



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HCCA. NO. 58 OF 2013

BLOWPLAST LTD.....APPELLANT

-VERSUS-

JULIUS ONDARI MOSE.....RESPONDENT

(Formerly PMCC Civil Case 1244 of 2011 Milimani Commercial Courts, Nairobi)

JUDGEMENT

INTRODUCTION

1. The dispute herein arose of an industrial accident in that while Plaintiff was Defendant employee on 23/05/2010.
2. The Plaintiff avers that while in course of his employment in Industrial Area Nairobi pursuant to directions and instructions of Defendant/Respondents agents or servants engaged in operating the blow molding machine making plastic bottles and cleaning the said machine using a pressure pipe when the stop switch failed and the mold revolved and chopped off the Plaintiff's (r) hand fingers.
3. Consequently he sustained severe injuries and suffered loss and damage. Thus he instituted suit seeking general damages, damages for loss of earning/diminished earning capacity, special damages costs and interests.
4. The Defendant filed defence and contended that, indeed the accident was caused or contributed to by negligence of the plaintiff. This was in response to plaintiff's averment that the accident was caused by the defendant and/or breach of duty or breach of contract on the part of Defendant or its agent/servant.
5. The matter went into full trial and Defendant was found fully to blame for the accident.
6. On quantum, the Plaintiff was awarded General Damage for pain and suffering – Kshs.800,000/=, diminished earning capacity Kshs.1,000,000/= and special damages Kshs.2, 000/=.
7. Being aggrieved b the above decision, the Defendant appealed setting 8 grounds of appeal namely:-
 - 1) **The Learned Trial Magistrate erred in both fact and in law by holding the Appellant wholly liable which finding was against the weight of evidence.**
 - 2) **The Learned Trial Magistrate erred in both fact and in law by ignoring the evidence tendered by the Appellant's witnesses which demonstrated that the Respondent was the author of his own misfortune.**
 - 3) **The Learned trial Magistrate erred in both fact and in law by attaching undue weight to the testimony of the Respondent vis a vis that of the Appellant's witnesses.**
 - 4) **The Learned Trial Magistrate erred in both fact and in law by ignoring the authorities cited in the Appellant's written submissions on the question of liability.**
 - 5) **The Learned Trial Magistrate erred in both fact and in law in failing to abide by the doctrine of stare decisis.**
 - 6) **The Learned Trial Magistrate's award of General damages for pain, suffering and loss of amenities is so manifestly**

excessive as to amount to an erroneous estimate of the loss suffered by the Respondent.

7) The Learned Trial Magistrate erred in both fact and in law by awarding damages for diminished capacity which claim was not properly pleaded and or proved.

8) The Learned Trial Magistrate erred in both fact and in law by applying the wrong principles in calculating damages for diminished earning capacity.

8. The parties agreed to canvass appeal via written submissions which they filed and exchanged.

APPELLANT'S SUBMISSIONS

9. The Appellants submit that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make a due allowance in this respect.

10. In that submission they rely on the cases of **COURT OF APPEAL AT NAIROBI CIVIL APPEAL NO. 304 OF 2001 SILPACK INDUSTRIES LIMITED VS- SAMWEL WAMBUA KIOKO** and **SELLE & ANOTHER –VS- ASSOCIATED MOTOR BOAT COMPANY LTD AND OTHERS (1968) E.A 123.**

11. It is argued that what is in contention is whether the Appellant was negligent and that the negligence led to the Respondent being injured.

12. From the Respondent's testimony found on page 3 of the Record of Appeal from line 15, the Respondent indicates that he had been operating a machine PM 28.

13. It is a machine that he had operated for quite some time. The Respondent merely stated that as he was cleaning the machine, it went on (sic) and chopped his two fingers.

14. There is no explanation as to how the machine came back on after the Respondent either did not switch off the machine in the first place or he negligently restarted it before completing the cleaning exercise.

15. On page 4 of the Record of Appeal at line 7 the Respondent stated that the stop button failed to stop the machine. This statement is contradictory bearing in mind that he had allegedly stopped the machine for the purposes of cleaning it.

16. Had the stop button been defective, there is no explanation as to how he earlier stopped the same machine and why he would go ahead and put his hands into a defective machine.

17. The witness statement by Mr. Jacob Change Ondigi who testified as DW1 is found on pages 30-31 of the Record of Appeal.

18. DW1 indicated that he together with the Respondent were operating the same machine PM 28. It is clear from DW1's statement that the Respondent did insert his hand into the subject machine deliberately in a bid to clean it on the inside and in the process his hand was caught.

