REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Case 118 of 2003

BONIFACE MUSANGO KISAMWA ..... PLAINTIFF

Versus

THE BLANKET INDUSTRIES LTD. ..... DEFENDANT

J U D G M E N T

Coram: Before Hon. Justice Mwera
Tarus for Plaintiff
Akanga for Defendant
Court clerk –Kazungu

The plaintiff herein sued his employer on 4.7.2003 claiming damages that arose from an industrial accident which took place on 13.1.2003. It was pleaded that while the plaintiff was on duty at the defendant's blanket manufacturing plant, he was engaged in the process of clearing a part of a machine which had been chocked by excess material that was going through it. That while doing that the plaintiff's right hand was caught between some rotating shafts whereupon he suffered a traumatic amputation of parts of all four fingers including a crush injury of the palm thereof.

Further it was pleaded that the injuries were occasioned by the defendant's negligence of exposing the plaintiff to a risk that it knew or ought to have known; that it did not maintain supervision over the plaintiff as he did his work – a dangerous activity that he had been instructed to execute. That the defendant did not take adequate safety measures of the plaintiff and did not warn him of the risky work he had to do. And that the defendant did not provide the plaintiff with safe and proper working systems and conditions.That all there were expressed or implied terms of contract of employment between the two litigants. Finally, that the plaintiff who was earning Sh. 7,170/= p.m. as a casual employee of the defendant, was not able to continue working with this employer due to the injuries (above) and has not been able to secure any other employment either. That this meant that having been injured at age 25 he has lost future earning capacity over the next 32 years.

In a defence filed on 25.7.2003 the defendant company denied that the plaintiff was ever its employee or that there existed an employment contract between them. It was further denied that the alleged accident took place and that the plaintiff was injured. Or that the injuries were due to the negligence of the defendant as particularized hereinafter. Without averring whether the defendant held the view that the plaintiff wholly or substantially contributed to the said accident, the defence contained particulars attributed to the plaintiff e.g that he did not take adequate precautions for his own safety; he exposed himself to known risk of injury; he failed to wear protective gear while on duty and he did nothing to avoid the injury.There seemed to have been no reply to this defence (see O.6.r.9 CPC) and the hearing

opened on 21.12.2003 with the plaintiff (P.W.1) on the witness stand.

The plaintiff produced his casual employment card with the defendant company (Exh.P1) claiming that since 2001 he had been working in a section called RAG II (or something of that sort). That in this section the plant converted second-hand cloth material into blanket threads. That the plaintiff was placed to work there without any training. As he was working on the material day, the machine got clogged with the cloth material and so the plaintiff proceeded to remove it as the rollers were still in motion.During the operation his right hand got stuck between the rollers and they crushed it. That at that moment the plaintiff was alone because the machine operator had gone to the toilet. That his supervisor had instructed P.W.1 to remove the cloth material as he did that day and he used to do daily. There were no emergency machines nearby. So P.W.1 screamed and another workmate rushed there to help. The machine was stopped and P.W.1's hand removed. The defendant organized for his transport to and admission at Coast General Hospital (Exh.P.2), where it paid the bills.That this machine shaft was worn out hence its clogging up with the cloth material. That the plaintiff operated it without any protective gloves and the employer did not provide a standby operator to oversee the working of the machine when its usual man was away. The court was told that P.W.1 worked 7 days a week earning Sh. 238/= per day. That he was right-handed, with low education and he expected to retire at age 55. P.W.1 identified two medical reports by Dr. H. Patel for which a total of Sh. 3,500/= was paid (Exh. P3A, B). He also produced his treatment notes (Exh. P4) and hospital card (Exh. P5). He denied having been negligent while on duty.

In cross examination P.W.1 said that his actual duties were to collect out put material and store in but he added that he would also assist the machine operator to rectify their machine whenever it got stuck. That even when threads got stuck in the machine, it could continue to roll. The threads were to be removed by hand – no hooks. That for 3 years he worked with this machine he had usually removed the offending material with his hand – and this was from the time the shafts began wearing out. That this fact had been reported to one Bhullam but that the spare parts usually took long to arrive from Italy. P.W.1 denied being negligent on the material day, and he could not use his injured right hand to do any work.

Dr. Hemant Patel (P.W.2) told the court that he examined P.W.1 twice – on 8/5/2003 and 15/1/2004 and made reports (Exh. P6, 7). Following the above accident, left P.W.1's right hand was crushed and four (4) fingers amputated. That hand had no use any more. The injuries were healed though. That closed the plaintiff's case. The defence case started.

