RREPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 48 OF 2013

PIETRO CANOBBIO.....APPELLANT

=VERSUS=

JOSEPH AMANI HINZANO..... RESPONDENT

J U D G M E NT

The respondent was an employee of the appellant. He was involved in an industrial accident on 25th September 2010 while on duty. He filed Kilifi Civil Case Number 645 of 2010. The trial court apportioned liability at 20% against the respondent and 80% against the appellant. General damages were assessed at Kshs.500,000 and damages for loss of earning at Kshs.1,800,000.

The award by the trial court triggered the filing of this appeal. The grounds of appeal are that the trial court failed to believe the appellant's evidence that the lawn mower not was defective but technically complicated to start, the trial court erred in law in not holding that the respondent was wholly liable and was to blame for the accident, the trial court erred in law by attributing 80% contributory negligence to the appellant and that the damages are excessive and the amount of Kshs.1,800,000 awarded as loss of earning was erroneous.

Mr. Gicharu, counsel for the appellant argued all the grounds together: Counsel contends that the appeal raises only two issues, liability and quantum. On liability, counsel submit that the respondent inserted his fingers into a lawn mower. He knew exactly what was going on. He was not qualified to operate or repair the lawn mower. He was also not allowed to repair it. The respondent used to work using a slasher. The trial court noted in the judgment that the respondent knew the risk by inserting his finger on the machine. This called for a higher degree of contribution.

It is also submitted that the lawn mower was not defective. The respondent admitted that he had used it the same morning. The defence evidence was consistent yet the trial court found it contradicting. The damages awarded are excessive. The authority relied upon of **JUMA KARANA V SOUTHERN ENGINEERING CO. LTD** only awarded Kshs.200,000. The trial court however awarded Kshs.800,000. The respondent was awarded Kshs.1.8 million for loss of earning which amount was uncalled for.

Mrs Kipsang, counsel for the respondent opposed the appeal. Counsel submitted that the appellant was granted leave to appeal out of time on condition that a sum of Kshs.500,000 was deposited in a joint account. That condition has not been complied with. The appellant filed an application for extension of time but the same was dismissed. He appealed to the court of Appeal seeking stay of execution but that

appeal was dismissed. Counsel maintains that the appeal was filed out of time and the appellant failed to comply with the court order. Counsel further maintains that the Memorandum of Appeal was filed by a different advocate without notice of change of Advocates.

On the issue of liability counsel maintains that the entire evidence on record including that of DW2 was in favour of the respondent. The appellant himself confirmed that the respondent was a gardener. Miss Kipsang is agreeable to the findings of the trial court on both quantum and liability. The respondent suffered amputation of three fingers leading to 18% permanent disability. He was earning Kshs.600,000 and was 27 years old. He was awarded a multiplier of 25 years.

The record of the trial court shows that two witnesses testified for the respondent. The respondent, Joseph Amani, informed the court that he was employed by the appellant as a gardener. The appellant was expecting visitors and together with a co-worker by the name Jesica, they were instructed to clean the compound using a lawn mower. Jesica informed the appellant that the machine was defective but the appellant told them to clean it and use it as the way it was. The appellant tried to clean it, there was a piece of metal (mabati) inside and he tried to remove it only to sustain the injuries on his left hand fingers. He was taken to Kilifi District Hospital for treatment. He blamed the appellant for the occurrence of the accident.

PW1, Dr. Ajoni Adede testified that the respondent suffered multiple amputation of left index finger, left ring finger and left little finger. He assessed permanent partial incapacity at 18%. The witness informed the court that the respondent was left with diminished ability to hold instruments.

The appellant's evidence before the trial court was that the respondent was his gardener. His duties included, gardening, trimming flowers and cutting grass. He confirmed that the respondent was injured at his premises. His other employee, Rama, was the one who used to work with the lawn mower. He did not allow the respondent to use the lawn mower. The respondent signed an agreement admitting that the mistake was his. The respondent was using a slasher to cut grass and not the machine. Only Rama was authorized to use the machine.

DW2 Jesica Sirika was the appellant's house-girl. Her evidence was that at times she used to engage in grass cutting when the work in the house was scarce. On 29th September 2010 she was told by the appellant to assist the respondent. Each had a slasher. The respondent did not want to use a slasher. They were not allowed to use the machine and it is complicated. The appellant took the machine and switched it on. He then put his fingers in the machine and was injured. She further testified that she had used the machine herself before. They were not expecting any guests.

