

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 0132 OF 2018
[High Court at Labasa Case No. HBC 4 OF 2017]

BETWEEN : **MUKESH CHAND**

Appellant

AND : **AIYUB KHAN**

Respondent

Coram : **Almeida Guneratne, JA**
: **Jameel, JA**
: **Gunawansa, JA**

Counsel : **Mr. A. Namua for the Appellant**
: **Mr. A. Ram for the Respondent**

Date of Hearing : **12th September, 2022**

Date of Judgment : **30th September, 2022**

JUDGMENT

Almeida Guneratne, JA

[1] I have read in draft the judgment of Justice Jameel and agree with the entirety of it.

Jameel, JA

- [2] This is an appeal from the judgment of the High Court dated 26 September 2018, whereby the court dismissed the claim of the Appellant against his employer for negligence, based on the failure to provide a safe system of work and effective supervision during work.
- [3] The original Statement of Claim was filed on 25 January 2017, however in the interim on the application of the Appellant's wife, the Appellant was declared a patient in terms of O. 80 r.1 of the High Court Rules (1988), the Appellant's wife Elizabeth, was appointed as his Manager in terms of section 108 of the Mental Health Act 2010, and as Next Friend and Guardian *ad litem* to represent the Appellant and continue the action filed. Consequently, the Appellant was granted leave to file and serve Amended Writ of Summons.
- [4] An Amended Statement of Claim was filed on 16th November 2017, in which the Appellant pleaded that he was employed as a driver by the Respondent and directed to operate the Grader bearing registration number EU 585 at Wainunu Bua Labasa, it was an implied term of the contract of employment that the Respondent would take reasonable care to provide and maintain a safe system of work and effective supervision, would not expose the Appellant to risk of damage or injury which he knew or ought to have known was dangerous, and would take all reasonable measures to ensure that the place of work and the machines required to be used for work are safe.
- [5] The Appellant claimed that he was directed by the Respondent to drive the Grader, and while trying to ascend the hill, the Grader started skidding and the engine stopped suddenly, the Grader began to roll down the hill, the Appellant lost control of it, and thereby sustained bodily injuries. He claimed that the Respondent had been negligent in failing to provide adequate supervision, take adequate precautions for the safety of the Appellant when engaged in the said work, had exposed the Appellant to risk of damage or injury which he knew or ought to have known, and required the Appellant to engage

in a dangerous and risky activity alone. He pleaded the particulars of injuries and treatment that he had undergone and claimed that as a result of the accident the Appellant had suffered damages and was completely bedridden. He relied on the doctrine of *res ipsa loquitur*. In the alternative he claimed compensation under the Workmen's Compensation Act (Cap.94).

- [6] Before the trial, the Appellant sought orders from the court restraining the defendant from transferring, selling, dealing with, charging, mortgaging, assigning, disposing of or removing from this jurisdiction any of the properties mentioned therein and from withdrawing or transferring money kept in bank account under his name and/or A K. Hire Services name except for his day to day expenses and payments to be made to suppliers and creditors until further order. The Respondent counter-claimed damages for loss caused to him due to the above restraining orders.

Reply to Amended Statement of Claim

- [7] In his Statement of Defence in reply to the amended Statement of Claim, the Respondent denied negligence and the applicability of *res ipsa loquitur*. He pleaded that, the Appellant was not directed to *drive* the Grader, and that instead, he was directed to *operate* the Grader for the purposes of grading a road that was being constructed. The Appellant having had sole control of the Grader, was required to have his seat belt fastened (which was fitted to the Grader), operate it in accordance with the operations and guidelines of the manufacturers, and at the correct speed gear and engine rev, and should not have allowed the Grader to stall or roll down the hill. The Respondent pleaded further that the Appellant was directed to operate the Grader along a road that was already formed, engineered and designed by the Fiji Roads Authority, he had been given strict instructions to level the base and sub-base metal (rocks), and continue and progress with the work in accordance with the design and specifications, the Grader that was operated by the Appellant had the necessary certificate of road worthiness and was constantly being checked, serviced and maintained by qualified mechanics and technicians. The Respondent also pleaded that the Grader was certified by the Labour Department under

Occupational Health and Safety requirements. The Respondent pleaded contributory negligence and failure on the part of the Appellant to operate the Grader at the correct engine rev, failure to wear the seat belt, failure to use the brakes to stop the Grader from rolling, failure to follow specific guidelines and procedures in operating the Grader, failure to use the emergency break (maxi break), and finally jumping out of the Grader when it was unsafe to do so. The Respondent pleaded further that an investigation and inspection after the incident, revealed that the Grader was in order, it had been operated and used by other operators on the same site without any complaints of any nature, and the Grader had stopped within 10 meters of where the Appellant had jumped off. The Respondent admitted that the Appellant was entitled to compensation under the Workmen's Compensation Scheme, and that the wages due to him thereunder had been paid to him.

