REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 76 OF 2012

LWAMBI FONDO NZAKA.....APPELLANT

-V E R S U S-

KALUWORKS LIMITED.....RESPONDENT

(Being an appeal from the judgment of Hon. Machage, SRM at Mariakani

in SRMCC No. 147 of 2010 delivered on 17th day of April, 2012)

JUDGMENT

INTRODUCTION

1. The Appellant's case is that he was injured in the course of his employment with the Respondent on 9th November, 2009. He filed a case being **Mariakani SRMCC No. 147 of 2010** in which he blamed the accident on the negligence of the Respondent and sought judgment in terms of special and general damages.

2. The case was heard by Hon. Machage SRM who delivered his judgment on 17/4/2012. He found the Appellant 100% liable for the accident and therefore dismissed the suit with no order as to costs. The Appellant was aggrieved by the said judgment hence he filed this appeal in which he is faulting the learned magistrate's finding on liability and the dismissal of the suit.

ISSUES FOR DETERMINATION

3. In my opinion, the main issue for determination is whether the learned trial magistrate was right in finding that the Appellant was 100% liable for the accident.

ANALYSIS

4. This being the first appeal, the court is mandated in law to revisit the case that was before the trial court afresh, analyze it, evaluate it and come to its own independent conclusion. However, the court must bear in mind that the trial court had the advantage of seeing and hearing the witnesses.

5. The Appellant's testimony was that on the material day, he was working at the Respondent's premises as a machine operator. He claimed that the machine he was operating automatically switched itself on, held the hand gloves he was wearing inside itself and thereby cutting his last two left fingers.

6. There seemed to have been no dispute in the trial court that the Appellant was injured while at work at the Respondent's premises. DW1, EDWIN ODHIAMBO admitted the same when testifying in court as follows:

> **"I was not a witness to the accident. True, he was injured at work..."**

7. The only dispute was on who between the Appellant and the Respondent was to blame for the accident. The Appellant blamed the accident on the Respondent's negligence and asked this court to reverse the trial court's decision and find the Respondent 100% liable for the same. The Respondent on the other hand claims that the Appellant was the author of his own misfortune and was wholly liable for the accident.

8. I have carefully gone through the proceedings of the trial court. The Appellant called two witnesses, himself and the medical doctor who examined him. The Respondent also called two witnesses, the supervisor who supervised how the Appellant was carrying out his duties and the engineer who was charged with repair and maintenance of the Respondent's machines.

9. The relevant part of the Appellant's testimony is as follows:

> **"The machine had been maintained in the morning but it had the same problem it switched itself on. I had alerted the employer. The gloves provided were not in good condition it was held in the machine."** (page 13 of the Record of Appeal).

10. On cross-examination, the Appellant stated as follows:

> **"Yes I have worked for 6 months. I was a machine operator. I knew how to operate the machine. I knew what it entails I knew what to do...I was using clip to place on the machine... there was no tongs on that day to use in holding the clips. I had used it but not on that day. I asked the supervisor to provide me with tongs (Mwacharo). He asked me to proceed with work without stopping...**
>
> **The accident occurred at 4 pm. I was using the same machine since morning. It had difficulty even then. It could switch itself on by itself. I nonetheless used it... The tongs were for safety reasons. I did not use tongs because they were not available."** (pages 14-15 of the Record of Appeal)

11. From the Appellant's testimony above, the following issues emerge:

> i. The Appellant was aware that the machine was not in good working condition but he proceeded to operate and use it.
>
> ii. The Appellant was aware that the gloves he was provided with were not in good condition but he went ahead and used them.
>
> iii. The Appellant was aware that tongs were a safety requirement when operating the machine but he chose to proceed without them.

12. The only conclusion that one arrives at from the above is that the Plaintiff was partially negligent in how he carried out his duties on the material day. Whether the Appellant was negligent is not in question. The only question is whether he was 100% negligent. Can the accident be attributed wholly to the negligence of the Appellant or was the Respondent partly to blame for the accident?

