**Obwoya v Railways Corporation**

**Division:** High Court of Uganda at Kampala

**Date of judgment:** 28 February 1974

**Case Number:** 59/1971 (71/74)

**Before:** Nyamuchoncho J

**Sourced by:** LawAfrica

*[1] Workmen’s Compensation – Accident – Arising out of and in course of employment – Workman on*

*employer’s premises returning to work – Employer liable.*

**JUDGMENT**

**Nyamuchoncho J:** In 1967, Martin Obwoya, the appellant, was employed as a cattle wagon cleaner by the East African Railways Corporation. On 22 September 1967 he reported for duty at 8 a.m. He broke off for lunch at 12.30 p.m.; at 2 p.m. while he was on his employer’s premises he was struck down by a railway wagon and sustained injuries on his leg. His leg was later amputated. The accident was reported to the Labour Officer in accordance with the provisions of s. 16 of the Workmen’s Compensation Act (Cap. 197). Compensation amounting to Shs. 7,977/10 was worked out but the respondent Corporation did not agree as to the amount of compensation to be paid, so the matter was taken to court under s. 17 of the Workmen’s Compensation Act for determination. At the trial the appellant gave evidence and called two witnesses; the respondent did not call any witness. After hearing the evidence the magistrate dismissed the application in the following words: “From the evidence on record, it appears to me that the claimant has only himself to blame for the injuries sustained since he was not keeping a proper lookout while crossing the railway track. The question, therefore, whether he was acting in the course of his employment does not arise.” It is against these findings that the present appeal is brought. Mr. Gaffa for the appellant put forward four grounds of appeal. These are: “1. That the learned Chief Magistrate erred in law and in fact in holding that the accident had been caused by the negligence of the appellant when there was no evidence to that effect.

2. That the learned Chief Magistrate misconstrued and misapplied section 5 of the Workmen’s Compensation Act.. 3.That the learned Chief Magistrate erred in holding that there was no proper medical evidence.