Gerald Mazera (D.W1), a supervisor with the defendant company told the court that the plaintiff was hired by it on casual basis as per Exh. D1 A, B 2). He was an assistant to the "grinder" at station No.2 – one William Nzai. That D.W.1 got word of the plaintiff injury which occurred when Nzai was not there. That P.W.1 earned Sh. 216.80 per day but after the injury the plaintiff did not return to take his workman's compensation form to a doctor to sign. The defendant paid Sh. 9,018/= (Exh. D3) medical expenses. That the plaintiff's services were not terminated after the accident. He simply did not return on duty. That he nevertheless earned half pay from January to April 2003 (Exh. D4).That the plaintiff wrote a report of the accident so did Abdalla Juma (D.W.3) who removed P.W.1 from the machine. To D.W.1, it was the specified machine technician who was supposed to rectify a faulty machine but not his assistant as P.W.1 did here. That no special training was given to work where the plaintiff worked but that such employees were given industrial regulations to read and follow. That the particular machine had "start" and "stop" switches in two places. That P.W.1 had no gloves but hooks were there for him to use and that he should have switched off the machine first. That if P.W.1 had returned on duty after treatment he would have been given a sweeping job, using his left hand.

Tsuri Charo (D.W.2), a technician with the defendant company was on duty when he heard screams from the section where Boniface (P.W.1) worked. On rushing there he found P.W.1's hand struck in the machine with the rollers still moving. He had been alone there. His operator, Nzai, was not. That the plaintiff was on the other side of the machine where nobody is allowed and guard rails are installed to that effect. And that P.W.1 was caught in the machine some distance from the switches.

Abdallah Juma (D.W.3) was a technician with the defendant company when this accident took place. He is employed elsewhere now. He was adjusting the rolling machines including one where P.W.1 worked

on the material day. As he moved between machine 1 and No.2, he heard screams from No.2 where P.W.1 worked. He rushed there only to find that P.W.1's right hand was struck in there. In essence D.W.3 had been informed that P.W.1's machine was faulty and so he was about to attend to it – to adjust it because excess cloth material was clogging it. In short as he moved to machine 1 to do the adjusting before attending to P.W.1's machine No.2, P.W.1 had put his hand in the rollers to remove the offending material and he was injured. D.W.3 spoke of several switches there to control various parts of the machine – including operating the rollers in issue.That P.W.1 was at his proper station doing what he was supposed to do.

David Mwendwa (D.W.4) an insurance claims assessor and investigator was instructed by the defendant sometime in April 2005 to investigate the subject accident of 13.1.2003. This trial was well under way with D.W.1 having testified. D.W.4 visited the defendant's premises read reports made at the time of the accident. He talked to managers and machine operators including William Nzai, Abdalla Juma (D.W.3) one Hamisi Mwamanono and Tsori Charo (D.W.2). He did not seek out the plaintiff for his views/report. D.W.4 then inspected the point of the accident, noting the operating of the machine, the position of switches, the written and posted instructions etc. The witness concluded that P.W.1's machine had developed a fault. The fault was reported but before it was rectified P.W.1 had gone on "to uncover its protective lid, insert his hand in it to rectify it" and thus he got injured. In essence D.W.4 laid blame on P.W.1 for his injury.Something may be said about this report later. The trial closed and both sides submitted.

If it can be taken that evidence has it that the plaintiff was the defendant's casual employee at the material time and he was injured while on duty on 13.1.2003, then the focus remains on liability and quantum only.

On liability the plaintiff's side maintained that he was given duties and instructed to work where he was injured without training or protective clothing/gear.

Mazera (D.W.1) told the court that no training was required for the plaintiff to do this duty of collecting finished threads and storing them. But that industrial regulations were given to staff to read and follow.And that if a fault occurred as it did it was William Nzai, the grinder/operator who was not there at the time of the accident, to rectify it – not the plaintiff. It was claimed, but no evidence was given by D.W.1 that although gloves were not provided to P.W.1 to do his work, there were hooks to remove the finished material sticking in the machine. That to do the last bit P.W.1 had to switch off the machine first and D.W.1 did not understand why he did not do just that.

On his part Abdalla (D.W.3) had been informed of the fault in the machine where P.W.1 worked. He saw it but as he attended to another first before returning to where P.W.1 was, P.W.1 had tried to remove the offending material by his hand from the moving machine and he was injured. To quote D.W.3 he said:

"Boniface had been at RAG 2 alone. I saw that the moving parts were not balanced; they had moved on one side.

Boniface was within Rag 2 where he was supposed to work – not a prohibited area.

I saw the part of the machine that injured Boniface, in my view within his area of duty.

I cannot say if Boniface did not act within his mandate in order to be injured."

