



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 388 OF 1999

CONSTRUCTION COMPANYAPPELLANT

VERSUS

DANIEL NGUNJIRI GITHENDURESPONDENT

J U D G M E N T

In 1991 the plaintiff was employed by the defendant as a casual worker on a timber splitting machine. While on duty at the machine on 21st May 1991 feeding the timber therein the said machine hit a knot on the timber causing the same to jump up and as the plaintiff tried to push it back he stumbled and caught at the place where the timber should have been causing his left hand to be crushed by the machine.

As a result of this accident the plaintiff sustained injuries thereby suffering loss and damage; in that his left thumb was amputated at the proximal interphalangeal joint, the index finger at the first interphalangeal joint, the middle finger at the mid phalanx and the ring finger at the first phalanx.

Following this injury, the plaintiff, through lawyers Lilian Njuguna & Company Advocates, filed Civil Case Number 4226 of 1992 in this court to pray for both special and general damages, costs of the suit and interest blaming the defendant for failing to take any precautions for the safety of the plaintiff while at work, and/or exposing him to the risk of damage or injury of which the defendant knew or reasonably ought to have known, and/or failing to take any adequate measures by way of examination, testing inspecting or otherwise to ensure that the place the plaintiff carried out his said work was safe and/or failing to provide and/or maintain a safe and proper system of working.

On 21st June, 1994 the plaintiff made an application for the transfer of the case from this court to the Chief Magistrate Court at Sheria House Nairobi and an order to this effect was made on 15th November, 1994.

By this time a defence and a reply to defence as well as statement of issues had been filed.

The case was heard by the Senior Principal Magistrate (J.R. Karanja) at the Milimani Commercial Courts on 22nd April, 1999 and 28th May 1999.

When the plaintiff testified he stated that on the day of the incident he used his hand to push pieces of timber into the timber splitting machine and that no hook had been provided on that day for that work.

That the machine required sharpening and that he had indicated this to his supervisor who told him to continue with work or go home.

The defence witness denied that the defendant was negligence and asserted that the plaintiff was

injured as a result of his own carelessness.

The learned magistrate wrote and delivered his judgment on 30th July 1999 and apportioned liability as to 30% against the plaintiff and 70% against the defendant and proceeded to award the plaintiff Kshs.400,750/= less 30% as special and general damages.

Out of this decision the appellant appealed to this court in a memorandum of appeal which listed eight (8) grounds of appeal and filed in this court on 15th September, 1999.

These grounds faulted the learned magistrate for entering judgment for the plaintiff when he had not proved his case on a balance of probabilities, and/or for finding that usage or non-usage of the hook did not appear to play a vital factor in the cause of the accident; and/or in concluding that the issue of the hook was contradictory when it was the distance at which the plaintiff stood while using the hook which contributed to the accident; and/or that the magistrate misdirected himself in entering judgment for the plaintiff even after he found that the plaintiff had not taken proper precaution and had exposed himself to the risk of injury, that he erred in not considering the plaintiff's training, experience and awareness that the circular saw was blunt and required to be sharpened before being used and not coming to the conclusion that the plaintiff's misfortunes were of his own making.

That the magistrates apportionment of liability was unproportional when it was clear that the plaintiff was more or wholly to blame for the accident, that he erred in his assessment of damages and came to an erroneous estimate of damages and that he erred in entering judgment in full without reducing it by the amount paid under the workmen's compensation when this amount was admitted in evidence.

Counsel for the parties appeared before this court on 24th July 2002 to either urge or oppose this appeal with counsel for the appellant dwelling mainly on the factor played by the use or non-use of the hook by the plaintiff in handling timber.

According to him by the plaintiff not using the hook he wholly contributed to the accident because there was no other way the defendant could have provided a safe system of work on a knot which was on the timber.

He stated that the plaintiff should have insisted on getting and using the hook and should also have sharpened the machine.

Counsel was of the view that the contribution of 30% against the plaintiff to 70% for the defendant was not proper and that such contribution should have been apportioned equally or that since the lower court heaped more blame upon the plaintiff, his liability should have been apportioned at 70%.

