



**Mini Bakeries Limited v Kimenye (Civil Appeal 433 of 2017)
[2024] KEHC 9216 (KLR) (Civ) (24 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9216 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 433 OF 2017

BM MUSYOKI, J

JULY 24, 2024

BETWEEN

MINI BAKERIES LIMITED APPELLANT

AND

ERICK NZIVO KIMENYE RESPONDENT

*(Being an appeal from judgement and decree of Honourable D.W. Mburu dated 28-07-2017
in Chief Magistrate's at Milimani Commercial Courts civil case number 2191 of 2016)*

JUDGMENT

1. The respondent was an employee of the appellant who alleged that on 5-10-2015 while in the course of his duty at the appellant's factory, his colleague switched on a bread slicing machine without notice in consequence of which the machine cut his right thumb. The right thumb ended up being amputated.
2. On 14-04-2016, the respondent filed a suit in Chief Magistrate's court at milimani commercial courts vide cmcc number 2191 of 2016 in which he blamed the appellant for the injury sustained. The respondent filed defence and denied liability and pleaded contributory negligence against the respondent. Honourable D.W. Mburu heard the case where the only evidence taken was that of the respondent. The appellant's advocate indicated that the appellant would not be calling any witnesses. The honourable magistrate found the appellant 100% liable and awarded the respondent a sum of Kshs 600,000.00 for pain and suffering and Kshs 3,500.00 as special damages.
3. The appellant preferred this appeal against the judgment and raised 8 grounds of appeal. Having gone through the grounds of appeal and the appellant's submissions dated 28th November 2022 and the respondent's submissions dated 28th November 2022, I have come to a conclusion that there are only two issues in this appeal which are; whether the magistrate was correct in finding the appellant 100% liable and whether the amount of general damages was too high that it amounted to erroneous estimate.



4. The evidence before the lower court was relatively short and brief. The respondent told the court that on 5-10-2015, he was lawfully performing his duties when a colleague switched on a machine without notice. According to the respondent, the machine is used for slicing bread. He told the court that the machine caught his right hand thumb and cut it. The respondent told the court that the accident was caused by the negligence of the appellant and breach its statutory duties of providing safe working conditions and environment. The respondent's injured thumb was eventually amputated. He produced five documents listed in his list of documents dated 5th April 2016. The documents were, a demand letter dated 23-03-2015, a blank P3 form dated 7-03-2015, case summary from Kenyatta National Hospital dated 6-10-2015, medical report by Dr. G.K Mwaura dated 24-03-2016 and receipt for the medical report dated 24-03-2016.
5. In cross examination, he stated that he reported the accident to his employer but he was ignored. The appellant did not call any evidence to rebut the respondent's. The judgement of the trial court, states that the appellant did not file submissions but I have seen its submissions in the record of appeal which appear to have been filed on 8-06-2017. I have gone through the original record of the lower court and I have not traced the appellant's submissions in the file.
6. The appellant chose to close its case without calling evidence. Although it is denied in the defence that the respondent was its employee, the appellant did not find it fit to call anyone from the company to controvert what the respondent told the court. Pleadings are not evidence and parties must adduce evidence in support of the pleaded facts. The appellant has not even raised the issue of its relationship with the respondent in this appeal. There is therefore no dispute that the respondent was at the time of accident an employee of the appellant.
7. There is also no dispute either from the evidence or the parties' submissions that the respondent was injured while working for the appellant. It is common ground that the appellant had a duty to provide safe and appropriate working conditions and environment for its employees. The appellant's place of work was a manufacturing plant with moving machines. The appellant is therefore required and expected in law to ensure that the machines do not pose a danger to its employees. This would include providing protective gear to and clothing for its employees. The appellant did not call evidence to show that it had provided the respondent with protective gear noting that the respondent was expected to handle things in a room where there were machines.
8. The appellant has in its submissions wondered why the respondent did not mention the colleague who switched on the machine on without notice. On this point, the respondent has cited to me the authority of *Peter Kibe Waweru vs Moses Maina (2022) eKLR* where Honourable Justice Matheka held that;

‘The appellant did not state how the respondent distracted him and due to the fact that the appellant did not demonstrate how the respondent distracted him, the respondent could not be held wholly to blame.
9. The above citation does not help the appellant in this matter. The respondent herein told the court that a colleague switched on the machine without warning meaning that the machine was not on when the respondent started working. To me, that is a satisfactory explanation of negligence on the part of the appellant's agent who switched on the machine. The appellant is vicariously liable for the action of its employee who switched on the machine. The appellant has proposed that I apportion liability at 50:50 as there was no evidence on how the accident occurred. I have no reason to find the respondent to have been negligent to any degree. The appellant should have called evidence to establish negligence on the part of the respondent. In the circumstances, I uphold the honourable magistrate's decision on liability and hold that the appellant was 100% liable.



