IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.160 OF 2005

GACHAGUA SAWMILLS LIMITED……………………………..…APPELLANT

VERSUS

ANTHONY OJIAMBO OLADI …………………………………..RESPONDENT

[An appeal from the Judgment in Nakuru C.M.C.C.NO.700 of 2002 by Hon. A.B. Mongare, Resident Magistrate, Nakuru dated 3rd August, 2007]

JUDGMENT

The respondent, Anthony Ojiambo Oladi was employed on a casual basis as a mechanioc for the appellant, Gachagua Saw Mills Limited.

On 1st July, 1998 while lifting a trailer using a jack, the trailer slipped and the jack hit the respondent on the left hand injuring the index finger. He was taken to the hospital for treatment. On 29th January, 2002, nearly 3½ years later Dr. Wellington K. Kiamba, examined the respondent and concluded that he suffered severe soft tissue injuries of the left index finger which reduced its function by 20%. He assessed the respondent's disability at 2%.

On behalf of the appellant, evidence was led by Patrick Mbugua Muturi, a supervisor who confirmed that indeed the respondent was injured as claimed. He, however, denied that the appellant was liable and instead blamed the respondent for not properly fitting the jack.

From the foregoing evidence, the learned trial magistrate (A.B. Mongare, Resident Magistrate) found the appellant 90% liable and awarded to the respondent general damages in the sum of Kshs.108,200 and Kshs.2000 in special damages.

The appellant was dissatisfied and preferred this appeal on the following summarized grounds

1) that the learned magistrate misdirected herself in holding that the respondent had proved his case against the appellant;

2) that there was no evidence to show that the appellant was liable;

3) that the learned magistrate erred in the apportionment of liability;

4) that the trial magistrate misdirected herself in awarding to the respondent general damages.

These grounds were argued before me on 28th March, 2011, counsel for both parties having filed their respective submissions. Submitting on the appeal, learned counsel for the appellant argued that although

the learned trial magistrate found that the claim based on the tort of negligence was statute barred, she nonetheless proceeded to enter judgment against the appellant for negligence; that no evidence was led to support the claim based on breach of contract of employment; that the award of damages was excessive.

The appeal was opposed by learned counsel for the respondent who maintained the issue of limitation with respect to negligence was not a ground of this appeal and could not be raised in oral argument; that from the respondent's evidence breach of contract was proved.

I have briefly explained how the accident in question occurred. This court being the first appellate court must, before embarking on the consideration of the merit or otherwise of the appeal is enjoined to re-evaluate the evidence presented at the trial in order to arrive at an independent conclusion.

There can be no doubt that the respondent's claim was based on both negligence and breach of contract. It is also common ground that the learned trial magistrate found as a matter of fact in her brief ruling of 22nd August, 2003 that the claim under negligence was statute barred. She however ordered the respondent to seek leave to file the suit out of time, which appears not to have been heeded. That being the case, what was left for consideration and determination before the learned magistrate was whether in terms of paragraphs 4 and 6 of the plaint, the appellant was in violation of a statutory duty.

Paragraphs 4 and 6 read in the pertinent part as follows:

"4. It was a term implied and/or expressed in the plaintiff's contract of employment with the defendant or otherwise it was the defendant's duty to take precaution for the plaintiff's safety whist engaged upon his said work.

5. ………………………………………………………………

6. In the alternative and/or further to the foregoing and without prejudice to anything herein contained the plaintiff aver that the said accident occurred owing to breach by the defendant of its contract with the plaintiff.

PARTICULARS OF BREACH OF CONTRACT

………………………………………………………………"

Although as a general rule general damages are not recoverable for breach of contract, in accident cases involving injuries to an employee in the course of employment, such damages have invariably been awarded. See **Tom Mboya Kombo** V. **Nairobi Frame Industries**, Civil Appeal No.347A/2002.

Having found as a common ground that the respondent was injured in the course of his duty and that in such situations general damages may be awarded, the next issue for determination is whether the appellant was in breach of its statutory duty and/or contract of employment..

At paragraph 560 of Halisbury's law of England, 4th Edition, Vol.16, it is stated, *inter alia* that:

"At common law an employer is under the duty to take reasonable care for the safety of his employees in all the circumstances so as not to expose them to unnecessary risk."

(Emphasis supplied)

See also statutory duty on the employer under **section 34** of the **Factories Act** and alsothe decision in **Makala Maku Mumende** V. **Nyali Golf & Country Club** C.A. No.16 of 1989. In the latter, the court explained that::

"Just because an employee accepts to do a job which happens to be inherently dangerous is, in my judgment, no warrant or excuse for the employer to neglect to carry out his side of the bargain and

ensure the existence of minimum reasonable measures of protection. The necessity is the greater for an employer to protect his employee from danger after a warning following a potentially dangerous incident during which no injuries are sustained"

(Emphasis supplied).

The respondent testified as follows:

"I was fixing gater both on the trailer. I did not have a protective gear. I was using a jeck (sic). The jerk (sic) hurt me. While I was trying to lift the Trailer the trailer slipped and hit me on the left hand……………………..… I was not given protective gear. The weather was wet. That also contributed."

In cross-examination, he added that:

"The gadgets I was using were defective. I was not forced to work. The mechanic confirmed that the apparatus were defective."

From the foregoing statement, the respondent was blaming the accident on his employer, the appellant for having given him a defective jack and for failing to supply him with a protective gear.

The appellant in my considered view failed to ensure the existence of minimum reasonable measure of protection to ensure the protection of the respondent while engaged in his work as a mechanic. Hand gloves would have minimized the extent of injury to the hand. The respondent's allegation that the Jack was defective has not been controverted.

On the other hand the appellant cannot be fully blamed for the accident. The respondent, as a mechanic ought, for his own safety, to have been more careful in lifting the trailer in a wet weather. To that extent I will apportion liability at the ratio of 30:70 against the appellant.

Before I leave the issue of liability, it was argued that the fact of the occurrence of the accident was doubtful for the reason that it was not clear whether the respondent was first treated at Elburgon Nyayo Hospital or Molo District hospital. The basis of this argument was a chit produced as P. Exhibit 1. That particular exhibit is missing from this record as well as the lower court record. I am unable in the absence of that exhibit to decided one way or another as to the alleged discrepancy.

Turning to the issue of quantum, it is noted that the only question raised is whether it was in order for the learned trial magistrate to award general damages for breach of contract. I have answered the question in the affirmative in the previous paragraph. Yes, the court can award general damages arising from breach of statutory duty resulting in personal injury.

Other than the ratio of contribution, I find no basis to interfere with the rest of the decision. Appeal is allowed to the extent stated and judgment entered as follows:

General damages Kshs. 120,000.00

Special damages - Kshs. 2,000.00

Less 30% - Kshs. **85,400.00** plus interest.

I award half of the costs of this appeal to the appellant.

Dated, Signed and Delivered at Nakuru this 4th day of October, 2011.

W. OUKO
JUDGE