



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL NO. 70 OF 2006**

**MAIZE MILLING CO. LIMITED.....APPELLANT**

**VERSUS**

**RASHID NAMWIBA HASSAN.....RESPONDENT**

*(Being an Appeal from the Judgment and Decree of the*

*Chief Magistrate Honourable F. N MUCHEMI (CM),*

*in Eldoret CMCC No. 320 of 2005 dated 10.05.2006)*

**JUDGMENT**

1. The appellant *Maize Milling Company Ltd* was the defendant in the lower court. The company had been sued by the respondent, then the plaintiff for general and special damages as a result of personal injuries allegedly sustained by him in an accident in the appellant's premises in the course of his employment.
2. It was the respondent's case that on or about 19<sup>th</sup> August 2002, he was lawfully and carefully carrying out his duties in the appellant's premises when he was cut by a machine on his right middle finger thereby sustaining some injuries. He blamed the occurrence of the accident on the negligence of the appellant and or its servants or employees.
3. In its statement of defence dated 19<sup>th</sup> April 2005, the appellant denied liability as alleged and attributed negligence to the respondent.
4. After a full trial, the learned trial magistrate rendered her decision on 10<sup>th</sup> May 2008. She apportioned liability in the ratio of 70:30% in favour of the respondent against the appellant. On quantum, the respondent was awarded general damages in the sum of Kshs. 100,000 and special damages of Kshs. 2,000. He was also awarded costs of the suit and interest.
5. The appellant was aggrieved by the trial court's decision on both liability and quantum. It filed the instant appeal citing four grounds of appeal which can be reduced to three grounds as follows;
  - i. That the learned trial magistrate erred in law and fact in holding the appellant 70% liable for the accident without evidence to that effect.

ii. That the learned trial magistrate erred in finding that the respondent was injured while lawfully carrying out his duties.

iii. That the learned trial magistrate erred in law and in fact in awarding general damages that were excessive in the circumstances.

6. By consent of the parties, the court directed that the appeal be prosecuted by way of written submissions. Those of the appellant were filed on 18<sup>th</sup> March 2016 while those of the respondent were filed on 28<sup>th</sup> September 2016.

7. This being a first appeal to the High court, it is an appeal on both facts and the law. I am alive to the duty of the first appellate court which is to revisit and re-evaluate all the evidence presented before the trial court in order to arrive at my own independent conclusion bearing in mind that unlike the trial court, I did not enjoy the benefit of seeing or hearing the witnesses.

See: **Peters V Sunday Post Ltd (1958) EA 424; Selle V Associated Motor Boat Company Ltd (1962) EA 123.**

8. I have carefully considered the grounds of appeal, the record of the lower court and the written submissions filed on behalf of the parties as well as the authorities cited.

9. In the submissions filed by the appellant's counsel *Ms. Kitiwa & Company Advocates*, it was contended that the respondent was the author of his own misfortune and that the appellant should not have been held liable at all; that the respondent was injured while performing duties that had not been assigned to him and that it was not the appellants duty to watch over the respondent throughout the day and ensure he remained in his work station.

10. On behalf of the respondent, *Ms Ndinya Omollo & Company Advocates* submitted that the respondent was injured in the course of his employment as a result of the appellant's negligence and that the appellant was 100% liable for his injuries. It was submitted that the respondent was not provided with hand gloves which could have prevented or minimized the injury and that the appellant being his employer had a duty to provide its employees with a safe system of work which was not done in this case.

11. Given the evidence on record and the submissions filed by the parties, I find that it is not disputed that the respondent was the appellant's employee and that he was actually injured on the defendant's premises on the date alleged. What is disputed is whether or not he sustained the injuries while performing tasks assigned to him in the course of his employment. This is then the issue which falls for my determination in this appeal on the issue of liability.

12. Before starting my determination on the above issue, it is important to summarise the evidence that was tendered before the trial court. The record shows that the respondent is the only witness who testified in support of his case. The medical report by *Dr. Aluda*; the receipt acknowledging payment of his fees and X-ray film were produced in evidence by consent of the parties without calling their makers.

13. In his evidence, the respondent testified that he was employed by the appellant as a packing machine operator. That on the material day, he was greasing the packing machine manually using his fingers as was his custom when the machine jerked, trapped his finger injuring it. He claimed that he had switched off the machine from electricity supply at the time but since it was defective, it jerked on its own causing his injury; that this was the second time the machine had malfunctioned and the first time it jerked, he had reported the matter to the appellant through its senior supervisor but nothing was done about it. He also claimed that previously, the machine was self greasing but that system had failed and that is why he was greasing it manually using his bare hands.