The proceedings in the High Court

[8] In the High Court the Appellant's wife Elizabeth testified that the Appellant was employed as a Grader operator and he had worked in the same capacity previously for other companies. On the day of the accident she received information that the Appellant had been injured, she went to the Labasa Hospital, and she found him to be unconscious and in a coma. He was hospitalized for 81 days, (at his expense), and was transferred to the CWM Hospital, but had not improved. He was unable to walk or even stand and had to be completely assisted for his day-to-day activities such as showering, eating and attending to all of his other personal matters.

[9] Witness Marini Tawake an employee of the Land Transport Authority stated that as of the 9 June 2016, the date of the accident, the Grader was not registered as the Wheel Tax had not been paid and it was paid only on the 10th of June 2016, a day after the accident. In cross-examination the witness said the fitness certificate of the vehicle was valid till 15 July, 2016.

[10] Witness Anand Sami Gounder, a Grader at the Respondent company, testified that on the 9 June 2016, he operated the Grader before the Appellant did, however, he did not check the maxi brake, and he could not confirm whether it was working or not, nor could he confirm whether there was a seat belt installed in the Grader. He saw the Grader rolling down and it stopped after it collided with a tree. He admitted in cross examination that the brake could have been applied, but in re-examination he stated that he was not certain whether the brake was working or not because he had not used it on that day. According to Gounder, after the engine stops, the steering wheel would get locked because the hydraulic system and foot brake would not work, and the air brake would work only for a few seconds.

The Respondent's evidence

[11] Witness Irshad testified that he was employed by the Respondent Company, and on the day of the accident, he was directed by the company to clear the larger rocks or gravel from that part of the area where the Grader had been operated by the Appellant. He said the place where the Appellant was operating the Grader was steep, the Appellant drove the Grader down the steep hill and reversed it on the steep hill, when he reversed it the engine stopped, the Grader then rolled down and toppled off the road, collided with two trees and halted. He testified that when the Grader started rolling down the hill, the Appellant signalled to him to move away, that the Appellant was not wearing the seatbelt, and the Appellant was thrown away from the Grader and lay unconscious. When he went up to the Appellant, he found him to be unconscious and injured.

[12] Witness Anand Sami Gounder testified that when he arrived at the scene of the accident, the engine of the Grader was not running, he could not say why the engine stopped. He testified further that if the engine stops suddenly the vehicle becomes uncontrollable and the steering wheel cannot be operated. He confirmed that the steering wheel does not work once the engine is stopped.

- [13] Witness Mansoor Khan testified for the Respondent. He had gone to the worksite after the accident. When he went to the worksite he saw the tire marks and found that the Grader had skidded off the road and rolled down. After the accident, MWH, the company that was in charge of the road works, the Police and a Mechanic had inspected the Grader. On the following day, the company used the same Grader to do the remaining work. The witness testified further that he has 10 years of experience in operating Graders, and in instances when a Grader stopped whilst in operation, the operator must apply the foot brake, and if it does not work, he must immediately apply the maxi break, which is an emergency brake. He said that if the Appellant had been wearing the seat belt, he would not have been injured.
- [14] Witness Mohammed Yusuf was an eye witness to the incident. He said while Mukesh Chand was operating the Grader it went sideways and rolled down, and he found the Appellant lying on the road.
- [15] Witness Faiyaz Khan was in charge of all operations of the company. He testified that as practice he had daily meetings with the workers, relating to work complains. On the day of the accident, there were no complains in regard to mechanical defects in any of the vehicles. On the day after the accident, a mechanic he engaged had confirmed that the Grader was in good condition. He said that if the Appellant had applied the brakes, the vehicle would have stopped, and that he should not have reversed the Grader up hill. Usually, the driver turns around at the bottom of the hill, rather than reverse the Grader.
- [16] Pradeep Mudaliar, a Mechanic who testified on behalf of the Respondents, had experience in heavy machinery maintenance. He had examined the Grader a day after the accident and found that it was in good mechanical condition, including the brakes.
- [17] Having heard the evidence, the learned High Court Judge found that, the vehicle had been under the total control of the Appellant, the Respondent's witnesses established that the vehicle was in proper mechanical condition and therefore, the maxim *res ipsa loquitur* was not applicable in the circumstances. From the evidence adduced by both

parties, the learned judge found that the Appellant had not operated the Grader in the manner in which he should have. Accordingly, he found that the Appellant had failed to prove that the injuries he suffered was as the result of the defendant's negligence.

