

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 103 OF 2001

CLASSIC ENGINEERING SERVICES LTD.....APPELLANT

VERSUS

TOM OWILI DUNGA.....RESPONDENT

(FROM ORIGINAL KISUMU CMCC NO. 702 OF 2000)

JUDGMENT

This is an appeal by M/S Classic Engineering Services Ltd against judgment and orders of the Kisumu Chief Magistrate's Court in CMCC No. 702 of 2000 delivered on 26th June 2001.

On 6th June 2000 Tom Owili Dunga, the respondent, herein filed a suit against the appellant in the Kisumu Chief Magistrate's Court seeking damages for the injuries suffered on 30th August 1999 while using an electrical grinder in the course of his employment with the appellant and when a grinding stone broke off and hit him causing the injury complained of. The respondent attributed the said accident to the negligence of and carelessness of the respondent and / or its agents or servants. The appellant in its written statement of defence denied that the respondent had been an employee of the appellant and that there was an express and / or implied term of the contract between the respondent and the appellant that the appellant was to take reasonable precautions for the safety of the respondent while he was engaged in his duties and that he would not be exposed to the risk of injury and that he was to be provided with safe working condition. The appellant was averred that the said accident was caused by the respondent's negligence. The appellant further averred that respondent was trained as a Lathe Operator and not a Turner / Fitter hence the injuries could not have arisen from the course of employment.

Eventually the case was tried before Mr. Kinyanjui the Senior Resident Magistrate who at the end of the said trial found the appellant liable to respondent in damages and thereafter he awarded Kshs. 12,000/- as general damages and Kshs. 3,000/- as special damages.

The appellant felt aggrieved by the finding on liability and the damages awarded.

In his submission Mr. Masika for the appellant contended that the learned Magistrate had erred in making a finding that the appellant was 100% liable to the respondent in view of the evidence adduced. He also claimed that the magistrate did not make a finding whether or not the respondent was issued with gloves. Mr. Masika also claimed that the learned Magistrate should have taken into consideration the fact that the grinder which caused the accident had been defective before the respondent had used.

Mr. Odhiambo for the respondent in his submission suggested that the court was under a duty to consider evidence on record as a whole and that the magistrate cannot have been faulty on liability because the grinder was defective and that the respondent did not cause it to crack and that the magistrate's finding was correct in terms of the evidence on the record. According to Mr. Odhiambo the evidence of DW1 was contradictory in respect to the gloves.

It was not denied that the respondent suffered injury while working in the premises of the appellant when the stone of the dgrander broke off and injured the respondent's 3 fingers which have become paralysed. The respondent claimed that the blamed the appellant as the grinder was defective and that the matter had been reported several times earlier on to Mr. Owingo but no steps were taken to replace it. There was also a claim that the respondent had not been provided with gloves. The appellant did not deny

those claims but Mr. Owingo was not called.

Section V of the Factories Act Cap 514 appears to impose strict liability upon the owner of the factory for accidents caused by defective machinery. Further more the learned magistrates finding on liability was an exercise of his discretion. No ground of any alleged misdirection which made him decide on liability as he did has been shown in this appeal and has not been demonstrated that as a whole the magistrate was clearly wrong in the exercise of his discretion and whether any injustice has resulted.

Having considered all these issues I find that this appeal is without merit, the same is therefore dismissed with costs. Dated and delivered this 6th of July 2004 in the presence of D. Otieno for Kasamani for appellant and Mr. Ouma for respondent.

B.K. TANUI

JUDGE