REPUBLIC OF KENYA

IN THE HIGH COURT OF NAKURU

CIVIL APPEAL NO 52 OF 2006

MEGA SPIN LTD.....APPELLANT

VERSUS

GIBSON NYAMESA NGOGE.....RESPONDENT

J U D G E M E N T

On 16/3/2006, the Senior Resident Magistrate- Nakuru (Emily Ominde) entered judgement in favour of the respondent, Gibson Nyamesa Ngoge, against Mega Spin Ltd, the appellant herein. The Court apportioned liability at 90% as against the appellant and made an award of Ksh50,000/= in general damages and Ksh3,000/= , special damages. The appellant being aggrieved by the said decision, filed this appeal on 5/4/2006. The grounds of appeal are as follows:

1. That the learned trial Magistrate erred in Law and in fact finding that the Respondent had proved his case against the appellant to the required standards.

2. That the learned trial Magistrate erred in Law and fact holding that the Respondent was injured on the material date despite the Respondent's failure to produce substantial evidence to the required standard and by opting to rely on the treatment documents and medical report which cannot be proof of injury occurring at the appellant's work place.

3. That the learned trial Magistrate erred in Law in the respondent's treatment notes after it became apparent and she noted that the same could have been exaggerated by altering the same.

4. That the learned trial Magistrate erred in Law and in fact in finding that the appellants provided a defective machine yet the same had not been pleaded by the plaintiff and no evidence was led to that effect.

5. That the learned trial Magistrate erred in Law and in fact failing to appreciate the principles applicable in a claim for negligence and finding the appellants 90% liable even after the respondent conceded that he was injured by the moving part of the waste and as such, the Respondent was at fault and should have shouldered a higher contribution.

6. THAT the learned trial Magistrate erred in Law and in fact in finding the appellants 90% liable yet the plaintiff admitted that he was competent and properly instructed to do his duty and that there were on duty, site mechanics to whom any malfunctions of the machinery was supposed to be reported to.

7. That the learned trial Magistrate erred in law and fact in holding that the machine ought to be covered yet it was never evidenced that it was reasonable and/or practical so to do and/or that

was not covered at all.

8. That the learned trial Magistrate erred in law in fact in failing to consider the principles applicable in awarding of damages by awarding damages that were excessive in the circumstance.

The respondent worked as a machine operator for the appellant. While on duty on 30/5/2005, while removing salvage waste from the machine, he was injured on his left hand small finger and reported to the supervisor who gave first aid and he was taken to the Provincial General Hospital Nakuru. He produced the treatment letter as evidence. The Company also filed for him LD 104 form, which he produced as (PEX2). He was seen by Doctor Omuyoma who prepared a report (PEX3). He was also examined by Doctor Malik who was instructed by the appellant and his report was also produced. He blamed the Company for not providing him with gloves. He claimed to have been injured by the same machine three months earlier but the supervisor, Mr Ongeri had not taken any action.

In cross examination, the respondent admitted that the injury was accidental and that he was trying to rectify the machine while it was in motion and that if he had stopped it , he would not have been injured.

The defendant called one witness, Mr Josiah Mongere the mechanic who repairs machines for the appellant and who was on duty on 3/5/05. He recalled the respondent coming to him with an injured finger which was bleeding and claimed to have been injured. He said that it was not the respondent's duty to unclog the machine but the work of the mechanic and it should have been reported to him.

There is no dispute that the respondent was injured in an industrial accident. In the plaint, he blamed the appellant for not providing a safe working environment ,a proper working system, exposing the plaintiff to danger which it knew or ought to have known, all was in breach of the terms of the contract The defendant denied those allegations and put the respondent to strict proof or contended that the respondent caused the injury to himself or substantially contributed to the injury.

