



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 328 of 2003

ROTO MOULDERS LTD.....APPELLANT

VERSUS

LAWRENCE MAINGI JOHN.....RESPONDENT

J U D G M E N T

The genesis of this appeal was a suit filed by Lawrence Maingi John (hereinafter referred to as the respondent), against Roto Moulders Ltd (hereinafter referred to as the appellant) in the Senior Principal Magistrate's Court at Nairobi. The respondent who was at the material time an employee of the appellant, sought general and special damages from the appellant, for personal injuries suffered by him, in an accident during the course of his employment. The respondent contended that the accident was caused by the negligence and or breach of the appellant's contractual obligation.

In its statement of defence filed in the lower court on 7th May, 2001, the appellant denied that the accident occurred as alleged or that that the appellant was negligent or in breach of any statutory duty to the respondent. In the alternative the appellant maintained that the respondent's injuries were wholly caused or substantially contributed to by the respondent's negligence.

At the hearing of the suit before the trial magistrate, the respondent and one Dr. Peter Odongo testified. Their evidence was that the respondent who was employed by the appellant was injured in an accident during the course of his duties on 25th September, 1999. The accident happened when the respondent climbed up to pour granules into the tank, and whilst coming down, slipped on some granules which had fallen. In the process of falling down, the respondent's hand was held by a machine which was running and his fingers were injured. He was admitted at Avenue Hospital for four days. Later he was discharged and was attended at MP Shah Hospital for a period of two weeks. The respondent was later examined by Dr. Peter Odongo who noted that he had a cut injury of the left hand which included fracture of proximal phalanx, fracture of metacarpal of the middle finger, amputation of the small finger at mid proximal phalanx and fracture of the left radius. At the time of examination the respondent still had pains in the fingers and was unable to grasp effectively with the hand. The right hand had numerous scars and there was a deformity of the middle finger which also had restriction in flexion movement. The little finger was missing. Dr. Odongo's opinion was that the respondent had suffered a permanent incapacity of approximately 50%. The respondent explained that the machine on which he fell had no protection and that the person who was supposed to sweep the granules had not done so as he was only to do it after work. The respondent also maintained that he was not provided with any protective wear. He therefore blamed the appellant for the accident.

The appellant called one witness, Alfred Wanjala, a machine operator with the company. The witness explained that he was operating a machine which was 15 meters away from the respondent's machine. He heard noises and on going to the respondent's machine, found that the hand of the respondent was caught in the machine belt. He pressed the button but the machine did not stop. The witness put off the machine and tried unsuccessfully to remove the respondent's hand. Later, he obtained the keys to the machine and opened the machine then removed the respondent's hand. He produced photographs of the machine explaining that the machine was curved and a hand could not enter into the machine. He maintained that the respondent was not supposed to put his hand into the machine nor was he supposed to repair the machine as he was not a mechanic. He added that the machine had a cover to prevent injury. He therefore blamed the respondent for the accident.

Under cross-examination, the appellant's witness maintained that the machine was fenced off. He could not explain how

the respondent's hand got into the machine. He also conceded that although the respondent was given a mask, he was not provided with gloves.

Written submissions were filed on behalf of both parties. Counsel for the respondent referred the court to Section 21(1) & (3), 22(1) & (3), 23(1), 25, 50 and 53 of the Factories Act Cap 514. He also relied on the case of *Makala Mailu Mumende vs Nyali Golf & County, Club Civil Appeal No.16 of 1998* where the court of appeal held that an employer is under a duty to take reasonable care for the safety of its employees so as not to expose them to unnecessary risks. Counsel urged the court to take into account the respondent's apparent young age and the fact that he may never be able to work properly again, and award the respondents general damages of Kshs.450,000/=.

Counsel for the appellant submitted that the machine the respondent was working on was well secured, and the respondent was extremely careless as he deliberately put his hand in the machine. It was submitted that since the respondent went out of his way to injure himself, he must bear at least 70% of liability. The court was urged to find general damages of Kshs.70,000/= appropriate.

In her judgment the trial magistrate found that the machine upon which the respondent fell, was unsecured, and the floor was unswept and full of granules. The trial magistrate further found that the respondent was not provided with protective wear such as boots which could have cushioned him from the risk of injury by slipping. She therefore found the appellant totally liable to the respondent, and awarded the respondent general damages of Kshs.270,000/=.

Being aggrieved, the appellant has brought this appeal raising 9 grounds as follows: -

- (1) That the learned Senior Resident Magistrate erred in law and in awarding the general damages.
- (2) That the learned Senior Resident Magistrate erred in law and in fact in awarding excessive general damages.
- (3) That the learned Senior Resident Magistrate erred in law and in fact in failing to appreciate that the plaintiff contributed to the accident in that he neglected to switch off the machine while he proceeded and moved nearer with his hand touching it when it had not fully stopped.
- (4) That the learned Senior Resident Magistrate misdirected herself that the defendant herein contributed 100% to the accident.
- (5) That the learned Senior Resident Magistrate misdirected herself in finding that the defendant has to pay general damages and special damages.
- (6) That the learned Senior Resident Magistrate misdirected herself in fact in her finding on liability against the defendant in view of the circumstances of the case.
- (7) That the learned Senior Resident Magistrate failed to appreciate both case law and facts in her finding on the quantum of damages and the award thereof was exaggerated in view of the facts and circumstances of the case.
- (8) That the learned Senior Resident Magistrate erred in law and in fact in basing her findings on the wrong premises and ignoring the defendant's evidence.
- (9) That the learned Senior Resident Magistrate erred in law and in fact in failing to consider or even adequately adopt and appreciate the written submissions of the appellant's advocate on record.