19. DW1 blamed the Respondent for having inserted his hand into the subject machine while it was still in motion. DW1 indicated that they had been trained on how to operate the said machine.

20. The Learned trial Magistrate made an extremely short analysis as to the issue of negligence and he made the following remarks.

“It cannot be said that the Plaintiff was acting negligently ... it would not be expected that he would wrongly put his hand in the machine if it is in motion while knowing that he would be injured. The court finds that the stop switch was defective causing the machine to come on while the Plaintiff was in his process of charging (sic) hence the injuries.”

21. It is not clear where the trial court got the information that the stop switch was defective since the Respondent's position was that there was no stop button but only an emergency button which the Respondent used to switch off the machine.

22. But even if the stop button were defective, it is not logical that it would cause the machine to switch on automatically. The trial court perhaps tried to assume that a defective stop button could act as a start button on its own.

23. The conclusion is based on no evidence since the Respondent had completed his shift and he had not experienced any defect with the machine he was using. A stop button cannot possibly play the role of a start button at the Respondent made the trial court believe.

24. The issue for determination is: should the Appellate Court interfere with the lower court's finding that the Appellant was negligent?

25. In the current case, it is event that the Trial Magistrate misdirected himself in finding fault on the part of the Appellant. There was not even an attempt to explain what the negligence was on the part of the appellant.

26. Perhaps it could be said to have been the supposedly defective stop switch but DW1 who had been working with the Respondent would

have noticed if there were anything amiss with the subject machine.

27. There was absolutely no basis for the trial court to find that the Appellant was negligent in any manner and the court should dismiss the trial court's finding on liability against the Appellant.

28. While an employer would be required to provide as safe working environment, it cannot prevent situations whereby an employee is grossly negligent as happened in this particular instance.

29. The Appellants submit that trial court ignored cited authorities namely, the first authority was **HCCA 95 OF 2008 AFRICAN HIGHLANDS PRODUCE CO. LTD –VS- WILFRED OTIENO ODHIAMBO** which held that the burden of proof is on the Plaintiff to prove that the employer failed to discharge his common law duty of care and show a link between his injury and the employer's negligence.

30. The court further noted that the Respondent in that appeal did not demonstrate what he did to avoid injury to himself. The court found that the Respondent had contributed to the injuries sustained by him.

31. The second authority that the Appellant relied on before the trial court is **HIGH COURT OF KENYA AT NAKURU CIVIL APPEAL NO. 79 OF 200 TMSALES LIMITED –VS- STEPHEN GACHIE** where Mr. Justice Musinga in allowing an appeal stated thus;

“If at all the machine was defective and such defect was what caused the injury that ought to have been pleaded specifically and proved sufficiently. Even assuming that the Respondent was asked by the Appellant to use a defective machine, that per se cannot cause an accident; an accident can be caused by many factors. A causal link between machine's defectiveness and the occurrence of the accident must be established by showing for example that due to the defects, the machine malfunctioned and that malfunction is what caused or led to the injury of the Plaintiff.”

32. The Respondent owed the court an explanation as to how a machine he had stopped could have been restarted by a faulty stop switch rather than a faulty start switch.

33. On award for pain and suffering, it is argued that the issue for determination by the Appellate court is whether the damages awarded by the trial court are so manifestly excessive as to warrant disturbance by the court.

34. According to the Doctor's report the Respondent's index and middle fingers were amputated as a result of the subject accident while the 4th and 5th fingers were found to be lacerated and stitched.

35. The Respondent proposed the award of Kshs.1,500,000/= as general damages for pain, suffering and loss of amenities. On the other hand the appellant's written submissions before the trial court proposed an award of the sum of Kshs.120,000/= as general damages for pain, suffering and loss of amenities.

36. They cited the case of **HIGH COURT OF KENYA AT SIAYA CIVIL APPEAL NO. 25 OF 2015 ROSELINE VIOLET AKINYI –VS- CELESTINE OPIYO WAGWAU** the learned Judge quoted with approval the decision of the appellate court in **KEMFERO AFRICA LTD –VS- LUBIA (1987) KLR 257** in which the court stated that:-

“The principles to be, observed by an Appellate Court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former court of appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

37. The Honourable Mr. Justice J.A Makau went further to state as follows;

“18. I have very carefully considered the trial court's judgment and authorities relied upon by the Appellant's counsel and I am satisfied that the trial court in assessing the damages took into account an irrelevant factor and left out of account a relevant one, failed to take into account that compare injuries should as far as possible be compensated by comparable awards, made an award without justification and without considering comparable injuries and awards attracted by them, I find the trial court erred in awarding an award so inordinately high, that it must be a wholly erroneous estimated of damage. That the award by the trial court has therefore to be interfered with”.

