REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Appeal 35 of 2003

FRANCIS NGUMBA KABIRU……………..…..……..APPELLANT

VERSUS

STEPHEN KANYORI MATU………………..……..RESPONDENT

JUDGMENT

The respondent, Stephen Kanyori Matu filed suit against the defendant seeking to be paid damages on account of injuries he alleged to have sustained when he was working at the farm of Francis Ngumba Kabiru (*the appellant*) on the 13th of April 1997. He averred that the defective machine which he was operating malfunctioned thereby causing him serious injuries. The respondent averred that the said injury was caused by the negligence of the appellant and appellant's failure to provide him with a proper and safe system of work. He averred that the appellant had breached the term of contract and employment by permitting him to work on a defective machine. He further pleaded that he had not been provided with protective devices when the said accident occured.

The appellant filed a defence denying that he was negligent or that he had failed to provide the respondent with a safe working environment. He further denied that he had allowed the appellant to work on a defective machine. He averred that the respondent was not supposed to work on the said machine on Sunday and therefore the injury that he sustained was due to the respondent's own negligence. He further averred that the respondent had by a written memorandum dated the 3rd of June 1997 agreed to waive any claim against the appellant that resulted from the injury that he had sustained.

The trial magistrate heard the claim by the respondent and after considering all the evidence that was adduced found the appellant 60% liable in damages to the respondent. The respondent was ordered to bear 40% contribution. The trial magistrate assessed the general damages to be paid to the respondent to be Kshs 500,000/=, less 40% contribution. The appellant was therefore ordered to pay the respondent Kshs 300,000/= costs and interest. The appellant was aggrieved by the said judgment of the trial magistrate and has appealed to this court against the said decision.

In his amended memorandum of appeal, the appellant raised eight grounds of appeal challenging the said decision of the trial magistrate. The said grounds of appeal may be summarised as follows: The appellant was aggrieved that the trial magistrate had not considered the totality of the evidence adduced before arriving at the decision apportioning liability. According to the appellant, the trial magistrate ought to have found that it was the respondent who was the author of his own misfortune in that he operated the machine when he was inebriated and further that no negligence was proved on the part of the appellant. The appellant was aggrieved that the trial magistrate had made an award that was inordinately high putting into consideration the injury that the appellant had sustained. The appellant was aggrieved that the trial magistrate had not taken into account the submissions made by the appellant before arriving

at the said decision. In any event, the appellant was of the view that the judgment delivered by the trial magistrate was not in accordance with the requirements of **Order XX Rule 4** of the **Civil Procedure Rules.**

At the hearing of the appeal, Mr. Kagucia Learned Counsel for the appellant submitted that the respondent had not proved his case against the appellant to the required standard. He argued that liability was not proved. Neither was negligence. He submitted that the trial magistrate had not made a finding on the issue of negligence and therefore erred when he apportioned liability. He submitted that the respondent was drunk when he was injured by the machine and therefore was an author of his own misfortune. He urged this court to re-evaluate the evidence and reach a finding that the respondent operated the machine on Sunday when he was not legally on duty. In his view, the respondent's injury could be said to be a case of *volenti non fit injuria*. He submitted that there was no basis why the trial magistrate awarded the respondent the sum of Kshs 500,000/=. He further submitted that the judgment which was delivered by the subordinate court was an incompetent judgment and should not therefore be upheld by this court because the said judgment did not meet the requirements of **Order XX rule 1** of the **Civil Procedure Rules** as to the date of delivery of the judgment, the signing of the judgment and the delivery of the judgment in the presence of the parties. He submitted that the said judgment being unlawful should be set aside and this court should order the trial to commence afresh. He urged this court to allow the appeal with costs.

Mr. Gekong'a, learned counsel for the respondent opposed the appeal. He submitted that the judgment which was delivered by the trial magistrate was valid and had been prepared and delivered in accordance with the established law. He submitted that the respondent had established to the required standard that the machine which he was operating in the course of his employment was faulty as it had a habit of switching itself on when it was switched off. He argued that this evidence by the respondent was not controverted by the appellant. He submitted that although the lower court did not make a specific finding as regard the issue of negligence, this court is mandated by the law to re-evaluate the evidence and reach an appropriate finding that the respondent had proved its case. He submitted that the appellant had not proved that the respondent was drunk when he operated the machine. Neither had he proved that the appellant had worked on a Sunday when he was not supposed to be on duty. He submitted that the respondent had operated the machine on the material day under the instructions of the appellant. He argued that even though the subordinate court visited the home of the appellant, at the time of the visit, the machine which injured the respondent had been replaced. He submitted that the respondent had proved that the machine which injured him had not been serviced for several years since its purchase. He argued that there was therefore sufficient evidence which enabled the trial magistrate to reach the finding that he did. He submitted that the award of damages made was sufficient taking into account that the respondent had lost all the fingers of his right hand. Being a right handed person, he had therefore been incapacitated. He urged this court to disallow the appeal.

In response, Mr. Kagucia submitted that the respondent ought to have been found solely liable for the injury that he has sustained because he took a risk when he operated a machine which he knew was faulty. He reiterated that the respondent operated the machine on a day when he knew he was not authorised to by the appellant. He submitted that the respondent had been trained on how to operate the machine but was not authorised to fiddle with the machine in the event that the said machine stalled. He argued that the appellant could not be blamed for replacing the machine because the court visited the scene five years after the event. He further submitted that the claim by the respondent had been compromised in the presence of the respondent's grandfather. He urged this court to allow the appeal.

This being a first appeal, this court is mandated to determine this appeal by way of re-hearing and re-evaluating the evidence adduced before the trial magistrate's court so as to reach an independent decision whether or not to uphold the decision by the trial magistrate. As was held in **Selle & Anor –vs- Associated Motor Boat Company Limited & Others [1968]EA 123** by Sir Clement de Lestang VP at page 126;

"***An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must***

reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound to follow the trial judge's finding of fact if it appears either that he clearly failed on some point to take account of particulars circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally. (Abdul Hameed Saif –vs- Ali Mohamed Sholani (1955) 22 EACA 270).”

In the present appeal, the issues for determination by this court are three fold; firstly, whether the judgment which was delivered by the subordinate court was incompetent and therefore ought not to be considered by this court on appeal and should be set aside. I have carefully perused the said judgment. The trial magistrate informed Mr. Gekongá the advocate for the respondent on the 17th of January 2003 that he would deliver the judgment on the 31st of January 2003. The court record shows that the appellant was not represented when the said judgment date was taken. The said judgment was however not delivered on the 31st of January 2003. It is apparent from the record that the said judgment was delivered on the 7th of February 2003. There is no indication that the parties to the suit were present when the said judgment was delivered. Further, there is no indication that the trial magistrate had notified the parties to the suit of the date when he was to deliver the said judgment.

This court tried to have the original file of the subordinate court availed for its perusal but was informed by the Executive Officer of this court that the said file of the subordinate court could not be immediately traced. This court could not therefore be certain that the proceedings in the record of appeal reflected the true record on the proceedings that took place in the subordinate court. I agree with the submissions made by Mr. Kagucia that the said judgment was therefore not delivered in accordance with the provisions of **Order XX rule 1, 2 & 3 of the Civil Procedure rules**. However it is apparent from the original memorandum of appeal filed by the appellant, that the appellant became aware of the said judgment sometimes before the 26th of February 2003 when the said memorandum of appeal was filed.

I hold that even though the appellant was not notified of the date of the delivery of the judgment and even though the said judgment appears not to have been dated when it was delivered, it is clear from the record that the said judgment was delivered on the 7th of February 2003. The appellant was not prejudiced because he filed his appeal within the period provided by the rules. In my considered opinion, if the appellant was not made aware of the judgment within the period which he was allowed to file an appeal, then he could have had a valid reason to have the High Court extend time for him to file an appeal out of time. I therefore hold that the irregularity evident in the judgment of the subordinate court does not vitiate its validity. I therefore find no merit with the argument made by the appellant that the said judgment should be set aside.

The second issue for determination by this court was whether the respondent proved to the required standard that he was injured by the negligence of the appellant. I have carefully evaluated the evidence adduced before the trial magistrate and also considered the submissions made before me on this appeal. Certain facts are not in dispute in this appeal. It is not disputed that the respondent was an employee of the appellant. From the evidence adduced, the respondent was employed as a farm hand. His duties involved working generally in the farm and feeding animals. He was also required to grind animal feeds using a machine that was electrically powered. According to the respondent, on the material day he was instructed to operate the said machine to grind animal feed. He testified that on the material day he noted that the machine was defective because the switch was not functioning properly. When he started operating the machine, the sharp blade of the moving part cut all his four fingers of his right hand. He was taken to the hospital where the said fingers were amputated. The respondent attributes the said accident to the negligence of the appellant who failed to put the said machine in a proper state of repair so that he could operate it safely.

The appellant denied that the said machine was faulty. He testified that the said machine was mechanically sound and was safe to operate. He testified that the respondent's fingers were cut because the respondent operated the said machine when he was not authorised. He testified that the respondent

was not authorised to operate the said machine on Sunday. He further testified that the respondent was drunk when he operated the said machine. It was his testimony therefore that he could not be held liable because the respondent was not supposed to be on duty when the said accident occurred.

