REPUBLIC OF KENYA

High Court at Eldoret

Criminal Appeal 67 of 2012

PYRAMID PACKAGING LIMITED ..... APPELLANT

VERSUS

HUMPHREY W. WANJALA …..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. A. Onginjo (SPM) in Eldoret Chief Magistrate's Court Civil Case No. 21 of 2010 delivered on 29th October, 2010)

JUDGMENT

The Appellant herein was the Defendant and the Respondent the Plaintiff in a suit before the Chief Magistrate's Court in Eldoret, being Civil Suit number 21 of 2010. The Respondent sued for general and special damages for injuries he sustained in the cause of his duties at the Appellant's premises on the 21st August, 2009.

In paragraph 5 of the Plaint the Respondent averred that on the fateful day, he was diligently discharging his duties as a general worker, when by an act of negligence or blantant breach of statutory duty of care on the part of the Appellant's agents and/or employees, while he was pulling out materials from the mixer machine, the same (machine), it was suddenly switched on, as a result of which he sustained serious injuries. Particulars of negligence are given in the same paragraph.

In paragraph 7 (of the Plaint) particulars of injuries are given as follows:-

(i) Swollen and tender left hand with bruises.

(ii) Traumatic amputation of the left index finger (lost all the phalanges).

(iii) Traumatic amputation of the left middle finger (lost all the phalanges).

(iv) Traumatic amputation of the left ring finger (loot all the phalanges).

Special damages of Ksh. 3,251/= were claimed comprising Ksh. 1,500/= for medical report and Ksh. 1,751/= for medical expenses.

The learned Magistrate delivered her Judgment on 26/10/2010 in which she awarded the Defendant Ksh. 700,000/= for general damages for pain and suffering as well as Ksh. 11,835/= special damages. It is this Judgment that the Appellant has appealed against, citing the following grounds as per Memorandum of Appeal dated and filed on 18th November, 2010.

“1. That the learned trial Magistrate erred in law and in fact in holding the defendant 100%

liable despite overwhelming evidence to the contrary.

2. That the learned trial Magistrate erred in law and in fact in awarding damages whereas the Plaintiff did not prove his case on a balance of probability.

3. That the learned trial Magistrate erred in law and in fact in applying wrong principles while assessing damages.

4. That the trial Magistrate erred in law and in fact in awarding damages which were inordinately excessive in the circumstances.

5. That the trial Magistrate erred in law and in fact in shifting the burden of proof to the defendant contrary to law."

The five (5) grounds of appeal can be summarized into three:-

(a) That the Respondent did not prove liability against the Appellant.

(b) That the learned Magistrate applied the wrong principles of law in assessing the damages.

(c) That the damages awarded were excessively too high in the circumstances.

This is the first appellate court whose duty is re-evaluate the evidence adduced in the subordinate court both on points of facts and law and come up with its findings and conclusions. See **SELLER -VS- ASSOCIATED MOTOR BOAT CO. LIMITED (1968) EA, 123** and **STANLEY MAORE -VS- GEOFFREY MWENDA NJERI CIVIL APPEAL NO. 147 OF 2002 KLR**.

LIABILITY

I bear in mind that "**a court of appeal will normally not interfere with a finding of a fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle" - EPHANTUS MWANGI AND GEOOFREY NGUYO NGTIA -VS- DUNCAN MWANGI WAMBUGU (1982-1988) 1 KLR, 278**.

The Respondent testified as PW1. He stated that he was employed by the Appellant as a mechanical operator. That he was pulling out some materials out of the machine so that those materials do not mix with what was being fed into it (machine). That suddenly his colleague, without notice switched on the machine and his three fingers were amputated. That he was admitted at the Moi Teaching & Referral Hospital from 21/8/2009 to 25/09/2009. PW1 said that he blamed the Appellant as he was not provided with protective gear. He added that he has been rendered incapacitated to work as he is left-handed.

On cross-examination he explained that he could not salvage the situation as he could not reach the switch located three metres from the ground and the machine was operated by a mortar and electricity. That the mortars pulled his hand into the machine as a result of which the fingers were cut off.

PW2 was Doctor Samuel Aluda whose evidence I will consider later on.

The Appellant called one witness who testified as DW1, one Duncan Muchende. He too worked as a machine operator and he produced his letter of casual employment as D.Exhibit.1. His evidence was that the Respondent was not entitled to operate the machine but to bring materials to him. He said when the Respondent brought the materials to him in a trolley, he switched on the machine so as to remove the left-over materials. That that is when the Respondent put his hand in the machine and when he realized that his hand was stuck in it, he switched it off.