Mrs. Otieno who argued the appeal for the appellant, submitted that the award of general damages was excessive. She noted that the respondent's contribution to the accident was not taken into account. She submitted that the circumstances in which the accident happened clearly show that the respondent was negligent in putting his bare hands inside the machine. The respondent therefore contributed substantially to the accident. Mrs. Otieno maintained that the appellant produced evidence showing that the machine was well guarded and the trial magistrate was wrong to summarily dismiss his evidence. She maintained that the trial magistrate completely disregarded the appellant's evidence and the submissions and only took into account the respondent's submissions. She therefore urged the court to allow the appeal.

Ms. Kirii, who appeared for the respondent, submitted that the appellant has not satisfied the grounds upon which this court as an appellate court can overturn the award made by the trial court. She submitted that there was no evidence that the trial magistrate failed to consider material facts or that the award was inordinately high. She maintained that the award was reasonable given that the respondent who was mainly relying on manual work to gain his living suffered 50% permanent incapacity. With regard to liability, Ms. Kirii submitted that the trial magistrate had the benefit of having

seen and assessed the demeanour of the witnesses. She further pointed out that the defence witness only went to the scene after the respondent's hand had already been caught in the machine. She submitted that the respondent's evidence regarding how his hand was caught in the machine remained uncontroverted. The trial magistrate was therefore right in arriving at her conclusion of a 100% liability. Ms. Kirii submitted that the appellant did not comply with the safety provisions provided under the Factory's Act for supply of grip boots, gloves, etc, nor was any certificate produced to confirm that the machine was exempted from the compliance of the Factory Act.

I have carefully reconsidered and evaluated the evidence and submissions which were tendered before the trial magistrate. I have also considered the grounds of appeal and the submissions made before me. It is clear from the evidence that the respondent was employed by the appellant and that the respondent was injured when his hand was caught by parts of a machine. The respondent was apparently alone at the time of the accident. The defence witness who came to his rescue came to the scene after the respondent's hand had been caught by the machine. The evidence of the defence witness that the respondent deliberately put his hand into the machine was therefore nothing more than pure conjecture. The defence witness maintained that the machine was securely guarded and that a hand could not enter the curve of the machine, as the cover would prevent one from injury. However, the respondent denied that the machine was securely guarded, he denied that the machine had any wire mesh around it, and he maintained that the photographs produced before the court did not reflect the whole machine. The trial magistrate who had the advantage of assessing the demeanour of the witness believed the respondent that the machine was not guarded. I have no reason to depart from this finding. Indeed, there is no explanation how the respondent's hand could otherwise have got caught up in the machine. The suggestion that the respondent deliberately put his hand inside the machine was not plausible as there was no reason as to why the respondent would do that. I find that the respondent's explanation that he slipped and was in the process of falling down when his hand was caught in the machine, the more likely version. The respondent slipped because of the granules left on the floor. By failing to provide the respondent with grip boots and also failing to have the granules removed, the appellant exposed the respondent to risk of injury. By failing to have the machine securely guarded, the appellant not only exposed the respondent to risk of injury but also failed to comply with the statutory provisions provided under the Factories Act. I am satisfied that the respondent did prove to the required standard the particulars of negligence and breach of statutory duty alleged against the appellant. I find that there was no evidence in support of the appellant's allegation that the respondent failed to follow the laid down safety regulations or that he failed to take due care and regard for his own safety or that he exposed himself to risk of injury. No negligence could therefore be attributed to the respondent.

In the circumstances, the trial magistrate was right in finding the appellant liable to the respondent as the appellant was fully to blame for the accident.

As regards the quantum of damages, the respondent suffered serious injuries which resulted in 50% permanent incapacity of the hand. As was held by the Court of Appeal in the case of *Mariga vs Musila (1984) KLR 251*, assessment of damages is more like an exercise of discretion, and an appellate court is slow to reverse a lower court on the question on the amount of damages, unless it is satisfied that the Judge acted on the wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. The question is not what the appellate court would award, but whether the lower court judge acted on the wrong principles. In my considered view, the trial magistrate did not act on any wrong principles nor did she misapprehend the facts, nor is the award of Kshs.270,000/= excessive as to justify the intervention of this court.

For these reasons, I find no merit in this appeal and do therefore dismiss it in its entirety. I award costs of the appeal to the respondent.

Those shall be the orders of this court.

Dated and delivered this 13th day of October, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Miss Wambua H/B for Otieno for the appellant

Miss Kirii for the respondent