



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CIVIL APPEAL NO. 61 OF 2008

CROWN INDUSTRIES LTD APPELLANT/ ORIGINAL DEFENDANT

VERSUS

BENEDICT OMONDI OPIYO RESPONDENT/ ORIGINAL PLAINTIFF

(Being an appeal from the Judgment of the Hon. A.N. Ongeru Esq Principal Magistrate delivered on the 22nd day of January 2007 in CMCC No. 11124 of 2004 at Milimani Commercial Courts, Nairobi)

JUDGMENT

I. INTRODUCTION

1. The relationship between the appellants and the respondent is that of master/servant. In brief on the 29th October 2001, the respondent, a male adult then aged 20 years old had worked at the appellant's factory for one year. He was assigned to work at six machine that is known as a cake moulding machine. He worked with the said machine but on reaching the third machine, his hand was crushed to his left hand. He also had a partial and fatal injury of the left arm.
2. The respondent attributed the cause to the machine having a rope tied to the safety guard.
3. The appellant's witness stated the machine was in good working condition more so when the machine was checked after the accident.
4. The trial magistrate found the appellant liable for the accident at 100% and awarded Ksh. 400,000/= as damages in tort for pain and suffering.
5. Special damages were awarded of Ksh. 2,500/= on the 22nd January 2007.
6. Being dissatisfied with this award, the appellant original defendant filed an appeal to this High Court on 12th February 2008.

II APPEAL

7. The grounds of the memorandum of appeal being:-
 - i) *The learned magistrate erred in law and fact in finding that the respondent had proved his case on a*

balance of probabilities.

ii) The learned magistrate erred in fact and law in awarding damages which were manifestly excessive in the circumstances.

iii) The learned magistrate erred in law and fact in holding that the appellant were wholly liable to the accident.

iv) The learned magistrate erred in law and fact in failing to weigh all the evidence placed before her before delivering the judgment.

v) The learned magistrate erred in fact and law in failing to take into consideration all documents produced and in particular both medical reports and the submissions filed by the applicants.

8. In the arguments put forward to this court, the appellant/employer stated that the machine was to run automatic. The respondent employee opted to put the machine on manual mode. The respondent employee had no formal training. He did not know it was risky to put his hands in the machine. The machine itself was in good working condition.

9. By his action, the appellant was of the opinion that there was contribution to the occurrence of the accident by the respondent.

10. On the issue of quantum, the award of Ksh. 400,000/= was excessive. The injury sustained was just a crushed injury. That they prayed the judgment be set aside with costs to them.

11. In reply, the respondent stated that the machines he was asked to attend to and did, were six. There was a rope tied to act as a safety guard. His hand was crushed in the course of his duty.

12. He prayed that the respondent be held fully liable for the accident.

13. As to quantum, the hand was not only crushed but the trauma suffered to it was grave. The award of Ksh. 400,000/= was not excessive.

III OPINION

14. The condition of the machine are said to have been in good working order. The issue was the knowledge that the respondent had been in employment for one year and was left without supervision to man six machine. If per chance one year was sufficient for him to have actually mastered the machine, it was questionable to have a rope act as a safety guard. As a result the appellant must take responsibility for this injury. I would not interfere with the findings of the trial magistrate on liability.

15. As to the issue of quantum, I look at the injury sustained:

**R.P. Shah
MB ChB
F.R.C.S.**

15.1 Male adult aged 20 years in 2001

15.2 Injury

i) Crush injury to thumb

ii) Middle finger and ring finger of left hand

iii) **The injury was treated by dressing, medication and physiotherapy**

15.3 In 2005, 4 years later after the accident, the left middle and left ring finger were slightly bent with some restriction. The left thumb was lost.

**Dr. M Kinuthia
MB ChB**

As a general practitioner

He described the injury to include amputation of the terminal phalanx left thumb.

This left thumb was refashioned.

There was deformity of the left middle finger left index finger and left ring finger.

16. The trial magistrate awarded Ksh. 400,000/=.

17. Special damages of Ksh. 2,500/= pleaded was awarded.

18. The plaintiff respondent most certainly sustained serious injuries that should be described as grievous harm.

19. I would find that this court would not interfere with this award given by the trial magistrate. Partial loss of the thumb was together with deformity of the fingers, a serious injury. Interest to run on special damages from date of judgment.

20. The appeal is dismissed with costs to the respondent in this appeal and in the subordinate court case.

Dated this 3rd Day of October 2011

**M. A. ANG'AWA
JUDGE**

1. *Advocate:*

1) *E.G. Kimani instructed by M/s Kibuchi & Co Advocates for the appellant/original defendant*

2) *E. Otieno instructed by M/s Muriuki Momba & Co Advocates for respondent/original plaintiff*