DW1 further testified that he Respondent was provided with gloves and overall as a requirement under the safety regulations, produced as D.Exhibit 3. That he (Respondent) deliberately failed to wear the

gloves and was therefore the author of his own misfortunes.

On cross-examination DW1 reiterated that the Respondent was not employed as a machine operator but worked in the mixing department. That he failed to wear gloves as a matter of choice and so could not attach blame to his employer. He further added that the safety regulations were read to all employees hence the Respondent was alive to precautions necessary to mitigate against an accident which included wearing of safety gear.

It is not in doubt that the Respondent was at the time assigned work at the mixing department. DW1 did confirm vide D. exhibit 2 that he (Respondent) was indeed on duty on the material date. I however poke holes in his denial that the Respondent should not have touched the machine. The Respondent was a general worker whose specific assignment is not given. He met the accident at a time he was doing duties assigned to him. Even if he was assigned the work of only delivering the materials, it was the duty of DW1 of ensuring that the machine is not switched on unless it was safe to do so. DW1 knew that there were other workers besides him in the machine area. He claimed to have been trained on how to operate the machine. This called on him to operate it cautiously in a manner that he did not endanger the lives of others. He failed to exercise this due diligence as demonstrated in D.Exhibit.3, which are Health and Safety Regulations at workplace.

He bound himself to the regulations by signing them on 7th August, 2008. My attention is drawn to regulations 5, 9 and 14 which read as follows:-

"**5. That, I know I must be attentive at all times I am at work, as the machines can cause harm and injury if mishandled.**

9. That I am aware I must not leave my machine unattended,

while it is in motion. I am aware this may result in damage, harm or injury.

14. That it is my obligation to ascertain the safety of the task performed, before I undertake it."

It is surprising that, even after having read and understood the regulations, he did the complete opposite. To the contrary, no such regulations were produced on behalf of the Respondent. DW1 could not have acted on behalf of all other workers. Each and every worker should have executed his part of bargain. In the same breathe, there is no prove that the Respondent had been assigned any over-coat or gloves. For these reasons, the DW1's employer (Appellate) must be held vicariously responsible for what befell the Respondent.

Moreso, I find the filed submissions by the Appellant contradictory. On the last paragraph at page 1 of the same, it is admitted that the Respondent was authorized to operate the machine and not to supply the materials. The contrary is said by DW1, who testified that Respondent's duty was only to supply the materials and not operate the machine. My view is that, in either capacity, one cannot divorce the duty of operating the machine and that of either feeding it with materials or removing the left over materials. The Appellant is being evasive so as to avoid liability and I am not persuaded to belief that the Respondent was the author of his misfortunes. After all, when he undertook to remove the materials from the machine, he did not know that the machine would be switched on.

I agree with the Appellant's submissions before the lower court that the law of negligence is premised, among other things, on the concepts of foreseeability and that the employer takes reasonable precaution to guard against the employee's negligence.

In this regard, the Respondent had not foreseen that any person, let alone DW1, would have switched on the machine without either alerting him or ensuring that it was safe to do so. Indeed, as rightly defended

by the Appellant, DW1 was properly trained and his employer ensured he adhered to the safety rules in the factory. To do the contrary meant that he was careless, utterly negligent and undertook his work in a casual manner. Such negligence cannot be apportioned to the Respondent as he was unaware of the acts of DW1 that led to the accident.

In effect I find that the learned Magistrate did not misapprehend the evidence or act on wrong principles of law and fact in finding that the Appellant was 100% liable. Evidence on record clearly demonstrates that the accident occurred as a result of direct breach of duty on the part of the Appellant's Employer, for which the Appellant must be held 100% vicariously liable.

QUANTUM

It is now well settled principle of law as held in **KIMOTHO & OTHERS -VS- VESTERS AND ANOTHER C.A. NO. 4 OF 1984** that:-

"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that in arriving at the award, the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect."

The Respondent had submitted on an award of Ksh. 900,000/= and had relied on three (3) authorities:-

1. **BARRY PROUD FOOT -VS- COAST BROADWAY CO. LTD & ANOTHER NAIROBI HCCC. NO. 1265 OF 1997** in which general damages of Ksh. 800,000/= were awarded for fractured ribs and permanent paralysis of his left hand.