Mr Musangi advocate argued the appeal on behalf of the appellant and submitted that these facts are similar to those in JORAM *KARANI BIJETI Vs CADBURY SCHWEPPES KENYA LTD HCC 4507/91* where the plaintiff failed to switch off a machine before starting to clean it and as a result he was injured. The Court apportioned liability at 10% as against defendant. In *JOHN OUKO YOGI Vrs SPIN KNIT Co LTD CA279/09* where the Court of Appeal upheld the High Court's decision to dismiss the claim where the appellant had failed to remove waste from a machine using some piece of metal and instead used his bare hands and was injured. For the submission that the award was excessive, counsel relied on the decision of *NAKURU TIMBER CASES VRS KEPHAGH SIMINWI NJOMO CA 28/2001*.

The respondent in this case admitted that he had worked as a machine operator for over 4 years. He had experience and knew how it operates. He admitted that the machine had a start button, slow motion button and stop button. However he tried to rectify the machine when it was in motion. He agreed that if he had stopped the machine he would not have been injured. The respondent knew of the defect in the machine and though he could have called the mechanic to repair it , he chose t o take upon himself a job that should have been done by another .

By choosing to repair the machine while it was in motion the respondent embarked on a course of action which he knew or ought to have known that it could cause injury to him. He volunteered to undertake a risky and dangerous venture.

The Respondent blamed the appellant for not providing him with gloves or failing to cover the machine so that the waste could go the correct direction. Even if that was the case, yet had the respondent switched off the machine before embarking on repairing it, he would not have been injured.

In the defence, the appellant had pleaded the doctrine of *volenti non fit injuria* and that the respondent was the sole cause or substantially contributed to the injuries that he sustained. The Respondent did not file any reply to the defence to rebut those allegations. Order VI Rule 9 provides that an allegation of fact made by a party in his pleadings shall be deemed to be admitted by the opposite party unless it is traversed by that party in his pleadings or is a joinder of issue. The respondent is deemed to have admitted the averments in the defence. In the instant case, it is true that the appellant did not provide gloves nor did he cover the machine but the respondent bears the most blame since he decided to clear the machine without switching it off. In my judgement , I will apportion liability at 10% as against the appellant and 90% as against the respondent.

The appellant also claims that the award of 50,000/= was excessive in the circumstances, considering that the respondent only suffered minor injuries . The hospital card issued to the respondent on 30/3/05 indicates that he had sustained a cut wound on the left hand small finger . Dr Omuyoma examined the respondent later, filed his report dated 9/5/2005 in which he observed that the respondent sustained a deep cut wound on the left small finger and soft tissue injury on the left small finger and it left a scar. Doctor Malik prepared a report in respect of the respondent dated 5/8/05 and he found no visible scar on the little finger and it was free of pain. He opined that the injury sustained was minor soft tissue injury and the respondent had no permanent disability. Before the lower Court, the plaintiff's counsel made a submission of Ksh100,000/= as general damages, while the appellant's counsel submitted that the respondent be paid a sum of Ksh40,000/=. The Court made an award of Ksh50,000/= and I find that in view of the appellants submission of Ksh 40,000/= as general damages, the award of Ksh 50,000/= was not in any way excessive. The Court awarded only 10,000/= more than what the appellant had suggested. It is well settled law that the Court will not interfere in a trial Court's award unless it is based on the wrong principles or if the award is manifestly excessive or too low or the court considered irrelevant factors . I find no good reason to interfere with the said award. The appeal succeeds on liability. The respondent will have judgement as follows:-

General Damages	Ksh.50,000.00
Proven Special Damages of	Ksh. 3,000.00
TOTAL	**Ksh.53,000.00**
Less contribution of 90%	47,700.00
TOTAL	**5,300.00**

Since the appeal is partially successful, I award costs at the same percentage, interest on damages to be assessed as from the date of award on 16/3/06.

Orders accordingly.

DATED AND DELIVERED THIS 3rd DAY OF JUNE 2011

R P V WENDOH
JUDGE

PRESENT
Mr Ochang for appellant
Mr Nyamwange for Respondent
CC: Kennedy Oguma