Counsel urged court to allow this appeal with costs or else reduce the award to Kshs.200,000/=

Counsel for the respondent opposed the appeal and submitted that no hook was provided to the plaintiff and that it was the bluntness of the machine – which had earlier been brought to the attention of the supervisor who refused to intervene, which caused this accident.

According to the plaintiffs counsel, his evidence stood unchallenged and that if the machine had been sharpened the knot on the timber would have passed through.

Counsel stated that the apportionment of liability was correct as the plaintiff did what he had to do at the time and that the assessment of damages was reasonable.

He prayed for the dismissal of the appeal with costs.

One question the magistrate was to decide was whether the plaintiff had been supplied with necessary appliances for

use at his place of work to enable him avoid falling into a risk or risks attendant at such place of work.

The plaintiff said there was no such appliance while the defence witness said there was one in form of a hook for use in feeding the machine with timber.

At one time in his evidence, though, the defence witness said the plaintiff used such hook while at another he said the plaintiff failed to use it and this is why the accident occurred.

The magistrate had to decide which version of the two pieces of evidence to accept. He found, in view of the contradiction in the evidence of the defence witness, that there was no such hook and/or that the evidence of the plaintiff in this respect was more believable than that of the defence witness.

But there was another crucial aspect of this incident than the use or non-use of the hook at the time of the accident.

This was that the piece of timber fed into the machine at the time had a knot which could not go through the said machine because the latter was blunt.

The plaintiff even went on to testify that he had brought this to the notice of his supervisor who told him to work with the machine the way it was or go home.

The plaintiff told the court that since he was working to earn his daily bread, he decided to go on using the machine the way it was.

According to him if the machine had been sharpened, the knot would have gone through the machine. This evidence was not challenged by the defence.

In his submission to this court counsel for the appellant states that the plaintiff, an experienced carpenter, should have insisted on having the machine sharpened.

This submission must simply be for the sake of argument; otherwise, an employee must go by the instructions of employer otherwise he loses his job!

Assuming for one moment that there was a hook, which has been denied, how would the plaintiff have used it in a situation where the timber failed to go through the machine because of the knot and jumped!

I take it that this happened at the spur of the moment and that it was only reasonable that the plaintiff uses his hand to control the timber and put it back in position!

How can he be blamed for doing this?

And that there could have been no possible appliance to be supplied to the plaintiff to meet such a situation could and does not absolve the defendant from liability.

In my view, the magistrate correctly apportioned liability at 30% against the plaintiff and 70% against the defendant.

In regard to damages, the appellate court can only interfere if the award made by the lower court was or is inordinately high or low or if it is (was) based on erroneous grounds.

In the case subject to this appeal the medical report prepared by Dr. Charles K. Munene gave the injuries the plaintiff suffered as follows:-

1. amputation of the thumb (left) at the metacarpal – phalangeal joint.

2. amputation of the index finger at the proximal interphalangeal joint.
3. amputation of the middle finger at the middle phalanx.
4. amputation of the ring finger at the first interphalangeal joint.

The doctor's opinion was that

“This man suffered serious injuries on his left hand when he was injured by a machine. He suffered a lot of pain and lost much blood. As a result he has lost almost total use of his left hand because four fingers were amputated. This is a permanent disability .”

With this kind of report and in consideration of the devalued Kenya Shilling and all the circumstances of the case, I would think a sum of Kshs.400,000/= in general damages was reasonable and commensurate with the injuries sustained.

I, however, agree that out of this amount, Kshs.33,900/= the plaintiff, admitted to have been paid in workmen's compensation should have been deducted from the judgment amount as well as 30%, the plaintiff's apportionment of liability.

Other than this variation in the award, the appeal has no merit and is hereby dismissed. The appellant to pay the respondent half costs of this appeal and the case in the lower court.

These shall be the orders of this court.

Delivered this 19th day of September, 2002.

D.K.S. AGANYANYA

JUDGE