The above evidence of P.W.1 not being in a prohibited area when he was injured, contrasts with that of Tsori Charo (D.W.2) who like D.W.3 helped extract P.W.1 from the machine:

"The complainant Bonface was on the motor side of this machine. A person is not allowed on this side of the roller and there are guard rails there."

On its part the defendant urged the court to hold the plaintiff 100% liable for this accident or that he

contributed up to 50% of it. This was hinged on the basis that the machine had a problem which was being attended to. And yet the plaintiff an unskilled worker, in absence of his machine operator and without having been instructed to do anything until the fault was rectified, proceeded to put his hand into the rolling machine to remove the stuck material. That having worked on the machine since 2000 he knew that it was risky to put his hand in the moving machine without even switching off the machine first.

Having the above on the evidence and submissions, this court is minded to find that liability here ought to be shared. Even without training, the plaintiff should have known that putting his hand in the moving parts of a machine was a risk that would turn tragic. He had no gloves, and even one wonders if these could have saved him from a crush injury of the hand, and it is not shown that he had hooks. But at least the plaintiff should have thought of switching off the machine before proceeding to remove the offending material or because the technician (Abdallah D.W.3) had already noted the problem and would eventually attend to it, that was all the reason why P.W.1 should have asked him to stop the machines first.He did not. And for the defendant its technicians knew that P.W.1 worked as an assistant to an operator who was not there. The worn out machine required full repair or constant adjustment to keep it working properly. If some material had stuck in it, the machine was not producing threads at its best. It should have been stopped as soon as the fault was seen. Anyway, the ratio of liability here is 70% against the defendant and 30% for the plaintiff. In arriving at this conclusion Mwendwa's (D.W.4) investigation report is wholly excluded because it was mainly hearsay (by defendants staff D.W.4 elected to interview and take reports from). None of those interviewed were present at the time of the accident and thus D.W.4's making judgmental conclusions as to what happened on the 13.1.2003 was entirely in error. In any case he decided not to interview the plaintiff.The trial was under way and the defendant company or the plaintiff's lawyers knew where to contact him for D.W.4. In the end his report was virtually worthless and could not be relied on.

Moving to the quantum of damages, the plaintiff approached it in three ways: damages for pain, suffering and loss of amenities and damages for loss of earning capacity. Then special damages.

To begin with the second aspect it was submitted that by loss of his right hand, with which he used to do any work, the plaintiff suffered permanent incapacity. That having been injured at age 25, a multiplier of 25 will do based on a daily wage of Sh. 238/=. The case of KENYA BUS SERVICES LTD. VS WANGURU NJOROGE H. CIVIL APPEAL NO. 133/001 was cited. There a 26 year old hawker got damages for future earning capacity pegged on a multiplier of 20.

The defence maintained that the plaintiff on his own left work. The defendant continued to pay him half pay for some 3 months and that had he returned D.W.1 (Mazera) would have given him some other casual job like sweeping where he could use his left arm.

In the circumstances of the case this court is inclined not to reward the plaintiff, though tragically and traumatically injured while on duty with the defendant, with projected earnings in the future. The plaintiff did not even return to have his workman's compensation form duly completed for that benefit. He did not report back on duty at all although as he nursed his hand he continued to draw half salary. He did not tell this court why he did not return to work at all and yet the employer was willing to give him alternative duties.For that nothing will issue on loss of future earning capacity. Had the court found an award here warranted a multiplier of about ten (10) for a casual worker or some lump sum would have been considered.

Regarding special damages, the plaintiff proved that he paid Sh. 3,000/= to Dr. H. Patel for the medical reports. The defendant did not seem to dispute this sum and it is awarded.

Now the damages for pain suffering and loss of amenities. The plaintiff asked for Sh. 600,000/= and cited the case of SAMUEL KAZUNGU VS UMOJA RUBBER INDUSTRIES LTD. MBA HCCC 350/1996. There a 24 year old casual worker who lost use of his left hand got Sh. 500,000/= with the doctor adding that the plaintiff would still do sweeping duties.

The defence proposed Sh. 300,000/= even as it appreciated that the plaintiff's right hand had lost grip.

From the evidence and submissions on this aspect of damages this court awards the plaintiff Sh. 400,000/= for pain, suffering and loss of amenities.

The total award is:

Special Damages - Sh. 3,000/=

Pain suffering & Loss of Amenities - Sh. 400,000/=

Sh. 403,000/=

Taking in regard contributory negligence 30% leaves a net award of Sh. 282,100/= (Two hundred eighty two thousand one hundred) due to the plaintiff. He also gets costs and interest at the lower court rates. Had he been paid benefits under the workman's compensation, the same could have been deducted from the award granted.

Judgment accordingly.

Delivered on 26th August 2005.

J.W. MWERA

JUDGE