



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL APPEAL NO. 65 OF 2002

SIMBA POSHO MILLS LTD.....APPELLANT

VERSUS

FRED MICHIRA ONGUTI.....RESPONDENT

JUDGMENT

The Appellant, Simba Posho Mills Limited, was sued by the Respondent Fred Michira Onguti on account of injuries that the Respondent claimed to have sustained while in the employment of the Appellant. According to the plaint filed by the Respondent, on the 22nd of January 2000 while he was on duty at his place of work operating a machine, a moving roller crushed his fingers as a result of which the Respondent sustained injuries which he particularised in his plaint. The Respondent blamed the Appellant for the said accident because, according to him, the Appellant has failed to provide him with a safe working environment. The Respondent further blamed the Appellant, inter alia, due to the fact that he was exposed to a dangerous working environment and further was not provided with protective devices while engaged at his employment. The Respondent sought to be paid damages for the injuries that he had sustained. The Appellant filed a defence. In the said defence, the Appellant denied that it was negligent or failed to provide a safe working environment to the Respondent. The Appellant averred that the said accident which the Respondent was injured was solely caused by the negligence of the Respondent who, inter alia, had placed his hand on a moving part of the said machine while knowing the same to be dangerous.

After hearing the case, the trial court found the Appellant to be liable for the said accident to the extent of 80%. The Respondent was found to have contributed to the said accident at 20%. General damages was awarded at Kshs 360,000/- for the injuries that the Respondent had sustained. Special damages was awarded at Kshs 2,000/-. 20% was deducted from the said award being the contributory negligence by the Plaintiff leaving a balance of Kshs 289,600/-. The said award was to be paid with costs and interest.

The Appellant was aggrieved by the said decision of the trial court and filed an appeal to this court. The Appellant was aggrieved that the trial magistrate had found the Defendant to be liable to a larger extent for the accident that occurred that resulted in the Respondent sustaining injuries yet evidence had been adduced that it was the Respondent who substantially contributed the said accident. The Appellant was further aggrieved that the award of damages made in favour of the Respondent was excessive and exorbitant in the circumstances. At the hearing of the appeal, Mrs Oduor, Learned Counsel for the Appellant urged this court to allow the appeal whilst Mr Gekong'a, Learned Counsel for the Respondent submitted that the decision of the trial magistrate ought to be upheld. I will consider the arguments made by counsel after briefly setting out the evidence that was adduced before the trial magistrate.

During the hearing of the case before the trial magistrate, only the Respondent testified in support of his case. The Respondent testified that on the 22nd January 2000 while at his place of work at Simba Posho

Mills, he was summoned by his supervisor and instructed to operate a new machine which had just been installed. The Respondent testified that the said newly installed machine did not have a slope where maize could be poured so that the said maize could be ground. The Respondent testified that he was instructed by his supervisor called Mayesh to push maize with his bare hands into the machine. The Respondent further testified that as he was pushing the maize into the machine the fingers of his right hand were caught by the machine and injured. The Respondent was taken to Pine Breeze Hospital where he was treated and discharged. The Respondent blamed the Appellant for the accident because, according to him, the installation of the new machine had not been completed and further the fact that the new machine did not have a receptacle installed whereby the maize could be poured into the machine without causing any danger to the machine operators. The Respondent testified that due to the accident, the remaining part of his finger which had been amputated was sensitive and he was unable to use his right hand as he used to prior to the accident. The Respondent admitted that he was aware that to put his hand in a machine that had moving parts was dangerous. The Respondent further admitted that it was only he would could have judged how far he could safely push his hand into the machine. The Respondent however attributed his accident to the fact that the machine was new and the fact that he had specifically been instructed to push the maize into the machine by his supervisor. The Respondent denied that he was careless.

The Appellant also called one witness to testify on its behalf. The witness who was called was Mayesh Karia who was the Mill Manager (supervisor) at the time the accident occurred. He testified that on the material day, the Respondent was on duty and was working at the packaging end of the machine. After about thirty minutes, the defence witness testified that he was informed by another employer that the Respondent had been injured. He talked to the Respondent and he informed that he had gone to assist the employee who was working on the feeding end of the machine as the product was not coming through to the packaging end. He testified that the Respondent had been injured as he had interfered with the feeding gate. He further testified that the employees were not allowed to fiddle the machines. The witness solely blamed the Respondent for the accident that resulted in the injuries that he suffered. The witness however admitted that he was not at the scene when the accident occurred. He further admitted that the machine that injured the Respondent had been newly installed and further that a certificate of competence of the newly installed machine had not been issued at the time the accident occurred.

The Appellant and the Respondent agreed by consent to admit the medical reports which were prepared by Dr Obed Omuyoma and Dr M. S. Malik. Both doctors agree that the Respondent sustained the following injuries;

- (i) Amputated distal phalanx and comminuted fracture of the right index finger of the right hand.*
- (ii) Decloving minor injury palp of the middle finger of the right hand.*
- (iii) Cut wound on the right thumb.*

At the time of his examination by Dr. M. S. Malik the Respondent still complained of pain in the amputated tip of the finger. The function of his right hand was assessed to have slightly diminished due to the loss of part of the index finger. The degree of permanent disability according to the **Workman's Compensation Act** was assessed at 8%.

This is a first appeal. As was stated by Sir Clement Lestang V.P. in **Selle –vs- Associated Motor Boat Co. Ltd [1968]** E.A. 123 at page 126 para G

“An appeal to this court from 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 necessarily to follow the trial judge's finding of fact if it appears either that he has clearly failed on some point to take account of particular 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.”

In the instant appeal, the evidence adduced before the trial magistrate by the two witnesses who testified is that a new machine had been installed at the Appellant's premises. A certificate of competence, though not a mandatory requirement, had not been issued. According to the Respondent on the material day, he was instructed by the supervisor to put maize into the receiving end of the machine. The Respondent testified that the newly installed machine did not have a sloping receptacle which could have enabled him to put the maize without necessarily risking injury to himself. It was the Respondent's testimony that the supervisor, called Mayesh, instructed him to put the maize into the machine with his bare hands. The Respondent inserted his hand in the machine as a result of which one of his fingers sustained an amputation injury. His other fingers were injured but to a lesser extent. It was the Appellant's case that the Respondent ought to have known that to put his hand into the machine with moving parts would be dangerous. According to the evidence of the witness of the Appellant, the Respondent removed the cover from the machine and inserted his hand to check why the machine was not grinding maize. It is because of the Respondent's reckless conduct that he was injured. When the Respondent was cross-examined by the Appellant, he admitted that the onus was on him to protect himself and not injure him by knowing what extent he could have inserted his hand. I have re-evaluated the evidence adduced. The issue for determination is whether the Respondent had established that he was entitled to be paid damages as a result of the Appellants negligence and breach of contract. The other issue for determination is whether the trial magistrate had applied the correct principles in awarding the said general damages to the Respondent. It is not disputed that the accident which resulted in the Plaintiff sustaining the injuries that he did occurred in a factory as defined by the **Factories Act (Cap 514 Laws of Kenya)** owned by the Appellant. Under **Section 22 and 23** of the said Act the Appellant was mandated by law to fence all moving or dangerous parts of the machine. The Appellant was therefore under statutory obligation to provide the Respondent with a safe working environment which included not exposing him to tasks which could result in his sustaining injury. The liability imposed upon the Appellant is statutory. The breach of statutory liability means that the Appellant was strictly liable for any injury that its employee sustains in the course of his employment. In the instant case, the Appellant instructed the Respondent to insert maize into a grinder that had parts which were moving. There was no protection or a fence installed to protect the Respondent. It is no defence that the Respondent was careless or reckless in undertaking the task that he was told to do. In the circumstances of this case, it is the finding of this court that the trial magistrate clearly erred in apportioning liability for the said accident as between the Appellant and the Respondent. I therefore set aside the decision of the trial court in apportioning liability and substitute it with the decision of this court finding the Appellant solely liable for the said industrial accident. The Appellant breached statutory provisions which resulted in the Respondent sustaining the said injury.

On quantum, this court can only interfere with the assessment of damages by the trial court if the assessment was either excessively high or excessively low putting into consideration the injuries sustained by the Respondent. I have re-evaluated the decided cases that were presented to the court in support of the quantification for damages. In my considered view the award of Kshs 360,000/- general damages was excessively high in the circumstances. The trial magistrate must have applied the wrong principles of the law in arriving at the said assessment and award of damages. Although the decision of **Arkay Industries Ltd -vs- Abdallah Amani Civil Appeal No. 22 of 1988 Nakuru, (unreported)** offered a guide on the award of damages to be made. In my assessment, the injuries sustained by the Respondent in that Appeal were more serious than the injuries that were sustained by the Respondent in this case. Having re-evaluated the evidence adduced, and putting into consideration the incidences of inflation since the **Arkay Industries (supra)** decision was made, I reassess the general damages payable to the Respondent at Kshs 180,000/-. The Respondent shall be paid Kshs 2,000/- special damages.

Since the Appellant was partially successful in the its appeal, it shall be paid half of the costs on appeal. The Respondent shall however be paid the costs of the suit in the lower court. The said general damages shall attract interest as usual court rates from the date judgment was delivered by the trial court.

DATED at NAKURU this 20th day of January 2005.

L. KIMARU

JUDGE