38. The Appellant submits that the award of Kshs.800, 000/= as general damages for pain suffering and loss of amenities is so manifestly excessive as to warrant disturbance by the court on appeal.

39. It is submitted that the two authorities cited by Respondent to convince the court to make an award for Kshs.1,500,000/= were unjustified justified, namely **NAIROBI HCCA 892 OF 2006 SUMARIA INDUSTRIES –VS- STEPHEN MWAKA MUYUMBUI** as claimant in the case had all fingers in a hand amputated. The High Court upheld an award for Kshs.800,000/=.

40. The second authority relied on by the Respondent is **MOMBASA HCCC NO. 447 OF 2001 JOSEPH WANDO AKECH –VS- CORRUGATED SHEETS LIMITED**, the said authority t the claimant therein suffered the following injuries;

i. Amputated distal phalanx and comminuted fracture of the right index finger of the right hand.

ii. Degloving minor injury pulp of the middle finger of the right hand.

iii. Cut wound on the right thumb.

41. The High Court on Appeal reassessed the general damages award to Kshs.180, 000/= and found that the earlier award of Kshs.360, 000/= was excessively high.

42. It is submitted that, the trial court, it was not clear how it arrived at a figure of Kshs.800,000/= as general damages for pain, suffering and loss of amenities.

43. The Appellant further submits that, the **HIGH COURT OF KENYA AT ELDORET CIVIL APPEAL NO. 14 OF 2013 EASTERN PRODUCE (K) LTD –VS- ALLAN OKISAI WASIKE** the Appellate Court upheld a general damage award of Kshs.200,000/= where the Respondent had his left index finger amputated. The Appellant proposes an award of Kshs. 120,000/= under pain and suffering.

44. Grounds 7 and 8 of the Memorandum of Appeal; challenging the award of damages for diminished earning capacity.

45. The Respondent filed the suit in the lower court by way of a plaint and pleaded as follows:-

“7. By reason of the injuries sustained, the Plaintiff a machine operator has suffered permanent disability, loss of earning capacity or diminished earning capacity and he claims damages for loss of earning and or diminished earning capacity.”

46. He went ahead to pray for;

“(a) Damages for loss of earnings/earning capacity or diminished earnings/diminished earning capacity.”

47. The Appellants submit that, the pleadings by the Respondent were very ambiguous. It is not clear what the Respondent wanted to be awarded by the court.

48. The court awarded as sum of Kshs.1,000,000/= as diminished earning capacity. The appellant relied on the case of **CIVIL APPEAL NO. 535 OF 2002 KENYA BUS SERVICES LIMITED –VS- FESTUS S. KIBE** which held as follows:-

“I agree with counsel for the Appellant that the claim for “loss of earnings and/ or earning capacity” had neither been pleaded sufficiently, nor had been prayed for, and cannot be allowed....”

49. Similarly, relied on **COURT OF APPEAL AT NAIROBI CIVIL APPEAL NO. 133 OF 1998 MBAKA NGURU & ANOTHER – VS- JAMES GEORGE RAKWAR** which stated as follows:-

“..... It will suffice to say that Plaintiffs who do not plead their damages properly and who then do not so at their own risk. They will not get those damages however sympathetic the court may feel towards them.....”

50. A claim for diminished earning capacity would have to be backed by figures. The Respondent’s testimony on page 3 of the Record of appeal at line 17 indicates that the time the lower court was hearing him, he was working at Kisii.

51. It is this percentage that would have informed the trial court in calculating the diminished earning capacity and which would be about 25%.

RESPONDENT’S SUBMISSIONS

52. The Respondent submit and support finding on liability by the Trial Court in summary that the machine was defective in that after putting on the emergency stop switch, it failed as the Respondent was cleaning the machine and it injured him.

53. On award on pain and suffering, the Respondent cites the case of **NAIROBI HCCA NO. 892 OF 2006 SUMARIA INDUSTRIES LIMITED –VS- STEPHEN MWAKA MUYUMBI** where the Respondent a machine operator suffered crush injuries of the fingers of the left hand leading to amputations, pain over the stump of the remaining parts of the left hand and inability to use the left hand effectively.

54. The grasping action of the left hand was nil. He was awarded General damages for pain and suffering assessed at Kshs.800,000/= and confirmed by the High Court of Appeal.

55. Further the Respondent argue that, he pleaded pleaded that by reason of the injuries he sustained, he being a machine operator had suffered permanent disability, loss of earning capacity or diminished earning capacity and he claimed damages for loss of earning capacity which in capacity was supported by Doctor’s report and evidence.

