



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 298 OF 2013

MORRIS NJUGUNA NANDWAAPPELLANT

- V E R S U S -

ARIHANT INDUSTRIES LIMITED.....RESPONDENT

(Being an appeal from the judgment, ruling and order of Hon. R. A. Oganyo SPM at Milimani Commercial Courts delivered on 3rd May 2013 in CMCC 6014 of 2009)

JUDGEMENT

1. Morris Njuguna Nandwa, the appellant herein filed a suit in the Chief Magistrate's Court at Nairobi, Milimani Commercial Courts by way of plaint on 11th September 2009 seeking compensation for injuries he sustained at work when in the employment of the respondent herein Arihant Industries Limited.

2. The appellant while in the course of his employment with the respondent premises at Industrial Area in Nairobi, he was assigned duties of processing used polythene material, using pelleyfizer machine .While feeding the same material into the machine the appellant's hand got trapped by the roller therein causing him the following injuries: crush injury and dislocation of the left index finger and ring finger, with- amputation of the left middle finger and amputation of part of the distal phalanx of the left index finger.

3. The learned trial magistrate R. A. Oganyo (Mrs), Senior Principal Magistrate in her judgment delivered on 3rd March 2013, entered Judgement for the appellant as follows:

1. Liability in the ratio of 60% to 40% with the appellant bearing the former and the respondent the latter.

2. General damages at ksh.144,500/=

3. Special damages of ksh.3,000/= as spent in the medical report preparation.

4. Costs of the suit and interest at court rates from date of filing suit till payment in full.

The appellant being aggrieved preferred this appeal.

4. On appeal, the appellant put forward the following grounds in its memorandum:

1. The learned magistrate erred in fact and in law by holding or finding the appellant guilty of contributing negligence in the face of the evidence of the respondent.

2. The learned magistrate erred in fact and in law by apportioning liability and damages in the proportion of 60:40 in the absence of any material or basis of such apportionment.

3. The learned magistrate erred in fact and in law in his assessment of general damages which were inordinately low, having regard to the unchallenged medical evidence.

4. The learned magistrate erred in fact and in law in failing to find that the appellant is fully incapacitated from the injuries he sustained.

5. That the learned magistrate erred in fact and in law in disregarding the appellant's submissions on damages.

6. That the learned magistrate erred in fact and in law in taking into account irrelevant issues in assessing damages.

7. That the learned magistrate assessment of damages was not based on any proper authorities.

5. When the appeal came up for inter partes hearing, learned counsels appearing in this appeal recorded a consent order to have the appeal disposed of by written submissions. By the time of writing this judgment, only the appellant had filed its written submission.

6. I have already enumerated the 7 grounds of appeal the appellant put forward in its memorandum. Though the appellant put forward 7 grounds of appeal, I am satisfied that those grounds can be summarised to two grounds namely;

i. Whether the learned magistrate erred in law and in fact in apportioning liability in the proportion of 60:40% as to the respondent and appellant respectively

ii. Whether the learned magistrate erred in law and fact in his award on quantum.

7. It is good to note that despite the two grounds of appeal above as summarised as to liability and quantum the appellant submissions are only limited to the ground no. 1 as to apportionment of liability. I will therefore proceed in line with that.

8. The appellant is of the view that in his evidence, he blamed the respondent for failing to issue him with gloves or boots. He further added as stated in page 57 of the record of appeal in line 20 that "the machine was not covered to protect him from injury."

9. This is the crux of this appeal as it was the main cause of the injuries sustained by the appellant. The appellant in cross examination admitted that he had been trained to operate a machine similar to the one he was working on, and in fact went ahead to say that he had been shown the extent his hand should reach. His hand according to the evidence on record was to reach the cover, however the machine the appellant had been given to work with had no cover.

10. It's the appellant's submission that the respondent well knew that the machine it had given to the appellant had no cover. This evidence was never controverted. The respondent never called evidence in the primary suit to shift this assertion which the appellant had stated in examination in chief and in cross examination. The appellant still asserted that he had no gloves and once the polythene wound around on his hand, he had to remove it and help himself. From the evidence on record, the appellant was alone, in the night and not even a supervisor was present. Any ordinary reasonable man faced with such a test/danger should and ought to help himself in these circumstances. The appellant further added that the machine had a very weak emergency switch that did not stop the machine when he tried to. This evidence was not shifted.

11. The appellant continues to state that the respondent should have been held 100% liable by the trial court and still is beseeching this court to be inclined to this and relied on the following points of law and

case law.

12. The occupational safety and health Act no. 15 of 2007 stipulates in Sections 57 and 58 in summary that every part of a transmission machinery shall be securely fenced. This duty on the part of any employer is mandatory and absolute. Section 58 states that if it is not possible to securely fence any part of a transmission machine, then a fence must be provided “which automatically prevents the operator from coming into contact with the part.” From the foregoing, it’s evidently clear that the respondent was in breach of its statutory duty to the appellant.

13. The cause of the accident lies in the fact that the appellant had no gloves which could have perhaps minimized the extent of injuries and most importantly there was no fencing cover to the dangerous part of the machine he was using. The appellant relied on the case of **Davis –vs- Owen (Thomas) & Co. Limited (1919)2K.B 39**, where Justice Saiter stated that:

“The obligation imposed by the factory workshop Act 1901(now the factories Act 1961) in relation to the fencing of dangerous machinery is absolute. It is an obligation not merely to fence but fence securely. The statute does not say that dangerous machinery shall be fenced if that is commercially practicable or mechanically possible if a machine cannot be securely fenced while remaining commercially practicable and useful, the statute in effect prohibits its use.”

14. When arriving at the award on liability at 60% to 40% as the respondent bears 40% of the blame, the trial magistrate looked at factors attributed to the respondent’s negligence as stated at paragraph 6 of the plaint. It was on the appellant to prove all those attributes on a balance of probabilities. It’s in the appellant evidence/testimony in court that his hand got stuck while he tried pulling out the material that was stuck in the machine while the said machine was still in motion. The respondent on the other hand submitted that the appellant ought to have known better to switch off the machine first before attempting to put his hand in the same. The respondent had put up notices everywhere for staff to follow safety regulation and that the respondent used to give out safety drills on weekly basis to sensitize the staff to guard against accidents. The appellant had admitted that he was the one who had control over the machine.

15. I think the learned trial magistrate was well guided by the evidence on record in finding that the appellant herein was to be blamed more than the respondent also on his part did not provide the appellant with protective gear for his hands and not putting guard rails around the gullible machine.

16. In the end, I find that the appeal lacks merit and it is therefore dismissed. The judgment of the trial court is upheld. Costs of the appeal to be on the Respondent.

Dated, Signed and Delivered in open court this 22nd day of September, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent