REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL NO. 423 OF 1998

JAGAT SINGH & SONS LTD …… APPELLANT

VERSUS

NJENGA MOCHE ……RESPONDENT

J U D G E M E N T

The plaintiff was, on 12th November, 1994, working at the premises of the defendant when he suffered an injury on his left eye.

He alleged he had been instructed to remove a metal partition from some motor vehicle using a grinder when the said partition flew and pierced his left eye in consequence of which the said plaintiff sustained severe injuries and he suffered loss and damage.

Particulars of injuries and special damage were pleaded in paragraph 5 of the plaint.

The plaintiff blamed the accident on the defendant for breach of statutory duty and negligence particulars whereof were pleaded in paragraphs 6 and 7 of the plaint.

A suit in this regard was filed in the court of the Chief Magistrate, (Sheria House) Nairobi on 14th December, 1994 to claim both special and general damages for the injuries sustained and expenses incurred.

There were also prayers for costs of the suit, interest and any other relief the court may deem just to grant.

After a memorandum of appearance and defence were filed in court the case was heard by R.E Ougo, (Mrs) Senior Resident Magistrate on 14th September 1998 and submissions made on 2nd October, 1998. Judgement was delivered on 9th November, 1998 in which the Learned Magistrate found the appellant 100% liable for this accident and awarded him Kshs.250,000/= general damages and Kshs.2,560/= as specials, hence the appeal filed herein on 20th November, 1998 in a memorandum of Appeal listing 9 grounds of appeal.

These grounds raised issues with liability, quantum and/or whether the respondent had proved his case on a balance of probabilities and/or whether he was not partly or wholly to blame for the accident.

The appeal was heard in this court on 12th October, 2002 when counsel for both parties appeared either to urge or oppose the appeal.

Counsel for the appellant submitted that the issue of liability was not correctly decided as the Magistrate did not give reasons for accepting the respondents' word against that of the appellant as to whether the former had been issued with goggles or not

That since the respondent had worked with the appellant for such a long time, he was a competent worker not always to be supervised by is master and that with such vast experience on the job, he would be expected to be aware of the risks involved and to try and avoid them including the one leading to the accident subject to this appeal.

According to counsel, some measure of negligence should have been attributed to the respondent.

Counsel disputed the figures awarded for both special and general damages because in case of the former, only Kshs.1,100/= was pleaded while in the later the injuries sustained did not warrant it.He prayed that the appeal be allowed with costs.

Counsel for the respondent supported the decision of the learned Magistrate on both liability and quantum.

He submitted that the defence witness was not present when the accident occurred and he did not produce sample of the goggles for identification purposes.

That there was no evidence that the respondent had disobeyed instructions by not wearing goggles, if any were provided.

He said the amount of Kshs.250,000/= awarded in general damages was adequate for the injury sustained. He prayed for the appeal to be dismissed with costs.

There was no dispute that the respondent was injured while performing duties for the appellant. This was the kind of job which required the respondent to wear goggles to protect foreign matter from entering his eyes.

While the respondent testified that he has not supplied with some the appellant's witness said some one supplied to workers including the respondent.

The Magistrate considered the two pieces of evidence and, decided in favour of the respondents' evidence.

The defence witness did not tell the lower court he was the one who issued the goggles to the respondent and/or when and/or why he could not produce samples to the lower court for identification purposes by the respondent.

It may be true the respondent had worked for the appellant in that position for more than ten (10) years without being injured but this does not mean when he is injured he should not claim damages for breach of statutory duty by and/or against the appellant because by his wide experience he should have been more careful.

Removing a metal particle from a motor vehicle using an electric grinder is fairly risky as the operator or worker is unlikely to have any control over the force with which it may come out when removed therefrom.

And because of lack of such control the speed at which it flies out as, in the case subject to this appeal, into the respondents' eye must have been so great it was hard for the respondent to evade it.

In the circumstance, it would be difficult for a reasonable Magistrate, as the lower court in this appeal, no doubt was, to find any basis for apportioning negligence upon the respondent and the learned Magistrate acted within the law in finding the appellant 100% to blame for failing to provide protective

appliances, namely goggles, to the respondent to prevent the accident which occurred on 12th November, 1994.

The appellant disputed the award of Kshs.250,000/= as general damages saying the injuries sustained did not warrant this kind of award.

The medical report prepared by Doctor Charles K. Munene on 18.5.96 showed that the particle flew and lodged in the respondents' eye on14.11.94 and was not removed until 17th November, 1994 under local anaesthesia.

For these 3 days, the respondent must have felt intense pain with a foreign matter in his left eye.

And the doctor's conclusion and prognosis was that the respondent suffered much pain for about ten days.

As a result of the injury vision in the left eye was impaired by about 75%. That what a normal person will see at six metres,(with his left eye) this man can only see it at one metre. That this incapacity is permanent and not accountable to any treatment.

The Magistrate considered this injury severe and awarded the respondent Kshs.250,000/= as general damages.

In the case of award of damages the appellate court can only interfere if such award is inordinately high or low.

No submissions have been advanced to satisfy this court that the award of Kshs.250,000/= was inordinately high or that it was based on an erroneous assessment or estimate;

See **BUTT vs KHAN [1982 -88] IKAR1 . -**

> **An appellate court will not disturb an award of damage**
>
> **s unless it is so inordinately high or low as to represent**
>
> **an entirely erroneous estimate. It must be shown that the**
>
> **judge (Magistrate) proceeded on wrong principles or that**
>
> **he misapprehended the evidence in some material respect,**
>
> **and so arrived at a figure which was either inordinately high or low".**

And in Nyambura Kigaragari vs Agripina Mary Aya [1982-88] I K.A.R 768 the Court of Appeal (Hancox, Nyarangi JJA and Platt Ag. J.A had this to say:

> **"Awards made in this type of cases or in any other similar**
>
> **on es must be seen not only to be within the limits set by the**
>
> **decided cases but also to be within what Kenyans can afford.**
>
> **That must bear heavily upon the courts. The largest application**
>
> **must be given to that approach. As large amounts are awarded**
>
> **they ar e passed on to members of the public, the vast majority**

of whom cannot just afford, in form of increased costs for insurance

cover…… or increased fees".

Guided by those authorities and without evidence to convince this court that the award made in the case subject to this appeal were so inordinately high or that the learned Magistrate proceeded on wrong principles or that she misapprehended the evidence in some material respect, my view is that a person with a deformed eye remains haunted by embarrassment throughout his life and that an adequate award should be made to him.

And that in the case subject to this appeal the Magistrate correctly made the award of Kshs.250,000/= as general damages and that I cannot interfere with it.

As regards the award of Kshs.2,560/= as special damages, the law on this type of damages is that they must be specifically pleaded and strictly proved – see Herbert Kahn vs Amrik Singh [1982-88] I KAR 738.

___The respondent pleaded Kshs.1,100/= in the plaint and could not purport to prove Kshs.2,560/=- without amending the plaint.

Apart, therefore, from making this slight variation in the figure of special damages from Kshs.2,560/= to Kshs.1,100/=, this appeal has no merit and I dismiss it with costs.

Delivered and dated this 8th day of October, 2002.

D.K.S AGANYANYA

JUDGE