2. **DAVID MWAWUGHANGA KINGAGA -VS- NARCOL ALUMINIUM ROLLING MILL LIMITED. MOMBASA HCCC. NO. 133 OF 1998**. The Plaintiff in this case suffered traumatic amputation of the whole of the left middle and ring fingers of two phalanges of the little finger and last phalanx of the index finger. An award of Ksh. 540,000/= in general damages was made.

3. **SAMUEL KAZUNGU -VS- UMOJA RUBBER INDUSTRIES LIMITED MOMBASA HCCC NO. 350 OF 1996**. The Plaintiff herein suffered traumatic amputation of his index middle and ring finger with laceration of the little finger. General damages of Ksh. 500,000/= were awarded.

The Appellant's Counsel on the other hand submitted that an award of Ksh. 250,000/= would be adequate. They relied on the following cases:-

1. **AKAY INDUSTRIES LTD -VS- ABDALLAH AMANI NAKURU CIVIL APPEAL NO. 22 OF 1998.** The Plaintiff's hand fell into a moving machine. He was injured and while in hospital his left mid- finger was amputated and his left index finger mangled. Disability was assessed at 16%. An award of Ksh. 200,000/= was made, which was upheld by the Court of Appeal.

2. **SAMUEL KARIUKI -VS- FOTFORM LTD – NAIROBI HCCC. NO. 1949 OF 1993** plaintiff sustained loss of the index middle and ring fingers of the left hand distal phalanx. He could not form a fist with the left hand. General damages for pain, suffering and loss of amenities were assessed at Ksh. 300,000/=.

3. **BENSON NJAU WAINAINA -VS- MOGOYA CONSTRUCTION AND ENGINEERING WORKS NAIROBI HCCC. NO. 2509 OF 1987.** The Plaintiff sustained a crush injury to the left hand resulting in loss of two fingers of the left hand. Disability was assessed at 25%. General damages of Ksh. 130,000/= for pain, suffering and loss of

amenities and Ksh. 299,376/= for loss of future earnings were awarded.

Two medical reports were produced. That of Dr. S. I. Aluda MD. Dated 8/10/2009 by the Respondent indicates that the Respondent lost all useful function of his arm due to the amputation of three fingers. That of Dr. Z. Gaya dated 9th April, 2010 was prepared at the request of the Appellant. It confirms that the 2nd, 3rd and 4th fingers were amputated. He noted that the 5th finger was also functionless. He assessed the degree of permanent disability at 25%.

According to the Respondent he had lost chances of marrying due to the disability. He is left handed and the disuse of the left hand has left him totally frustrated. The Appellant further urge the court to consider two other authorities, namely:-

1. **PYRAMID PACKAGING LTD -VS- WESLEY GESANDA OMWENGA – ELDORET HIGH COURT CIVIL APPEAL NO. 11 OF 2004** The Hon. Judge reduced the award of general damages from Ksh. 150,000/= to Ksh. 100,000/= for a cut wound on the right hand and soft tissue injuries to the right hand and wrist joint.

2. **KIGARAGARI -VS- AYA (1985) KLR, 273 –** The Court of Appeal refused to disturb the award of Ksh. 250,000/= general damages awarded by the High Court. The plaintiff before the trial court had been knocked down by a motor vehicle. She was hospitalized for 26 days and amputation of one of her legs done. The injuries left her walking with aid of a walking stick. She could not have sexual intercourse and was mentally stressed.

The two authorities are however not comparable with on the instant.

The Respondent was hospitalized for about one month and four days (per discharge summary produced by the Respondent). This confirms that injuries were by no means serious. He has lost almost all the use of his left hand. The award was made in the year 2010. The court took into account the inflationary trends at the time. Considering all factors, the submissions made and the cited case law, I would consider an award of Ksh. 650,000/= as adequate compensation for pain, suffering and loss of amenities.

SPECIAL DAMAGES

The parties recorded consent that the same be payable at Ksh. 11,835/=. I will not therefore disturb the amount awarded.

CONCLUSIONS

In the sum I make the following awards:-

(a)	General damages	Ksh. 650,000/=
(b)	Special damages	Ksh. 11,835/=
	TOTAL PAYABLE	**Ksh. 661,835/=**

The Appellant shall pay costs of the lower court proceedings based on the current award. This appeal has partly succeeded and I therefore make no orders as to its costs.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 28th day of March, 2013.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:-

Mr. Kiplimo for the Appellant

Mr. Nyamwega holding brief for Terer for Respondent