REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NO. 43 OF 1998
(Being an appeal from the judgment of the Resident Magistrate at Nakuru Hon. G. N. Ombongi in CMCC No. 1734 of 1995 dated 24th November, 1996)

MWANGI NJAU……..…….....….
……APPELLANT
VERSUS
HARDWOOD ENGINEERING WORKS LIMITED…….....….
…….……..DEFENDANT

JUDGMENT

The Appellant was the Plaintiff in Nakuru SRMCC No. 1734 of 1995 in which he sued the Respondent *(then Defendant)* and was awarded Kshs 40,000/= as damages. Dissatisfied with the said award the Appellant appealed to this court in an Amended Memorandum of Appeal dated 8th August 2005 on six grounds -

(1) THAT the learned trial magistrate erred in law and in fact in finding that the Appellant was liable to 50% contributory negligence when there was no basis both in evidence and in law for such a finding.

(1a) THAT the learned trial magistrate erred in law and misdirected himself on the legal principle to be considered in awarding general damages and hence arrived at the wrong conclusion in awarding a mean for loss of finger.

(2) THAT the learned trial magistrate erred in law in failing to consider that the loss of a finger on right hand had drastically reduced the efficiency of the right hand and that an award of Kshs 40,000/= was inadequate.

(3) THAT the learned trial magistrate exercised his discretion wrongfully in awarding damages and hence arrived at the wrong conclusion.

(4) THAT the learned trial magistrate failed to give a breakdown of the general damages and to itemize each head as required by law and hence arrived at the wrong conclusion.

(5) That the learned magistrate erred in law in failing to award damages pain and suffering, loss of future earnings and disfigurement.

(6) That in all the circumstances of the case the award of Kshs 40,000/= was too mean and inadequate.

The Appellant was originally represented by the late Mirugi Kariuki of the firm of Mirugi Kariuki & Co. Advocates. The said firm withdrew from acting for the Appellant way back on 8th October, 2008. When the appeal came up for hearing on 20th July 2010, the Appellant told the court that his Advocate, the late Mirugi Kariuki had died. He needed help. He is permanently disabled, he is unable to hold anything with his right hand.

According to an Affidavit of Service sworn by one Charles Wanjohi Mwangi, a process server, he

served the Respondents Advocates, M/s Susan Kahoya & Co. Advocates whose offices are situate at Pan African Life House on 22nd June 2010, by tendering a copy of the Hearing Notice to Mr. Mania, a Court Clerk of the said firm, who received by signing and stamping and dated the copy, 22.06.2010, 10.30 a.m.

Despite service of the Hearing Notice, the Appellant was not represented at the hearing of the Appeal herein, and hearing proceeded without the said Advocates for the Respondent.

The Appeal in my view raises two issues **firstly**, liability and **secondly** quantum of damages.

From the pleadings, and subsequent evidence given by the Appellant and the Respondent's Managing Director, the Appellant contended that the accident was caused by the negligence of the Respondent. On its part the Respondent contended that it was not negligent at all.

In brief, the facts were the following. The Appellant was an employee of the Respondent. He was a machine operator on mill three, and his duty was to split timber. The Appellant testified that on the material day, he was splitting timber when the machine cut his hand and although the machine was fenced and guarded, *"a piece of timber came off and hit my hand"*, and that *"though the saw was not defective, it was the wood which was to blame."*

The Appellant also testified that he was treated at the Nakuru Provincial General Hospital, and was subsequently examined by a Doctor to whom he paid a sum of Kshs 1,000/= as consultation fees. The Appellant produced a receipt for said consultation. The Appellant was the sole witness.

Mr Bitley Singh Rehal testified as the Managing Director of the Respondent. He corroborated the Appellant's evidence that the machine *(roller bend/bead)* was fully guarded, and that his company was not negligent. He had himself received information from the Appellant at 5.15 p.m., he was shown the injury on the first finger and nail. He took the Appellant to hospital, but the Appellant was not treated until the next day and he gave him Shs 200/= and even bought drugs for the Appellant the next day. In the end however because of the delay in the treatment of the Appellants finger was amputated, because the finger was getting rotten.

This witness told the trial court that the Appellant's finger was not seriously injured, and that the Surgeon in-charge of the Hospital did not approve of the amputation and asked the court to dismiss the case with costs.

At the close of the case, the respective counsel filed written submissions. The Appellant's counsel submitted that a sum of Ksh 100,000/= was adequate compensation in general damages.