[18] Aggrieved by the judgment of the High Court the Appellant filed this appeal and urged the following grounds.

GROUND OF APPEAL

1. **THAT** the learned trial Judge erred in law and in fact not holding that the defendant breached the duty of care in not providing adequate supervision at the time the plaintiff was operating the heavy machinery normally the Grader, and that the Grader had skidded because of the appeal and attempt to reverse it uphill.
2. **THAT** the learned Trial Judge erred in law and in fact in not holding the liability against the defendant when there was no evidence before the court from the defendant that the plaintiff was accorded with adequate training to operate digger on a steep place.
3. **THAT** the learned trial judge erred in law and in fact and not holding the defendant liable for permitting or allowing the plaintiff to operate the Grader registration No.EU 585 which was unregistered machinery.
4. **THAT** the learned trial Judge erred in law and in fact in not holding liability against the defendant when there was sufficient evidence before the court that the road worthiness or the registration of the Grader No.EU 585 was expired on 9th day of June 2016.
5. **THAT** the learned trial Judge erred in law and in fact in holding that the fitness certificates of the Grader registration No.EU585 was valid until 15th July 2016 when the road worthiness or wheel tax was paid only on 10th day of June 2016.
6. **THAT** the learned trial Judge erred in law and in fact in holding the plaintiff was liable as he was not wearing the seat beat when there was no such evidence to rely upon.
7. **THAT** the learned trial Judge erred in law and in fact in not considering that there was no evidence or records from Land Transport Authority that the Grader registration No.EU 585 did not have any defects.

8. ***THAT*** the learned trial Judge erred in law and in fact in relying on the evidence of Faiyaz Ali that plaintiff was not directed to operate the Grader forward and backward on the steep place.

Discussion of the grounds of appeal

- [19] The thrust of the grounds of appeal is that the Respondent failed to provide the Appellant with proper supervision at work. The Appellant argues that there was insufficient supervision because witness Mansoor Khan the Supervisor was not around when the Appellant was operating the Grader. The Appellant therefore states that the Respondent breached the duty of care that was expected of the employer. In reply, the Respondent submits that the Appellant was an experienced Grader, there was no evidence as to why the Grader stopped, he was familiar with the Grader, he had operated it previously without help, the supervisor had assigned the job to the Appellant on the same day and there were no problems in regard to mechanical defects of the Grader. Further the same Grader had been used twice by witness Anand earlier on the same day, and the Appellant took over after Anand.
- [20] In respect of the issue of lack of supervision in the circumstances, I am unable to agree with the position of the Appellant. The nature and level of supervision that was needed in this particular case did not warrant Mansoor Khan the supervisor, standing around the Appellant whilst he was operating the Grader. In this case the Appellant was an experienced Grader who could work independently, the Grader had only one seat so it undoubtedly, had to be used by only the person operating it. The Appellant had previously operated the same Grader. By its very nature the Grader is designed in such a way that it was meant to be controlled fully by the person who was operating it. I accept the submission of the Respondents that the Appellant was in full and complete control of all aspects of the running of the Grader and, if the engine went off on a hilly area, no amount of supervision would have helped because in a moment of emergency, it is a split-second decision that the driver would have had to make. Besides, an experienced Grader

is expected to be able to work on roads constructed on a variety of terrains. The Appellant's claim that it was dangerous is misconceived in law.

[21] On a consideration of the entirety of the evidence, the learned High Court Judge was correct when he found that the evidence led by the Appellant did not establish that his injuries were caused by the Respondent's negligence. The evidence revealed that the maxi brakes had not been applied, but that the Appellant had instead stood on the machine behind the steering wheel, did not wear the seat belt, and jumped off when he felt vulnerable. In this particular context, the level of supervision that was in place was adequate and reasonable. The learned High Court judge was therefore correct when he found that the Appellant had failed to prove that it was the negligence of the Respondent that had resulted in his injuries.

[22] Having considered the submissions that were made both oral and written, I am unable to find any reason to set aside the findings of the learned High Court Judge. I am not unmindful of the extremely unfortunate situation that the Appellant finds himself in, however, there is no legal basis on which this court could assist him. The appeal is therefore dismissed.

Gunawansa JA

[23] I agree with the reasons, conclusions and the proposed orders.

Orders of the court:

- 1 *The appeal is dismissed.*
2. *In the circumstances of the case, the parties will bear their own costs.*



Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL

Hon. Madam Justice Farzana Jameel
JUSTICE OF APPEAL

Hon. Justice Asanga Gunawansa
JUSTICE OF APPEAL