



**IN THE REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 452 OF 1998**

**DAVID KITUU NZUMA.....PLAINTIFF**

**V E R S U S**

**EPCO BUILDERS LIMITED.....DEFENDANT**

**JUDGEMENT**

The Plaintiff filed a Plaint against the Defendant on 5.12.97 claiming for general and special damages in negligence arising from industrial injury. In his evidence, he stated that he was employed in 1993 as a labourer but later he became a storekeeper in August 1993. His job included inter alia washing the concrete mixer and keeping it in store, but he says the employer added the work of greasing the machine as well. He was doing so in the mornings and washing it in the afternoons. He complained to the employer about the greasing job saying he was not trained for it and the work was dangerous but he left him to do it.

On 20.1.97 at about 11.00 a.m. he was asked by the owner to grease the mixer. He was wearing a loose overall not a tight one. At that time, the machine was on. The loose garment facilitated contact on the machine. His right hand got caught in it and was crushed up to the wrist. By then he had done this kind of job for 3 days. At that time, he was 32 years of age.

The Defendant denied liability and DW1 Samuel Mugo Muchoka an investigator for the Kenindia Assurance Company visited the scene in May 1997 at Westlands where the accident occurred. His was just to trace back what had happened.

DW2 Manji Kalyan Bhudia, a building foreman with Ebco Builders, the Defendant company, was the superior at the time of the accident. He confirmed that Plaintiff was a store keeper and that he was greasing the mixer when he got the accident and that he had greased it for some time, but he did not know for how long. He did not know how the accident happened as he was not on the scene. He claimed that the Plaintiff had learnt greasing on the job and that the machine was a small one anyone could operate.

There were ten agreed issues which when considered leaves 3 main issues; First, was the Defendant injured? Secondly, was employer negligent? Thirdly, if so, what is the quantum of damage? This is what is normally called industrial accidents the peculiar nature of it is that it arises in both tort as well as in contract because there must be relationship of employer and employee so as to make the master be liable in tort normally of negligence based on breach of statutory duty or common law or both.

In this case, the Plaintiff was employee of the Defendant and got injured while on duty. The duty of the employer that he owes to his employee is threefold, in an industrial injury clause first a master must use reasonable care in choice of his servants. Proper competent persons to superintend the work, secondly, he must maintain plant and appliances proper to the work in which they are to be used and thirdly, to provide a safe and proper system of work.

The evidence here is that the Plaintiff was a storekeeper but against his will was prevailed on by power of superiority to grease the mixer and to do so dangerously when the machine was in motion.

DW2 a supervisor was faint heartedly attempting to suggest that the work was not to be done when the machine was in motion, but I do not believe him. Plaintiff was asked to do so in any case even with qualified hands the duty upon the master is that “he must give such instructions as may be necessary” to offset a servant youth or inexperience or to check dangerous misbehaviour.

HUDSON V. RIDGE MANUFACTURING CO. LTD. (1957) 2 QB 348 Inexperienced workmen should be made aware of the danger and be warned. Here nothing was done in this regard. A worker was exposed to danger without warning.

It is also proved that the master did not provide a safe system of work. It is not enough to say the workman is competent and machinery is good. The law requires that they may be joined in a safe system of work. Here the grease was used in a running machine. The man having no protection whatsoever, and wearing baggy dress posing danger instead of tight clothes. This was unsafe system and the master is liable.

DW2’s evidence suggests that much was left to the workman to take his own precaution, but that does not discharge the duty by leaving it to the workman to take initiative to avert possible danger. What is relevant is what GREEN MR said in quotable case of SPEED V THOMAS SWIFT & COMPANY LIMITED (1943) KB 557 That physical layout of the job, procedure adopted, the sequence in which the work is to be carried out, provision of warnings, notices and special instructions all may be relevant.

Looking at this evidence, the employer was far from meeting what is required. As for machinery, there is no blame but of course he should not have allowed greasing to be done when the machine was in motion even as it was said that it was intended to advance maximum result.

I find the employer negligent.

As for damages, Dr. Harshed Patel’s report of 8.4.97 says Plaintiff suffered crush injury on right hand although surgically well treated, he lost right hand at a level of wrist joint so amputation was a level lower 1/3 of forearm. His disability is assessed at 50%.

He was 32 years by the time he was incapacitated. He could have worked until he was 52 years. His loss is therefore, about 20 years at a salary of Kshs.3,360/- per month. Given that his gross would be less tax about 2/3 leaving  $1120 \times 2 = 2240$ ;

He would have earned  $(2240 \times 12 \times 20)$

Kshs.44,800 x 12

Kshs.534,600

Pain and suffering Kshs.100,000

**TOTAL Kshs.634,600**

From this deduct payments –

i) workmen’s compensation Kshs.120,000/-

ii) Hospital bills Kshs. 53,000/-

iii) salary paid for 3 months being  $\frac{1}{2}$

salary (3360 x 3/2 x 1 Kshs. 5,040/-

**TOTAL Kshs.178,050/-**

Special damages not proved and is disallowed. So total award -

Kshs.634,600/-

Less Kshs.178,050/-

**Kshs.456,550/-**

Plus interest and costs.

**DELIVERED at Nairobi this 23rd day of May 2003**

**A.I. HAYANGA**

**JUDGE**

**Read to –**

**Mr. Nduna for Plaintiff**

**No appearance for Respondent**

**A.I. HAYANGA**

**JUDGE**