



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 229 OF 2009

ROYNEX CHUMBAAPPELLANT

VERSUS

SUNNY AUTOPARTS (K) LTD.....RESPONDENT

(An appeal from the judgment of Hon. G. C. Mutembei (Mr.) Chief Magistrate delivered on 14th November, 2007 in Nakuru CMCC NO. 549 of 2006)

JUDGMENT

1. In a judgment delivered on the 14th November 2007, the trial Magistrate apportioned liability between the Appellant and the Respondent equally following an accident involving the Appellant while working for the Respondent on the 30th January 2005.

In his evidence in chief, the Appellant (PW1) stated that he worked for the respondent as a machine attendant for three years and had been trained by the company on how to operate it. He testified that while operating the machine and removing a can the machine came down and crushed his hand due to an electric fault for which he stated had reported to his superior the previous day. That morning, he testified that the machine had been repaired. His two fingers were amputated and the third was injured. He stated that he was not to blame for the accident as the machine was faulty but had no evidence of such.

2. DW1 was Paul Mbuthia who described himself as a production co-coordinator in the defendants company. His testimony was that the Appellant was injured while at work but that he was not present when it happened but found his hand trapped between the machine. He testified that the machine punch can only operate when the power button is pressed once using the left hand to activate the machine. He stated that every morning maintenance people check the machines to ensure they are working properly before they hand them to the supervisions.

Upon cross examination, he stated that the had nothing to show or confirm that the machine was not defective nor could he tell when it was last serviced though they had a maintenance calender which he did not have in court. He denied that the company had failed to maintain the machine.

3. Upon the above evidence, the trial court found both parties to blame, on the part of the appellant that she did not call any evidence as to the defect of the machine while the respondent failed to offer any evidence that the said machine was in good order and well serviced. It was his finding that there was possibility that the applicant failed to operate the machine in the appropriate method thus causing injury to herself.

He apportioned liability at 50:50 basis, and awarded the appellant Kshs.280,000/= in general

damages for pain and suffering and loss of amenities.

Being aggrieved by the trial Magistrates judgment, this appeal was preferred, both on **liability and quantum of damages**.

4. It is not in dispute that the appellant was an employee of the respondent nor that he was injured while in the course of work. The main issue is who between the Appellant and the Respondent was liable in negligence leading to the injuries, and sequential damages.

5. The appellant stated that he reported a machine defect the previous day to his supervisor which according to the respondent was rectified. The respondent however failed to produce any records to show when the said machine was serviced and whether it was repaired the previous day prior to the accident. On the other hand it is also not demonstrated by the appellant that he indeed reported a defect as none was recorded. It was his word against the respondents word. The respondent blamed him for not following the correct procedure in the operation of the machine. Neither party called the supervisor who is alleged to have been informed of the defect.

The respondent on its part submitted that the machine that is operated by electricity could not move unless the power button is pressed, and that it is obvious that the appellant pressed the button to activate it without removing his hand despite having been trained on how to operate the same and worked with it for three years. The respondent thus blamed the appellant.

6. I have reconsidered the evidence tendered before the trial court as mandated of an appellate court. The evidence of both appellant and the respondent present to me of an accident that was caused by negligence by both parties in equal measure. I can not blame the trial Magistrate at all for coming to the same conclusion. Both parties failed to call evidence to corroborate their testimonies, documentary or otherwise. Nothing was tendered to show that the machine was defective. Likewise, no evidence was tendered to show that the appellant failed to follow the correct procedure in the operation of the machine. It is a blame game.

For those reasons, I find no fault with the trial Magistrates findings on liability. I too find both parties equally to blame.

7. **Quantum of damages**

The Appellant sustained injuries and was admitted at the War Memorial Hospital for six days. The discharge Summary showed a crash injury to the right hand fingers. **Dr. Wellington K. Kiamba** prepared a medical report that showed:

- a) ***amputation for the right third finger,***
- b) ***Amputation of the right fourth finger and***
- c) ***Degloving injury tot he right index finger.***

The figures were amputated at the metatarsals. Examination showed that the index finger was deformed and the interphalangeal joint had permanent inflexion position. A permanent incapacitation was assessed at 20%.

Dr. Malik for the respondent too assessed the permanent incapacitation at 20% according to the **Workman's Compensation Act** after reconfirming the injuries as sustained. The trial court awarded damages in the sum of Kshs.280,000/= for pain and suffering which the appellant submits is too low and erroneous estimate of the damages.

8. The Respondent submits that the award of damages was sufficient and the trial court relied on the authority **Hardwood Engineering -vs- Charles Onulo Oyola** which was comparable by way of injuries

and award.

The Appellant submits that the award was so low compared to the injuries sustained by the Appellant and comparable awards.

I have looked at the authority cited before the trial court by the appellant. It is not a full judgment but a case digest. It is **Saleh Suleiman Mwabagura -vs- Narshidas Co. Ltd HCCC No. 911 of 1990 Mombasa** the court cannot rely on it. It only indicates that the plaintiff sustained similar injuries. General damages were assessed at Kshs.440,000/= over ten years ago. Relying on the unauthenticated authority, it is urged that the court do award Kshs.600,000/=.

9. On loss of earnings, it was submitted for the that as the appellant had lost function of his right hand, a multiplier of 30 years would be reasonable. He urged the court to award Kshs.1,863,3000/= based on a multiplier of 30 years against an income of Kshs.5,175/=.

10. In his judgment the trial Magistrate ignored the above authority as its authenticity could not be confirmed. He proceeded to award Kshs.280,000/= based on the decision in **Hardwood Engineering (Supra)** with similar authorities.

11. I have considered submissions on this aspect. In **Kemfro Africa Ltd t/a Meru Express Service -vs- A.M. Lubia & Another (1982-88) L KAR 729**, an appellate court will be very slow to interfere with a trial court's assessment of damages unless the same is too low or too high as to represent an erroneous estimate of damages.

Further in **Stanley Maore -vs- Geoffrey Mwenda Nyeri C A. No 147 of 2002**, the Court of Appeal stated that the general method of assessment of general damage should as far as possible be compensated by comparable awards keeping in mind the correct awards in similar cases.

The offending award was made in 2007, almost ten years ago. The authority cited by the trial court **Hardwood Engineering -vs- Chares Onalo Nakuru HCCA No.160 of 2002** shows the appellants injuries as:

- ***Amputation of the middle distal phalanges of fourth finger right hand***
- ***Amputation of right thumb***
- ***Deep laceration of the index middle and small fingers of right hand.***

On Appeal the court set aside award of Kshs.350,000/= and substituted it with Kshs.180,000/=. That was in 2004.

12. In 2007, I am satisfied that an award of Kshs.280,000/= would be very reasonable for similar injuries having taken into account the incident of inflation.

For those reasons, I find the appeal on the matter of *quantum* of damages unmerited. It is dismissed.

In its totality, I find the appeal baseless. It is dismissed with costs to the respondent.

Dated, signed and delivered in open court this 22nd day of September 2016.

JANET MULWA

JUDGE