REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 221 OF 2007

(Being an appeal from the Judgment and Decree of the Honourable Mrs J. Oseko (SPM) delivered on the 27th November 2007 in Molo SPMCC No. 173 of 2006)

OLIVE MUTHONI KARURI……..…….APPELLANT

VERSUS

NJORO CANNING FACTORY (K) LTD…...……...……RESPONDENT

JUDGMENT

The Appellant sued the Respondent for -

(a) General Damages,

(b) Special Damages for Ksh 2,500/=,

(c) Costs of this suite and interest,

(d) Any other relief *(which the court may deem fit to grant).*

After due hearing and evidence on both sides, the lower court dismissed the Appellant\'s case on the principal ground that the appellant had not proved her case on the usual standard in civil cases, the balance of probability.

Aggrieved with that judgment, the appellant appealed to this court on nine grounds namely -

(1) that the learned trial magistrate erred in law and in fact in dismissing the Appellant\'s suit despite clear evidence by the Appellant that the Respondent was negligent and in breach of common law duty of care.

(2) that the learned trial magistrate misdirected herself in law and in fact in finding that the Appellant got injured when she inserted her finger into the machine a finding that is contrary to the undisputed fact that the Appellant got injured by a drive belt that had got disengaged.

(3) that the learned trial magistrate erred in law and in fact in giving undue weight to the evidence of DW1 Leonard Odhiambo, Personnel and Administration Manager of the Respondent on the safety regulations as the said witness joined the employment of the Respondent long after the industrial accident and his evidence on the circumstances of the accident and safety regulations at the time of the accident is of little probative value.

(4) that the learned trial magistrate erred in law and in fact in finding the plaintiff negligent on the basis that the Appellant had been given instructions not to touch moving parts of a machine and that in case of a problem the Appellant was supposed to stop the machine and alert the supervisor as the Defendant\'s only witness DW1 Leonard Odhiambo was not in the employment of the Respondent to testify to that fact.

(5) that the Learned Trial Magistrate erred in law and in fact in not finding that the milling machine was faulty a fact known to the Respondent and thereby the Appellant was unfairly exposed to the risk of injury.

(6) that the learned trial magistrate erred in law and in fact in not finding that the Respondent was in breach of its common law duty of care by not providing the Appellant with gloves that could have prevented the injury or minimized the extent of the injury yet the Appellant was working at a factory engaged in feeding a milling machine.

(7) that the learned trial magistrate erred in law and in fact in not finding that the milling machine was uncovered and therefore under the Factories Act, there ought to be strict liability against the Respondent.

(8) that the learned trial magistrate erred in law and in fact in holding that the Appellant had been given safety instructions and adequately trained which was wholly inaccurate as no proficiency certificate was produced in evidence nor was there any evidence to support that finding as the Appellant was a casual worker newly employed.

(9) that the learned trial magistrate erred in law and in fact in failing to assess the quantum of damages.

And on those grounds prayed that -

(a) Judgment of the subordinate court be set aside and in its place there be a finding in favour of the Appellant both on liability and damages be assessed, and

(b) Costs of the appeal and of the subordinate court be awarded to the Appellant with interest therein.

The facts on either side are not disputed. The Appellant was an employee of the Respondent and was deployed in the Respondent\'s factory on duty of feeding onions on a milling machine. The Appellant\'s testimony was that the drive belt of the milling machine came off in the course of her feeding the onions. She testified that the milling machine was faulty as the drive belt frequently got off.

According to the Respondent\'s standing instructions, an employee is required to wait for 4 minutes before touching or returning the belt on its wheel. On this occasion, the appellant testified that she waited for the 4 minutes, but when she put her hand to restore the belt, the machine was still running, and that it crushed her right hand fingers. The Appellant claimed that the drive safety area was not covered and she had no gloves to minimize the injuries. The Appellant, therefore claimed that the Respondent breached its duty of care to her, an employee.

