



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL NO. 23 OF 2015

BETWEEN

SINOHYDRO CORPORATION LIMITEDAPPELLANT

AND

DANIEL ODHIAMBO NYAURARESPONDENT

(Being an appeal from the Judgment and Decree of Hon. D.O.Chepkwony, SPM in the Principal Magistrates Court at Nyando in Civil Case No. 126 of 2011 dated 21st March 2013)

JUDGMENT

1. Before the trial court, the respondent's case against the appellant was that on 23rd July 2011 he was injured in the course of employment while using an electronic machine to plane a board resulting in an amputation of the upper part of his first right finger. After hearing the case, the trial court apportioned liability at 80:20 against the appellant and assessed general damages at Kshs. 250,000/-. It is the judgment that precipitated this appeal.
2. The sum of the appeal in the memorandum of appeal dated 27th March 2013, is that the learned magistrate failed to consider the evidence and came to a conclusion that was against the weight of evidence. Mr Nyamweya, learned counsel for the appellant, complained that in the circumstances of the case, the respondent, who operated the machine failed to take care of his own safety and as such he ought to have borne a greater percentage of the liability as the machine was a permanent fixture. He also urged that, given the nature and extent of the injuries, the award of general damages was inordinately high.
3. Mr Singahachi, learned counsel for the respondent, supported the judgment and submitted that learned magistrate appreciated the evidence and came to a correct conclusion on the issue of liability. In his view, the award was reasonable in light of the nature of the injuries and the authorities submitted.
4. This being a first appeal, this court is required in law to re-consider and re-evaluate the evidence adduced before the trial magistrate and before reaching its own independent determination whether or not to uphold the decision of the trial magistrate. The court has to bear in mind that it neither saw nor heard the witnesses testify (see *Peters v Sunday Post Ltd* [1958] E.A 424).
5. The respondent (PW 1) testified that he was a casual employee of the appellant and that on the morning of 23rd July 2011, he was working at a timber planing machine affixed on the floor. He told the court that two people were required to place the timber. He pushed the piece of timber towards his colleague who also pulled it towards himself and when it reached the end of the timber, his colleague used force and the machine cut his 4th finger on the right hand. He was taken to the nearby dispensary after the accident

and treated. In his testimony, he claimed that the working environment was not conducive as the machine was blunt and he had not been provided with gloves. He told the court that his finger was paralysed and could not function.

6. When cross-examined, the respondent stated that he was experienced at the work. He explained that when using the machine, he would push the piece of timber to the last bit and change the direction of the hand in order to avoid injury. He could not recall what happened on that date but he stated that did not change the direction of his hand late. He stated that the machine was blunt and that he informed the foreman. He further stated that in his training he was told not to work on a blunt machine.

7. The only witness for the appellant, Oliver Tambo (DW 1), confirmed that PW 1 was an employee of the respondent. Although he was not present at the accident, he told the court that the respondent was not authorised to plane timber and he did so without authority.

8. The respondent admitted that he was experienced in handling the planing machine and explained how it operated. It was permanently fixed and he was in control of the movement of the wood. His complaint was that the machine was blunt but he did not explain how the bluntness could have affected the manner in which the machine worked. Further, the failure to provide gloves would only have mitigated the injury but not prevented the accident. Even if I accept that the machine was blunt, this is case where the respondent bears higher responsibility for the accident. I therefore set aside the apportionment of liability and hold the respondent 50% liable for the accident.

9. On the issue of damages, it is not in dispute that the respondent sustained an amputation of the 4th finger of the right hand. According to the report dated 12th August 2011 by Dr L. W. Okombo, who examined the respondent, stated that, "*in view of the amputated distal phalanx, he is consequently not able to effectively perform his duties as a mason.*" The doctor recommended further treatment and classified the injuries as grievous harm.

10. This court can only interfere with the assessment of damages by the trial court if the award was made in disregard or misapprehension of established principles or it was excessively high or low so as to amount to an erroneous estimate having regard to the nature of injuries. Before the trial court, the respondent submitted that a sum of Kshs. 500,000/- was reasonable based on the case of ***Akay Industries Ltd v Abdallah Amani* NKR Civil Appeal No. 22 of 1988 (UR)**. The appellant submitted that Kshs. 180,000/- was reasonable based on the case of ***Hardwood Engineering v Charles Owalo Oyula* NKR HCCA No. 160 of 2002 (UR)**.

11. I have reviewed the original file and neither the appellant nor respondent filed copies of the cases referred. In these circumstances it is difficult to conclude whether the learned magistrate strayed from the reasonable path by awarding very high or low damages. The overriding duty of the advocates appearing before the court to assist it come to fair decision by submitting the relevant material. In this case, I cannot say the award is too high or too low in light of the fact that the amputation of a finger the right hand is bound to result in some form of disability. Consequently, I decline to disturb the award on damages.

12. I allow the appeal to the extent that I set aside the apportionment of liability and substitute it with equal liability.

13. The appellant shall have half the costs of the appeal.

DATED and DELIVERED at KISUMU this 30th day of September 2016.

D.S. MAJANJA

JUDGE

Mr Nyamweya instructed by L. G. Menezes and Company Advocates for the appellant.

Mr Singahachi instructed by Kuke and Company Advocates for the respondent.