13. To answer that question, I am obligated to look at the evidence tendered by the Respondent at trial. DW1 testified as follows:

> **"I was on duty when the incident occurred. I was doing dysecting. I started at 8 am. I**

checked it sub 4 was well. It did not have any issue. It punches clips. My work was to ensure that it was well. I then tested by use of sample. I use tong. I sampled 10-20 then gave it to the operator.... I was not the one who was charged with the duty to repair the machine."

I understand **sub 4** was the machine in question.

14. DW1 went on to testify on cross-examination as follows:

"Dy sett. I check the machines beforehand. I found it was ok... I have no report to show that I checked and found it in good working condition... I am not a fundi myself.

True it can dysfunction any time. The machine was ok in the morning. I have no history of the machine in court."

15. DWII, FRANCIS AMUYUNA who was employed by the Respondent as Engineer Supervisor testified as follows:

"Should the machine break down, the operator reports to the dy sett. The dy sett reports to the production engineer. Our company has maintenance logbook. It registered breakdown on all machines. They are all recorded. On 4/11/09 had a report on three machines, breakdown sub 4 there was no problem made on that day."

The witness then produced the maintenance logbook but the same is neither part of the Record of Appeal nor is it available in the trial court's file. I have not had the benefit to look at it. However, from the testimony of DWII on cross examination, it is clear that the exhibit related to maintenance report for three machines other than the one in question.

16. On cross-examination, DWII stated as follows:

"The Defence exhibit is filled by the maintenance officer...it is filled on completion of the breakdown. It is not possible, it was repaired and faulted... They all go through routine maintenance check up... Had only three machines which were repaired on that day."

17. From the evidence of the two Defence witnesses, the following issues emerge:

i. No evidence was tabled to show that the machine in question (referred to as **sub 4**) was routinely maintained. No maintenance record was produced as the exhibit produced by the Respondent only related to three other machines and not the one in question. The machine may have well never broken down but that did not absolve the Respondent from routinely checking up and maintaining it. It does not also follow automatically that if the machine had never broken down, then it could not brake down on the material day.

ii. The person who verified the machine on the material day before the Appellant started operating it was not qualified and could therefore, in my opinion, not tell if the machine had a mechanical problem. DWI was very categorical that he was not the one who was charged with the repair (and I believe maintenance) of the machine and that he was not a "*fundi*". In fact, this was confirmed by DWII who testified that the dy sett (who was DWI in this case) was to report to the production engineer in case of a breakdown, a clear indication that the dy sett himself was not competent to handle the technical aspects of the machine.

iii. Even assuming that DWI was competent to repair and maintain the machine, he did not adduce any evidence to prove that he had checked the machine on the material morning and given it a clean bill of health. Furthermore, DWI admitted that a break down could occur any

time. Since he failed to produce a record of the history of the machine, it is only logical to believe the Appellant that the machine developed a technical problem on the material day.

18. In my opinion, therefore, both the Appellant and the Respondent were negligent: the Appellant being negligent for proceeding to work with faulty gloves and machine; and the Respondent for failure to competently maintain and repair the subject machine. Both must share liability but the greater liability should be on the shoulders of the Respondent because it failed to provide Appellant with the tongs.

19. I would therefore propose that the learned Magistrate's finding of 100% liability on the Appellant be substituted with a finding that both parties were liable and therefore liability be apportioned at 75% against the Respondent and 25% against Appellant.

CONCLUSION

20. Judgment is therefore entered for the Appellant against Respondent for 75% liability of Kshs. 300,000/- awarded by the lower Court. Appellant is also awarded Kshs. 2,000/- as proved special damages and costs of this appeal and of the lower Court case. The judgment of the lower Court is hereby set aside.

DATED and DELIVERED at MOMBASA this 20TH day of MARCH, 2014.

MARY KASANGO

JUDGE