The main issues for determination by this court relates to liability and quantum of damages. There is no dispute that the respondent was employed by the appellant. The evidence shows that the respondent was earning a monthly salary of Kshs.6,000/=. The appellant's point of view is that the respondent was negligent and ought to shoulder a higher proportion of liability than the appellant. It is also submitted that the respondent was not allowed to use the machine (lawn mower).

I have carefully read the judgement of the trial court and its analysis of the issue of liability. I am satisfied that the trial court evaluated the evidence and its findings on liability is supported by the evidence on record. The contention that the appellant was not allowed to use the lawn mower cannot stand. The respondent testified that he was employed as a gardener. The appellant himself testified to the effect that he employed the respondent as a gardener. It is common knowledge that gardeners use lawn mowers to cut grass.

The evidence of DW2 Jesika Sirika is that she is the one who switched on the lawn mower for the respondent. She continued to cut grass. She had used the machine herself. It was alleged that only one employee, Rama, was the one allowed to use the lawn mower. Rama did not testify. DW2 also used the machine at times. It is clear to me that there was no exclusivity in the use of the machine. The machine was available for use by any gardener.

The respondent's evidence is that some "mabati" was stuck in the machine and the machine was not rotating. The trial court found that the respondent was also negligent by inserting his fingers in the machine. The respondent knew the machine was on. According to DW2, the respondent did not know how to switch on the machine.

The evidence does establish that there was no proper working system. Everyone was allowed to use the lawn mower even those who did not know how to switch it on like the respondent. The machine was available and there is no evidence that the respondent was under instructions not to use the machine. It was not locked in the store.

Given the circumstances of the case, I will enhance the respondent's liability from 20% to 30%. Section 6(1) of the Occupational Safety and Health Act state as follows: -

> **"S. 6(1)**
>
> **Every occupier (employer) shall ensure the safety, health and welfare at work of all persons working in his workplace."**

Similarly, Section 13(1) of the same Act stipulates as follows: -

> **"S. 13(1)**
>
> **Every employee shall, while at the workplace -**
>
> **(a) ensure his own safety and health and that of other persons who may be affected by his acts or omissions at the workplace."**

In the case of **PURITY WAMBUI MURIITHI V HIGHLANDS MINERALWATER CO. LTD [2015] eKLR**, the Court of Appeal held the following in relation to Occupational Safety: -

> **"..... as a general rule the employer is liable for any injury or loss that occurs to his employees while at the workplace as a result of the employer's failure to ensure their safety. Does this mean that the employer would always be liable in all circumstances regardless of what caused the accident in question? We do not think so. We say so because where an accident happens due to the employees own negligence it would be unfair to hold the employer liable.**
>
> **….. the employee is also required to take reasonable precaution to ensure his/her safety at the workplace while performing his /her duties."**

Given the evidence herein, I do find that the appellant ought to bare a larger proportion of liability than the respondent. If only Rama was allowed to use the lawn mower, why was it then available to every employee. It could have been kept under lock and key for the use of Rama only. Further, the respondent was not trained on the use of the machine. The machine seemed to have had some defects and that was why it was not rotating. I hereby apportion liability at 70:30% against the appellant.

On the issue of quantum, the appellant contends that the award is excessive. Mr. Gicharu submitted that reference was made to the case of **JUMA KATANA V SOUTHERN ENGINEERING CO. LTD**. Msa No. 338 of 2002. Kshs.200,000/= was awarded for amputation of the left index, middle and ring fingers. Counsel for the appellant maintains that the amount of Kshs.1.8 million awarded for loss of earning was uncalled for.

Counsel for the respondent maintains that the respondent was 27 years old earning Kshs.6,000/= monthly. Permanent incapacity was assessed at 18%. He had requested for a multiplier of 33 years but was award 25 years.

The general rule in cases involving award of damages is that there should be some degree of uniformity in awarding damages. Regard must be sought to recent awards in comparable cases. Similar injuries must attract similar award. Progressive increments should be made taking into account time lapse and the effects of inflation. Damages for similar injuries cannot remain constant for a long period of time. Cost of nursing injuries keep on increasing. Cost of buy medical facilities have also increased. Where a victim is to be fixed with a metal plate in his leg, the cost of such service has increased compared to what it used to cost ten (10) yeas ago: This is so despite the invention of new medical technology.