56. The Respondent had urged the subordinate court to adopt a multiplier of 35 and work out damages for loss of earnings or loss of earning capacity as follows:-

Kshs.8, 520/= x 35 x 12months = Kshs.3, 578,400/=.

57. The Trial Court awarded a global sum of Kshs.1, 000,000/= as damages for loss of earnings or diminished earning capacity.

58. The Respondent urge this appellate court to uphold the award or alternatively award damages for loss of earnings or diminished earning capacity as follows:-

Kshs.8, 250/= x 35 x 12 x 25/100 = Kshs.866, 250/=

59. He relies on the case of **NAIROBI HCCA NO. 892 OF 2006 SUMARIA INDUSTRIES LIMITED –VS- STEPHEN MWAKA MUUYUMBUI** where the Respondent suffered a permanent disability of 10% and was awarded damages for diminished earnings or reduced capacity in the sum of Kshs.220,000/=.

60. He further cites **MOMBASA HCCC NO. 447 OF 2001 JOSEPH WANDO AKETCH –VS- CORRUGATED SHEETS LTD** where the Plaintiff suffered an amputation of the 2nd, 3rd and 4th fingers of the right hand and crush wound on the thumb and was awarded Kshs.320,640/= as damages for loss of future earnings.

THE DUTY OF THE APPELLANT COURT

61. The duty of the first Appellate Court is to subject the whole of the evidence to a fresh exhaustive scrutiny and make any of its own conclusions about it bearing in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of **SELLE & ANOR –VS- ASSOCIATE MOTOR BOAT CO. LTD 1968 EA 123.**

62. The Plaintiff (PW1) was a machine operator working as a machine operator I operated machine P.M 28. He used to make bottles for medicine. He was in charge for PM 28. On 23/05/2010, he was on duty. He had reported for 4.00 p.m. on 22/05/2010.

63. He was assigned to make petroleum bottles. He was on night shift. At 7.00 p.m., he was instructed to clear the machine using passive pipes, in the process he stopped the machine first, and he opened the safe valve.

64. He was cleaning it. The machine went on and chopped his right hand 2 fingers which was housing the passive pipe. It was his work to clean the inside and outside of the machine using the pressure pipe. The metal carriage cut his fingers. The stop button failed to stop the machine.

65. The button was defective. He was not given any protection, cover or clothing. He shouted for help and first aid was given. He was taken to hospital.

66. He was given a discharge summary – PEXH 1. He was examined by the doctor as per the bundle of bundles. He was examined by Dr. Wokabi who prepared a medical report – MFI – 2 dated 28/09/2010.

67. He paid the doctor Kshs.2, 000/=. A demand letter was sent to the Defendant. He was terminated thereafter. He was earning Kshs.9,446.50/=. His pay slips were annexed. He was not able to work which requires efforts. He produced the discharge summary as evidence. He sought to be paid the injury sustained and costs.

68. The doctor (PW2) prepared a report – (PEXH.5) and charged Kshs.2,000/= for the same – PEXH.2b. He also charged for Kshs.5,000/=, court attendance – PEXH .5.c.

69. The Plaintiff lost grip in the hand and could not do some certain tasks like zip buttoning. The Plaintiff had a cut injury which led to amputation. The laceration in the fingers was not in the discharge summary.

70. DW1 testified that, on 23/05/2010, him and the Plaintiff were engaged to make bottles using a machine. They were foremen. They were on night shift. They were cleaning the valve together with the Plaintiff when he was injured on the hands. He had to be supervised while using the machine.

71. DW1 said that that the picture shown to him shows only a part of the whole machine. He was injured while the machine was working. He did not see his fingers inserted in the machine.

72. He warned him. That is the reason (DW1) thought he was injured. They were only to clean outside the machine. He was injured and treated.

ISSUES, ANALYSIS AND DETERMINATION

73. The issues arising are:-

1) Whether the Appellant was 100% liable for the accident?

2) What is the quantum?

3) What is the order as to costs?