On its part, the Respondent denied any negligence on its part, and attributed contributory negligence on the Appellant\'s part.

I agree with the submissions of the Respondent both before this court, and the lower court. The law is settled that in claims based on negligence, a plaintiff must prove on the balance of probability that -

(a) the Defendant owes him a duty of care,

(b) the Defendant has breached that duty of care, and

(c) the plaintiff has suffered injury or loss as a result of that breach.

I also agree with the Respondent\'s Counsel\'s submission in the lower court and this Court, that when a contract of employment exists, the Defendant\'s or Employer\'s Duty of Care to an employee translates to provision of a safe system of work, and this entails -

(1) provision of sufficient training in work at the machine, or particular location,

(2) provision of protective gear, and

(3) provision of adequate supervision.

The Appellant\'s evidence both in-chief and in cross-examination was consistent. She and other operators working in the milling machine area were instructed on the manner of performing their work. She switched off the machine when the belt came off the motor. She waited for 4 minutes and then attempted to replace the belt when her fingers got caught as the motor was still in motion.

The Appellant accepted in cross-examination that they were provided with adequate supervision, and she was not authorized to replace drive belt which came off the machine. She was required to report to her supervisor in the event of any technical problem. There was no explanation from the Appellant why she failed to call the supervisor after she had switched off the milling machine.

Although DW1 the Personnel Manager, *(and the only witness called by the Respondent),* testified and produced a copy of the Respondent\'s Safety Rules, dated 25th November 1985, none of these rules provides that the employee will be provided with protective gear. The Rules are basically the Respondent\'s safety rules to minimize accidents to employees and to the factory itself. For example, Rule 4 of the Safety Rules requires employees to *"keep hands and feet off moving machinery and equipment"*, and Rule 6, says, *"keep safety guards and general rails in place"*. There is no statement in the rules, that moving equipment will generally be fenced so that only employees trained in installation and repair of such equipment are authorized to repair them.

What comes out in this case is that the **"Motor"** which drives the belt(s) in the milling machine is either exposed or not sufficiently guarded so that a mill operator who is merely trained to feed raw material *(onions)* on the machine, is over a period of familiarity with the machine, tempted to replace or restore a moving part, like the belt or chain in a bicycle.

Whereas such replacement of a bicycle chain has no risks, because there are no other moving parts, any such attempt to replace a belt from an electrically driven motor is fraught with the danger.

In this case, the appellant threw all caution to the air. Even measuring 4 minutes in the flow of an electric current is not without danger, the motor may still be moving after the 4 minutes have passed. Clearly the better option for the Appellant was to call her supervisor to fix the fallen belt, and not try to do so herself. To a very large extent, the Appellant was the author of her own unfortunate injury. I would hold the appellant to be 85% to blame for the accident.

For failure to adequately fence the machine so that untrained operators *(in repair)*, such as the Appellant have no access to it, and also for failure to give the milling machine operator protective gloves, the Respondent failed in its duty of care, and I would hold the Respondent 15% liable for the accident.

The injuries according to Dr. Omuyoma\'s evidence healed well, and the Appellant suffered no

permanent or partial incapacitation. Those being soft tissue injuries, I would award the Appellant shs 120,000/= for injuries less 85% contributory negligence.

Special damages of Kshs 2,500/= were pleaded and proved. I would award the appellant that sum. I would also award the Appellant witness expenses in the sum of Kshs 5,000/= making a total of Ksh 7,000/=.

In summary therefore the appellant\'s appeal succeeds, the judgment of the lower court is set aside and there shall be judgment for the appellant in the sum of Kshs 31,000/= made up as follows -

(i) General Damages Kshs 120,000/=

Less 85% contributory negligence Kshs 96,000/=

Kshs 24,000/=

(ii) Special Damages Kshs 7,000/=

31,000/=

I would also allow the appellant costs in this court and the lower court.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 13th day of October, 2011

M. J. ANYARA EMUKULE
JUDGE