Another principle elating to cases involving award of damages is that an appellate court would to interfere with an award of the trial court unless the same does not comply with the general precedent in such case. In the case of **KEMFO AFRICA LTD T/A MERU EXPRESS & ANOTHER -VS- A.M. LUBI & ANOTHER (NO.2) [1987] KLR 30**. The Court of Appeal held as follows: -

> **"The principles to be observed by an appellate curt in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are 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 wholly erroneous estimate of the damage."**

The medical report by Dr. Adede who examined the respondent on 16.10.2010 indicate that the respondent sustained the following injuries: -

Amputation of left index finger, left ring finger and small finger.

The doctor assessed permanent incapacity at 18%. In essence therefore, the respondent's earning capacity was reduced due to the permanent incapacity. The respondent was not rendered unemployable. He could still work. The evidence indicate that he is illiterate and could only do manual jobs. I believe he could still slash grass using his right hand. The injury was on his left hand.

In her written submissions before the trial court, counsel for the respondent relied on several authorities. These include **SHADRACK ZACHARIA OMAYIO V ROADSERVICES LTD.** Msa HCC No. 99 of 1999. Kshs.385,000/= was awarded for loss of two fingers and loss of amenities. In the case of J**OSEPH WANDO AKETCH V CORRUGATED SHEET LTD**, Msa HCCC NO. 447 of 2001, Kshs.600,000/= was awarded for loss of five fingers and loss of amenities. In the case of **BWAUNA CONSTRUCTION LTD V JOSEPH KARURI MWANGI**, Nakuru Civil appeal No. 110 of 2006, Kshs.500,000/= was awarded for amputation of distal phalanx middle finger, ring finger and fracture of distal phalanx index finger. Permanent incapacity was assessed at 10%.

In all the above cases no damages were awarded for loss of income. The trial court treated the respondent as if he was a deceased person. The principle applied by the court relate to damages under the Law reform Act. The courts have been awarding a global sum for pain and suffering as well as loss of amenities. Loss of earnings relate to complete total loss of the earnings. This can be computed for a specific period, let say when one is dismissed from work unlawfully, loss of earnings can be computed upto the time he gets another employment. Loss of earning capacity deals with the reduced capacity of an accident victim to earn in future. This cannot be complete replacement of the claimant's future earnings. The respondent herein can still work as a driver, watchman or gardener. His earning capacity has only been reduced. It can be said that people with certain disabilities have reduced earning capacity. That does not mean that they cannot work and earn. Some even work and earn just like someone without any disability.

From the evidence herein, I do find that the award of Kshs.1.8 million for loss of earnings is not supported by legal principles applicable in the award of damages. The respondent is still alive and is capable of earning from employment. I do proceed and set aside that award.

Counsel for the respondent submitted for Kshs.700,000/= as general damages. Counsel also sought damages for loss of earnings separately. In the case of **BUTLER V BUTLER [1984] KLR, 225**, the

court held that a person's loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour market or work, as well as paid as before the accident are lessened by his injury: The respondent's capacity to earn has been reduced by 18% permanent incapacity. In the case of **PYRAMID PACKAGINGLIMITED V HUPHREY W. WANJALA [2012] eKLR**, Justice G.W. Ngenye Macharia awarded Kshs.650,000/= for complete amputation of the left index, middle and ring fingers. The appellant in that case was left handed and the injuries rendered him incapacitated to work. The above injuries are somewhat similar to those sustained by the respondent herein. I do find that an award of Kshs.750,000/= for pain, suffering and loss of amenities shall be sufficient compensation for the respondent.

In the end, I do find that the appeal partly succeeds. Liability is apportioned as follows: -

Appellant - 70%

Respondent - 30%

On quantum, the respondent is awarded Kshs.700,000/= as general damages for pain and suffering and loss of amenities. The award of Kshs.1.8 million for loss of earnings is hereby set aside. The award of Kshs.500,000/= as general damages is replaced by 750,000/=. The award damages of Kshs.750,000/= shall be subjected to 30% contribution leaving a balance of Kshs.525,000/=. The respondent shall have the costs and special damages awarded by the trial court Each party shall meet their own costs of the appeal.

Dated and delivered in Malindi this 17th day of March, 2016.

S.CHITEMBWE

JUDGE