4. That the learned Chief Magistrate’s judgment is against the weight of the evidence as a whole.” Mr. Bishota has conceded that he does not support the learned Chief Magistrate’s finding of negligence nor does he support the finding that there was no proper medical evidence. In this way ground 1 and 3 above were disposed of without argument. Mr. Gaffa then contended that as Mr. Bishota has conceded two grounds of appeal he could not be heard to support the judgment of the chief magistrate on another ground to be able to do so he should have filed a cross-appeal. Mr. Bishota replied that under the Civil Procedure Rules relating to appeals to the High Court he is not required to file a notice of grounds for affirming the judgment on other grounds. Without making any ruling I allowed Mr. Bishota to address me. I now would like to consider the respondent’s position. O. 39 which governs appeals to the High Court contains no provisions similar to r. 91 of the Court of Appeal for East Africa Rules 1972, which requires a notice of grounds for affirming the decision of the court on grounds other than those relied upon by that court to be given. As far as the Civil Procedure Rules are concerned the respondent is under no such obligation. Mr. Gaffa argued that it is the practice to do so. I have not seen a case decided on this point by the High Court whereby failure to file a cross-appeal debarred the respondent from seeking to affirm the judgment of a lower court on another ground. O. 39, r. 27, empowers the High Court to pass any decree or make any order which ought to have been made or passed on appeal as the case may require. In my opinion, the High Court is vested with power to affirm a judgment on other grounds other than those relied on by the lower court so long as there is material on the record upon which it can act. There is no doubt that the construction of s. 5 was in issue before the court below and it is the main issue in this appeal. The respondent seeks to support the judgment of the chief magistrate on the ground that had the magistrate correctly addressed his mind to the provisions of s. 5 as he was requested to do in the defence submissions, he would have dismissed the appeal anyway. The appellant contends that the magistrate misconstrued and misapplied s. 5, and that if he had properly considered s. 5 he would have allowed the application. These arguments were heard by the lower court, they are not new. There is in substance one argument but presented differently by each counsel to suit his case. It is the determination of this point which will decide the appeal. Even if it is not raised by the respondent the court would have to consider it as the appellant has raised it. In view of this, I am of the opinion that counsel for the respondent was in order to ask the court to affirm the judgment on that ground. Mr. Gaffa argued in the second ground of appeal that the magistrate misconstrued and misapplied s. 5 of the Workmen’s Compensation Act. He argued that as the accident occurred in an area where the appellant worked, the appellant was on duty. He relied on the proviso to s. 5 to bring the appellant’s case within the ambit of s. 5. He asked the court to uphold the appeal and confirm the compensation. Mr. Bishota argued that the proper question to be decided is whether the accident arose out of and in the course of the employment. He did not think the accident arose out of and in the course of the employment for the following reasons: 1. T he appellant had not reached his place of work. 2. H is employment had not commenced. He had not been assigned duties by the headman. 3. T he route he followed was not known to his employer. He relied on the interpretation of the expression “arising out of and in the course of the employment” given in *Virani v. Dharamsi*, [1967] E.A. 132. He also referred to Strouds Judicial Dictionary, 4th Edn., Vol. 1, p. 22 for the meaning of “arising out of and in the course of the employment”. He submitted that if the chief magistrate had properly considered s. 5 he would have dismissed the application, and he asked the court to affirm the judgment on that ground. The trial magistrate was addressed at length on s. 5 but in his judgment the chief magistrate makes a very brief reference to it when he says “the question therefore, whether he was acting in the course of his employment does not arise”. He did not give any reason for this finding. I am inclined to believe that the trial magistrate could not have used the very words of s. 5 unless he was considering its interpretation. Although he did not say so plainly I am satisfied that he considered it. On the evidence the appellant met with an accident on his employer’s premises before he reached his place of work; this is admitted in cross-examination when the appellant says: “I was waiting for the engine to pass so that I could get to my place of work and the wagon hit me. I had not reached my place of work.” The accident occurred at a place very near the place where the appellant worked. According to Kalisunja it was only 200 yards away from his place of work. The fact that at the time he met with an accident the appellant was on his employer’s premises, does not bring his case within the ambit of s. 5 as Mr. Gaffa would appear to suggest. The appellant must show that the accident happened in the course of his employment as well. The case of *R. v. Industrial Injuries Commissioner* (below) establishes this. Mr. Bishota conceded that the appellant was probably coming from lunch going to report for duty when the accident happened, and that as the accident happened on the employer’s premises, it can be said that the accident arose out of his employment but that it did not arise in the course of his employment. With this admission I am left with one point for determination, it is whether the accident arose out of the appellant’s employment. Section 5 states: *Employer’s liability for compensation for death or incapacity resulting from accident.* 5.(1) If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the provisions of this Act; Provided that: ......................................................................................(*a*) ( *b*) i f it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall be disallowed: Provided: that where the injury results in death or serious and permanent incapacity, the court on a consideration of all the circumstances may award the compensation provided for by this Act or such part thereof as it shall think fit. (2) For the purpose of this Act, an accident resulting in the death or serious and permanent incapacity of a workman shall be deemed to arise out of and in the course of his employment, notwithstanding that the man was at the time when the accident happened acting in contravention of any statutory or other regulation applicable to his employment, or of any orders given by or on behalf of his employer, or that he was acting without instructions from his employer, if such act was done by the workman for the purposes of and in connection with his employer’s trade or business. Mr. Gaffa suggested that the appellant’s case falls within the proviso to s. 5. By this I think he meant the proviso to proviso (1) (*b*). In my opinion the second proviso can only apply if the accident is held to have arisen out of and in the course of the employment but the claim is disallowed under the proviso to sub-s. (1) (*b*) on account of the serious and wilful misconduct of the workman. A claim cannot be disallowed under this proviso unless the employer proves that the accident is attributable to the serious and wilful misconduct of the workman. The burden of proof lies on the employer. It is only when such proof has been given and accepted by the court that the court may nevertheless exercise its discretion and take the case back into sub-s. (1) and award such compensation as it thinks fit. In this case there is no evidence, and indeed the respondent adduced no evidence, to prove that the appellant was guilty of serious and wilful misconduct. I am of the opinion that on the evidence on record the provisions of the proviso to the proviso to sub-s. (1) (*b*) of s. 5 cannot be applied to this case. The facts of this case confine it within the provisions of sub-s. (1) and the only question to consider is whether the accident arose out of and in the course of the employment. Mr. Bishota referred me to *Virani v. Dharamsi*, [1967] E.A. 132 for the interpretation of the meaning of “arising out of and in the course of employment”. I have carefully considered the paragraphs referred to me. In my opinion the President of the Court was construing the provisions of s. 5 (2). At paras. G-I, p. 131, the President laid down what has to be considered in order to bring the case within sub-s. (2). With respect I think it is incumbent on the court to consider the very important words without which the subsection would not have been enacted “notwithstanding that the workman was at the time when the accident happened acting in contravention of any statutory or other regulation . . . etc” along with the requirements laid down by the President of the Court of Appeal. There is no evidence to show that the appellant, when the accident happened, was acting in contravention of any statutory or other regulation applicable to his employment or of any orders given by or on behalf of his employer or that he was acting without instructions from his employer. *Virani’s* case is therefore only an authority on the correct interpretation of s. 5 (2). In fact the case merely decided that it did not matter under which subsection the workman recovered the compensation. The expression “in the course of the employment” has given rise to a lot of litigation and has been given various interpretations. Halsbury’s Statutes 2nd Edn., Vol. 16, defines it as follows: “In the course of employment does not mean during the currency of the engagement but means in the course of the work which the workman is employed to do and what is incidental to it.” This definition leads to another question, when does the workman’s employment begin, does it begin with the commencement of the work as Mr. Bishota has argued? Again the answer is found in Halsbury’s Laws 2nd Edn., Vol. 16, p. 805: “The employment of a workman is not limited to the moment when he reaches the place where he is to begin his work. It includes a reasonable interval of time and space: *Game v. Norton Hill Colliery Co.*, [1902] 2 K.B. 539. The moment at which the actual work of the workman begins cannot be taken as the true moment of the commencement of his employment for the purposes of the Act: *Sharp v. Johnson Co.*, *Ltd.*, [1905] 2 K.B. 139; *Cross, Tentley Co. Ltd. v. Catterall*, [1926] 1 K.B. 488.” The interpretation of this expression was summarised in *R. v. Industrial Injuries Commissioner* ex. p. A.E.U. (No. 2), [1966] 2 Q.B. 31, by Salmon, L.J. He put it this way: “I assume that in law a man is working in the course of his employment not only when he is doing what he is employed to do but also when he is doing something for purposes of his own which is reasonably incidental to his employment. That certainly ought to be the law, I think, on the authority of Redford’s case and the decision of this court in Knight v. Howard Wall Ltd., 1938 that is the law.” The decisions quoted above are not binding on this court but they carry a lot of weight and are persuasive and in the absence of any other decision in East Africa, they are of immense value. As the appellant was on his way to report for duty and was injured a few hundred yards from his place of work I am of the opinion that the appellant was doing something for purposes of his own which was reasonably incidental to his employment. At the time he had an accident he was in the course of his employment. It may be argued that the appellant was late to report to duty and had exceeded the time allowed him for lunch so as to take himself out of the course of his employment. In *R. v. Industrial Injuries Commissioner* (above), Lord Denning, M.R. said at p. 47: “What is the position when a man overstays his tea-break or his meal break? I do not think that the mere fact of overstaying his time takes him out of the course of his employment; certainly not when it is done without thinking. Even if it is done negligently or disobediently it does not automatically take him outside the course of his employment. He is only taken out of the course of his employment when the circumstances show that he is doing something of a kind different from anything he was employed to do.” The accident took place at 2 p.m. just at the time when the appellant was supposed to resume work. I do not think that the appellant interrupted his course of employment simply because he had not reached his place of work at 2 p.m. He was prevented by the accident from so doing. There remains one other argument to consider, that is whether the route followed by the appellant was known to the employer. I did not quite understand whether Mr. Bishota intended by this argument to say that the appellant was a trespasser. As far as the record shows no evidence was led to show that the employer had prescribed a route for the appellant and his co-workers to follow. According to Kwamanya the headman, the workmen came from different directions for reporting on duty. There is no evidence to show that the appellant was prohibited from following that route. This argument was not put before the trial magistrate. I think, in the absence of the evidence to support the argument and considering that it was not raised in the lower court, I should reject it. Perhaps I can only say that the headman, by saying that workmen came from different directions, must have known that the appellant used this route. He did not stop him from using that route. His knowledge must be imputed to his employer. In any case, I think that this contention must fail. I am satisfied that the appellant met with the accident at 2 p.m. when returning from lunch, on his employer’s premises. That at the time of the accident the appellant was going to report for duty. That the fact that he had not reached his place of work and had not reported to the headman does not take him out of the course of the employment. I hold that the accident arose out of and in the course of the employment. I was not addressed on the question of the compensation. I confirm that the appellant should be paid the amount of compensation as assessed.

*Appeal allowed.*

For the appellant:

*F Gaffa* (instructed by *Kirenga &*