ANALYSIS AND DETERMINATION

74. In the case of; AFRICAN HIGHLAND PRODUCE COMPANY –VS- OTIENO ODHIAMBO 2011 eKLR TIMSALES LTD –VS- STEPHEN GACHIE 2005 Eklr it was stated that, that the worker owes himself a duty of care and that there has to be a causal link between the machine defective and occurrence of the accident.
75. The Trial Court found that the stop switch was defective causing the machine to come on while the Plaintiff was in his process of charging hence the injuries.
76. Thus the trial court found Liability in full against the Defendant. Respondent gave explanation as to what transpired leading to the injuries he sustained. Thus he testified that he was cleaning the machine. The machine went on and chopped his right hand 2 fingers which were housing the passive pipe; He showed a document indicating that he was given instructions to wash the machine. The same was a written memo.
77. It was his work to clean the inside and outside of the machine using the pressure pipe. The metal carriage cut his fingers. The stop button failed to stop the machine. The button was defective. He was not given any protection, cover or clothing.
78. The Respondent side via DW1 testified and blamed the Respondent for having inserted his hand into the subject machine while it was still in motion. DW1 indicated that they had been trained on how to operate the said machine.
79. The Respondent having been trained as alleged he could have been a victim of malfunctioning machine. The Respondent side theorize that respondent put hand in a machine deliberately to get injured which is absurd.
80. The Appellant did not produce report to rule out defect in its machine in the operations. On the other hand the respondent has not demonstrated what he did to avoid the accident.
81. The evidence on record points to the both sides being guilty on negligence on equal measure thus court apportions liability at a ratio of 50; 50. Unlike in the case of Musinga J HIGH COURT OF KENYA AT NAKURU CIVIL APPEAL NO. 79 OF 200 TIMSALES LIMITED –VS- STEPHEN GACHIE the respondent had pleaded defects and on balance of probabilities proved though he did not exonerate himself entirely.
82. On quantum, the respondent sustained the following injuries; **Amputated distal phalanx and comminuted fracture of the right index finger of the right hand. Degloving minor injury pulp of the middle finger of the right hand. Cut wound on the right thumb.**
83. The case of SUMARIA INDUSTRIES CASE Supra was relied on for influencing the court to award Kshs. 800,000/=. In that case the trial court found same to involve amputation of all the five fingers unlike the Respondent in the current suit who lost two fingers leaving him able to continue carrying out his responsibilities though at a diminished capacity.
84. In HIGH COURT OF KENYA AT ELDORET CIVIL APPEAL NO. 14 OF 2013 EASTERN PRODUCE (K) LTD –VS- ALLAN OKISAI WASIKE the Appellate Court upheld a general damage award of Kshs.200,000/= where the Respondent had his left index finger amputated.
85. The court finds the award of Kshs. 800,000/= excessive in the circumstances and in lieu substitutes it with award of Kshs. 600,000/=.
86. On claim for loss of earning, the appellant submits that, same was not specifically pleaded in the plaint. Nor was specific evidence adduced to prove the same, and rely on the case of CIVIL APPEAL NO. 535 OF 2002 KENYA BUS SERVICES LIMITED –VS- FESTUS S. KIBE where the court stated as follows:-
- “I agree with counsel for the Appellant that the claim for “loss of earnings and/or earning capacity” had neither been pleaded sufficiently, nor had been prayed for, and cannot be allowed.”*
87. However there are other authorities which hold otherwise on the pleading of the claim for loss of earning capacity, See in the case of Sophina Co. Ltd & Anor –Vs- Daniel Ngang Kanyi Nakuru Civil Appeal No. 315 of 200 where the court held;
- “.....the loss of earning capacity is prospective financial loss and which is awarded as part of general damages and which does not have to be specifically pleaded..... which justified an award in the form of general damages.”*
88. Am persuaded by the aforesaid authority which upheld an award of Kshs. 420,000/= for loss of earning capacity.
89. The Respondent lost index and middle finger and according to the doctor, he lost the dexterity (proficiency) and grip of his right hand. The disability was fixed at 25%.
90. However respondent said he was working in Kisii at the time he testified but did not furnish the details as to what work he was doing and whether he earned less due to the injuries.
91. In the circumstances, I find it fare to reduce on this heading and substitute it with an award of Kshs. 400,000/= which I find to be adequate compensation for loss of earning capacity. This is after taking to account the injuries, earning of claimant and his age and the fact

that he was still on employment when he testified.

92. In sum the court holds that the appeal succeeds partially and makes the following orders;

1. Liability is apportioned on 50:50 basis between Appellant and the Respondent.

2. General damages for Pain and Suffering;

- Kshs. 600,000/=

3. Special Damages - Kshs. 2,000/=

4. Loss of earning capacity - Kshs. 400,000/=

Total - Kshs. 1,002,000/=

5. Less 50% - Kshs. 501,000/=

6. Balance - Kshs. 501,000/=

7. Plus interest from the date of the lower court judgement.

8. The Appellant to get half costs of the appeal.

SIGNED, DATED AND DELIVERED THIS 23RD DAY OF NOVEMBER, 2018 IN OPEN COURT.

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HON. C. KARIUKI

JUDGE