14. To counter the respondent's case, the appellant called two witnesses. DW1, the respondent's supervisor denied having allocated the respondent the duty of greasing the packing machine on the material day but confirmed having assigned him the duty of operating the said machine. DW2 on his part

claimed that he was the only one who was responsible for greasing of all machines in the appellant's premises and that he did not instruct the respondent to grease any machine on the material date.

15. It is pertinent to note that though both defence witnesses maintained that the respondent had not been assigned the duty of greasing the machine he was assigned to operate, none of them responded to the respondent's claim that all machine operators including the respondent had the task of greasing the machines every morning before operating them. DW2 did not also avail to the court any evidence to prove his allegation that he was the only employee who was mandated to grease all machines in the appellant's premises.

16. The appellant did not also avail any evidence to controvert the respondent's claim that the machine had malfunctioned and that is why it jerked causing an injury to his finger. The two witnesses did not also deny that previously, the machine was self-greasing but that the automatic greasing system later failed and that is why it had to be greased manually. In law, what is not disputed is deemed to be admitted.

17. In view of the foregoing, I find that the respondent demonstrated on a balance of probabilities that he was injured on the material date in the course of his employment and that the appellant was largely to blame for the accident. Granted, an employer does not have a duty to babysit its employees but every employer is duty bound to provide a safe system of work and a safe working environment for all its employees. This is both a common law and statutory duty.

18. The appellant in this case ought to have ensured that all machines in its premises were in perfect working condition and that they were well maintained in order to ensure that its employees working with the said machines did so without being exposed to risks of injury. The appellant admitted through its witnesses that indeed the respondent had not been provided with protective clothing like hand gloves. The fact that the machine the respondent was assigned to operate malfunctioned is clear evidence that it was not well maintained. Secondly, allowing its employees to grease machines manually without providing them with hand gloves is another piece of evidence proving that the appellant failed to observe its duty of care towards its employees.

19. That said, I also find that the respondent was partly to blame for the accident in which he was injured for having agreed to work with the said machine knowing fully well that it was faulty having in mind his claim that it had malfunctioned previously and that it had not been repaired. The respondent also had a duty to take necessary measures to ensure his safety at the work place.

20. Given the foregoing, I have come to the same conclusion as did the learned trial magistrate on liability albeit for slightly different reasons. The trial court's finding on liability is thus upheld.

21. On quantum, it is not disputed that the respondent suffered a cut wound on the right finger and severe pain. The injury healed well. In awarding the respondent Kshs.100,000 in general damages, the trial court relied on the authority of **Julius Chala Katunda V Ligna Ltd HCC 594 of 1985**. I have read the said authority and there is no doubt that the injuries sustained by the plaintiff in that case were much more severe than the injury suffered by the plaintiff in this case. In that case, the plaintiff suffered a crush injury to his left thumb with cut tendons. The thumb was made functionally useless and the plaintiff could not grasp objects with the left hand properly. In this case, the plaintiff suffered a cut wound on a finger which healed without leaving any disability.

I am thus in agreement with the appellant that the award of Kshs.100,000 was excessive and inordinately high given the minor injuries sustained by the respondent in this case.

22. The appellant have proposed a sum of Kshs. 20,000 relying on the case of **Socfinaf Company Ltd V Joshua Ngugi Mwaura Nairobi HCCA 742 of 2003**. In that case, the plaintiff had sustained a blunt injury to the right forearm which fully healed. *Hon. Visram J* (as he then was) reduced an award of Kshs. 70,000 awarded by the trial court to Kshs. 20,000. This authority is merely persuasive to this court though it would have been binding on the lower court had it been cited to the learned trial magistrate but

it was not. The case was decided in June 2005 while the impugned judgment was delivered three years later.

23. Taking into account all the relevant factors, I find that an award of Kshs. 70,000 would have been more appropriate in this case. For the above reasons, I set aside the award of general damages in the sum of Kshs. 100,000 and substitute it with an award of Kshs. 70,000. The special damages awarded of Kshs. 2,000 were pleaded and proved. The same will therefore remain undisturbed.

24. In the end, the judgement of the lower court is hereby set aside and is substituted with a judgment of this court in favour of the respondent against the appellant in the total sum of Kshs. 72,000 less contributory negligence of 30% apportioned to the respondent. The amount shall attract interest at court rates from date of the judgment of the lower court until full payment.

25. On costs, the appellant shall bear the respondents costs in the lower court but since the appeal has partially succeeded, it shall have one third of costs of the appeal.

It is so ordered.

**C.W GITHUA**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 22<sup>nd</sup> day of March, 2017**

In the presence of:

Ms Kamau for the Appellant

Lobolia Court clerk

No appearance for the Respondent