I have evaluated the said evidence adduced. In my considered opinion, liability in respect of the accident that occurred on the material day was statutory liability. The appellant was required to provide the respondent with a safe working environment by providing him with the tools and machinery that would be operated safely. **Section 23(1) of the Factories Act** imposed statutory obligation on the appellant to make sure that a machine which is considered to be dangerous is put in such state of repair that it can be operated safely by its employees. As was held by the Court of Appeal in the case of **Arkay Industries Limited –vs- Amani [1990]KLR 309** at page 314;

"***The prime concern of this subsection is the safety of every person employed or working on the premises in which the dangerous part of any machinery is situated. Because of this, it imposes an obligatory duty to ensure such safety in the manner provided therein. It does not, however, impose strict liability in negligence for where a plaintiff has taken a risk created by the breach of a statutory duty by a defendant, that risk may amount to contributory negligence if it is one which is reasonable prudent man in the position of such a plaintiff would take."***

In the present appeal, the respondent established that the switch of the said machine had malfunctioned and the machine would unexpectedly switch itself on. The appellant admitted in his evidence that he had not serviced the said machine from the date he had purchased it. It is clear from the evidence adduced that the appellant was aware that the said machine was faulty. The respondent was also aware that the machine was faulty. However he had no choice but to operate the machine because that is what he was employed to do. I do not accept the argument by the appellant that the respondent ought not to have operated the machine knowing that it was faulty. The decision whether or not to operate the machine was up to the appellant and not the respondent. As an employee, the respondent could not make a decision whether or not to operate the machine when he had been instructed by his employer to operate the said machine.

There is evidence however that the said accident could not have occurred if the respondent was not inebriated. He was not fully alert and therefore could not react as fast as a sober person could have reacted in the circumstances. I did not accept the preposition by the appellant that the respondent was not authorised to operate the said machine on a Sunday. Animals kept in a farm are fed seven days a week. The feeding of animals does not take account if it is a Monday or a Sunday. The evidence by the respondent that he was instructed to prepare the feed for the animals by the appellant on Sunday was therefore credible. The respondent therefore established that the appellant was negligent in so far as he allowed him to operate a machine which was inherently dangerous and which was faulty. The liability placed on the appellant is statutory liability. The appellant however proved that the respondent contributed to the said accident because he operated the said machine when he was under the influence of alcohol. In the circumstances of this case, I find no fault with the apportionment of liability by the trial magistrate. Although he did not give reasons for apportioning liability, on re-evaluation of the evidence adduced before the said subordinate court, I hold that the trial magistrate appreciated the said evidence adduced and properly apportioned liability as between the appellant and the respondent. The appeal on liability lacks merit and is therefore dismissed.

On quantum, the Court of Appeal in **Ali –vs- Nyambu t/a Sisera Store [1990] KLR 534** at page 538 quoted with approval the principles laid down by the **Privy Council in Nance –vs- British Columbia Electric Railways Co. Ltd. [1951]AC 601** at page 613 where it was held that:

"***The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of the law (as by taking into account some irrelevant factor or leaving out of***

account some relevant one); or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages (Flint –vs- Lovell [1935] 1KB 354) approved by the House of Lords in Davis –vs- Powell Duffryn Associated Collievers Ltd. [1941]AC 601."

Further, in the **Arkay Industries case** (*supra*) the Court of Appeal held at page 315 that;

"***The assessment of damages is essentially a matter of judicial discretion as was observed by Nyarangi JA in the case of Nyambura Kigaragari –vs- Angripina Mary Aya, Civil appeal No. 85 of 1983 (unreported) following a similar observation in the case of Idi Ayub Shabani –vs- City Council of Nairobi & Anor, Civil Appeal No. 52 of 1994 (unreported);***

'***for this court to interfere it must be shown that the sum awarded is demonstrably wrong or that the award was based on a wrong principle or it was manifestly excessive or inadequate that a wrong principle may be inferred'."***

In this appeal, the appellant lost the four fingers of his right hand. The said fingers were amputated. According to Dr. Wellington Kiamba, the respondent had sustained an amputation of the distal phalanx of the right thumb and the amputation of the 2nd, 3rd and 4th fingers of the right hand. He assessed the degree of injury to be grievous harm and the degree of permanent disability at 36%. The respondent relied on the decision of **David Kingada –vs- Narcol Aluminium Rolling Mills Limited Mombasa HCCC No. 133 of 1998 (unreported)** where Waki J. (*as he was then*) awarded the plaintiff the sum of Kshs 540,000/= for injuries similar to the one sustained by the respondent in this case. The appellant relied on decisions of the High Court where awards were made of Kshs 200,000/=. I did not have the benefit of seeing the said decisions that the appellant purported to rely on. I am persuaded that the trial magistrate properly assessed the damages to be paid to the respondent. The said award was neither inordinately high nor inordinately low as to amount to an application of the wrong principles of the law. The trial magistrate properly exercised his discretion when he made the said award. I similarly find no merit of the appeal on quantum.

The last issue for determination by this court is whether the respondent had entered into an agreement with the appellant whereby he had agreed to compromise his claim. I have carefully gone through the proceedings of the subordinate court. I noted that although the said agreement was marked for identification by the appellant, it was not produced as an exhibit in evidence. In the circumstances of this case therefore, the submissions made before me that there was a compromise out of court is neither here nor there. Since the agreement was not produced in evidence at the trial, I hold that no such compromise was entered between the appellant and the respondent.

The upshot of the above reasons, is that the appeal filed by the appellant lacks merit and is dismissed with costs to the respondent.

DATED at NAKURU this 30th day of June 2006.

L. KIMARU

JUDGE