In their written submissions, counsel for the Respondent submitted that the Appellant had not established or proved negligence on the part of the Respondent, or breach of statutory provisions under the Factories Act, *(Cap 514 Laws of Kenya)*, and suggested the Appellant's injury was due to negligence solely on his part, he did not work with due care and attention, and he was working outside working hours, and was cutting firewood for his own use.

Counsel then for the Respondent submitted that if the court were to find the Respondent liable in negligence, then the level of liability and subsequent quantum should be reduced to the extent to which the Appellant contributed to his injuries. Counsel cited the example given in the English case of **JONES VS. LWOX QUARRIES LIMITED [1952] 2QB 608,** (and cited in **JAMES NGAYA vs. BEERS [1961] E.A. 390**), where Denning L.J. said -

"If a man carelessly rides on a vehicle in a dangerous position, and subsequently there is a collision in which his injuries are made worse by reason of his position than otherwise would have been, then his damage is partly the result of his own fault, and the damages recoverable by him fall to be reduced accordingly."

In his judgment Denning L. J. had referred to his decision in **LURE POLEMIS & ANOTHER and FURNESS WITHY & CO. LTD (4)- [1921] 1K.B. 560** and had said that the consequences of negligence do not depend upon foreseability but on causation of which foreseability was a relevant factor, but Singleton LJ said - in the case of Jones vs. Livox Quarries Ltd (3) at p. 613-

"Buckwill L.J. there puts himself what he describes as the ordinary plain common sense of this business. I believe that to be the test in all these cases."

In **JAMES NGAYA vs. BEERS***(supra)* the respondent was driving his motor vehicle with his elbow outside his window and was on a collision with a lorry so injured that his arm had to be amputated. The court held inter alia that the respondent was in the circumstances, negligent in driving with his elbow out of the driving window, but only to a small degree, and consequently 5 per cent should be added to trial court's assessment of his blame, and liability was subsequently at: 45%, 35% and 20%.

In this case, from both the evidence of the Appellant and the Respondent's Managing Director, the machine was fenced and guarded. However according to the Appellant, the timber was to blame. It came off the machine, causing the same to hit his first or pointing finger, injuring his nail. The Appellant did not in his evidence say why he blamed the wood. The Managing Director of the Respondent also failed to tell the trial court either the size of logs or type of timber his factory dealt in. The Managing Director also failed to say whether the Respondent provided workers such as the Appellant with protective clothing.

Such information would have pointed more to the degree of negligence by either the Appellant or the Respondent. For instance if the machine can only take a certain size of logs, there is a danger in placing on it for splitting logs which are either bigger or smaller than the machine's installed capacity or size. In either case the machine or saw in this case, might cut too fast, or cause the log or plunk thereof to roll off the machine thus occasioning an accidental injury. In the absence of such detailed evidence as aforesaid, this is the only reasonable inference the court will draw in this type of case.

The Respondent's Managing Director testified that the accident causing the injury to the Appellant's finger happened after office hours at 5.15 p.m. No evidence was called that the work at the Respondent's factory stopped exactly at 5.00 p.m., and all factory hands would be out by that hour. No submission was called to show that the various machines were switched off by 5.00 p.m. on the material day or that workers laid off their aprons by that hour. The chances are that the machines would be switched off one by one until the factory fell silent. That time would not be exactly 5.00 p.m. It would be anywhere between 4.45 p.m. to 5.15 p.m. or even later.

If the Appellant was cutting some firewood for himself at that hour, no evidence was laid before court that such an activity was forbidden.

In the circumstances the trial magistrate using his best common sense apportioned liability at 50%:50%. I would not interfere with that finding in light of the reasons I have advanced above. The court awarded Kshs 80,000/= as general damages, and Shs 1,000/= as special damages. Having apportioned liability at 50% to the Appellant, the above sum was reduced by that percentage to Ksh 40,500/= plus costs and interest.

Although the award was in line with general awards at the time the case was decided, there is no doubt that an amputation of a pointing or first finger does impair the capacity of the right hand in particular. Dr. Mbati who examined the Appellant before the hearing gave 10% permanent impairment of the right hand. For that reason I would enhance the general award by the lower court by 10%.

I would therefore allow the appeal and award the Appellant general damages of Kshs 88,000/= less 50% contribution to Shs 44,000/= plus special damages of Ksh 1,000/- to make a total sum of Kshs 45,000/= plus costs and interest on the said sum and from the date hereof and until payment in full. There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 12th day of November 2010

M. J. ANYARA EMUKULE
JUDGE