the Employer's business, not personally benefit the Appellant and the Driver. There was evidence that the Appellant and the Driver had been taking the Tanker to other garages while out of Mombasa for repairs. Their decision to do so while in Mombasa was perhaps as a result of their usage while out of Mombasa, and clearly outside the Respondent's instructions and policy, but certainly not a frolic of their own, so as to consider the Respondent completely discharged from liability. The Court thinks the principle cited by the Respondent from *Salmond on Torts 17th Edition*, that the Employee's conduct must be in the course of business so as to form part of it, and not merely coincident in time with it, is to be read within the demarcation placed in the concepts of a 'frolic' and a 'detour.' It is merely co-incident in time, where the Employee frolics. It is in the course of business, where the Employee detours.

33. The Court does not think that the role of the Appellant could be reduced to mere loading and

offloading, where only an overall and gloves were required for discharge of his role. It must be asked what material was being loaded and offloaded. In the particular case, the Appellant was tasked with loading and offloading of super petrol, not cereals. Transportation and handling of highly flammable super petrol would require much more than an overall and a glove as protective apparel. Transportation, loading and offloading of super petrol called for greater thought from the Respondent, in designing a safe working environment for the two Employees. Even assuming the Appellant did not engage in conduct which was equivalent to intermeddling with an unexploded bomb, there could have been other 3rd Party interventions in the journey map, which could result in similar incidents as occurred at Corner Port Reitz. There was a statutory and common law obligation to provide the Appellant with apparel and tools of trade, capable of minimizing the risks posed by movement of hazardous material. The Occupational Safety and Health Act 2007, and not the repealed Factories and Other Places of Work Act as cited by the Appellant, requires adequate protective gear is given to Employee involved in hazardous undertakings. This obligation is replete in a myriad of judicial authorities. It is a common law obligation as well as a statutory law obligation. In ***Mghosi v. Gayatri Engineering Works [1981] KLR 163***, and ***Sokoro Saw Mills Limited v. Benard Muthimbi Njenga*** cited above, the High Court of Kenya held that it was not indeed enough for the Employer to supply safe working system or appliances; the Employer must ensure the system is followed and user trained. The Respondent did not adduce evidence demonstrating the Appellant had been issued proper protective apparel suitable to his fuel transportation role, or that he had been trained in handling flammables. It was not sufficient to offer the Appellant an overall and gloves. The measures adopted by the Respondent did not match the common law duty to take all reasonable steps to ensure the Employee's safety, as discussed in the High Court decision in ***Stat Pack Industries v. James Mbith Muniyao***. It was not sufficient that there were protective apparels at the Garage within the Bamburi Yard; the Appellant's workplace comprised the Tanker, a mobile workplace, and the Tanker had to be a safe working environment.

34. The Court does not think the fact that the Appellant was instructed to assist the Welder by the Driver, would have any effect on liability. It was, from the evidence of the Parties, within the duties of the Appellant to ensure the Tanker was in a good, motorable condition. His climbing the top of the Tanker was within his job description, though discharged contrary to the Employer's instructions. It was not material that the Driver was, or was not, in a supervisory role to the Appellant, or that he instructed the Appellant. It suffices that ensuring the Tanker was in good condition fell within the duties of the Appellant.

35. The Court is persuaded the Trial Court failed to adequately analyze the scope of Employer's liability, for the acts of an Employee carried out within the scope of employment, even though not expressly authorized by the Employer. The concept of activities carried out on one's own frolic, and activities in the nature of a detour, were blurred, leading ultimately to wholesale application of the principle of *volenti non fit injuria*, rather than a consideration of contributory negligence. The Respondent as an Employer instructing Employees to transport super petrol, a highly flammable material, did not demonstrate to have availed to the Employees a safe system of work. Mr. Rashid Ali Faki on his part, intermeddled with an unexploded bomb, and was severely injured. He detoured. He bears most of the blame. His Appeal however has merit, and must be partly allowed on the following terms:-

[a] The Appeal is allowed, on the ground that both Parties were negligent.

[b] Liability is apportioned at 60% on the Appellant and 40 % on the Respondent.

[c] Assessment of general damages at Kshs. 600,000, as would have been granted by the Trial Court is allowed.

[d] Special damages allowed in favour of the Appellant at Kshs. 2,000.

[e] In total the Respondent shall pay to the Appellant general damages at Kshs. 240,000 and special damages at Kshs. 2,000- total Kshs. 242,000, to be paid within 30 days of the delivery of this Judgment.

[e] Parties shall meet their costs of the Trial and the Appeal

[f] The principal amount to attract an interest of 14% p.a. from the date of this Judgment, if the amount remains unpaid 30 days after delivery of the Judgment.

Dated and delivered at Mombasa this 18th day of March, 2016

James Rika

Judge