10. On quantum, the appellant submits that the amount of Kshs 600,000.00 was too high. It is trite law that an appellate court should not disturb an award of damages unless it is shown that the trial court left out a relevant matter or considered an irrelevant factor or that the court applied wrong principles. An appellate court will also be justified to disturb an award of the trial court if it is shown that the award was too high or too low such that it amounted to an erroneous estimate considering the nature of injuries and the trend of awards for similar injuries. Otherwise, damages are at the discretion of the trial court. In this matter I am called upon to determine whether Kshs 600,000.00 was too high for the kind of injuries the respondent sustained.
11. It is not in dispute that the respondent sustained injury to his right hand thumb which led to its traumatic amputation. The medical report by Dr Mwaura does not state any other injury but assesses permanent incapacity at 25%. There is no indication that the respondent continued to experience any pain or post treatment complications. It has not been shown how the injury or amputation has affected the respondent's life.
12. The appellant has complained that the trial court should have called for a second medical examination to ascertain the degree of injuries. I do not know of a practice where the court should order for a second or further medical opinion without a request by one of the parties. It is wrong and unprofessional for the counsel to fault a court for their own failures. I have gone through the proceedings and I have not seen anywhere the appellant made an application for the court to make an order for a second medical examination. Whereas it is the right of defendants in accident cases to have the plaintiff undergo medical re-examination, the court has no duty of supervising exercise of that right suo moto. The appellant did not ask the court for that right and it should not be heard complaining of the lack of second medical report on appeal. In any event, the appellant's advocate did not even oppose production of the plaintiff's doctor's medical report. It is presumed that the report was produced by consent meaning that the nature and extent of injuries was not contested.
13. The appellant has asked me to reduce the sum to Kshs 200,000.00 and cited the authorities of *Pietro Canobbio vs Joseph Amani Hinzano (2016) eKLR* where the respondent was awarded a sum of Kshs 750,000/= for amputation of three fingers leading to 18% permanent incapacity; *Sino Hydro Corporation Ltd vs Daniela Afilu Kuminda (2016) eKLR* where a sum of Kshs 600,000/= was awarded to the plaintiff who had suffered an amputation of middle and ring fingers and *Eastern Produce (K) Limited vs Allan Okisai Wasike (2014) eKLR* in which the respondent who had suffered amputation of the left index finger was awarded a sum of Kshs 200,000.00.
14. The respondent on the other hand maintained that the amount awarded by the trial court was commensurate with his injuries and comparable to other awards involving similar injuries. The respondent claims in his submissions that he spent 2 months in hospital. I have not seen any evidence in proof or even suggesting that the respondent was admitted to hospital for two months. The case summary from Kenyatta National Hospital has the date of admission as 6-10-2015 but has no date of discharge. The respondent stated that the appellant ignored his case in which case one would expect to see receipts for payment of a hospital bill reflective of a two months treatment as inpatient. I have not seen any receipt for payment of medical expenses which would show that the respondent spent a day in hospital.
15. The respondent has cited *Pyramids Packaging Limited v Humphrey W. Wanjala (2012) eKLR* where a sum of Kshs 650,000.00 was awarded for the respondent who had sustained amputation of the left index finger, middle and ring fingers and *Sino Hydro Corporation Limited vs Daniel Afilu Kuminda (2016) eKLR* which was also cited by the appellant.



16. It is clear to me that the authorities the respondent has relied on involved injuries which were more serious than his case. I have also had a look at the authority of Christine Kongáni Juma vs Flexpac International Limited (2017) eKLR in which the court awarded damages of Kshs 200,000.00 on 2-01-2017 to the appellant who had injuries on the thumb leading to its deformity and permanent incapacity of 5% and Simba Posho Mills Limited vs Onguti (2005) eKLR in which the court on 20th January 2005 awarded a sum of Kshs 180,000.00 for the respondent who had suffered an amputation of the right index finger, degloving injury to the middle finger of the right hand and a cut wound on the right thumb which in my opinion is more comparable to the respondent's injuries and doing all that I can, I am of the view that a sum of Kshs 250,000.00 is adequate and commensurate with the respondent's case. I find the award of Kshs 600,000.00 too high for the injuries sustained by the respondent. The same is reduced to Kshs 250,000.00.
17. The totality of the above is that this appeal has partially succeeded with results that the general damages for pain and suffering and loss of amenities being reduced to Kshs 250,000.00. The same together with the uncontested special damages shall attract interest from the date of the judgement of the trial court until payment in full. There will be no orders as to the costs in respect of this appeal but the respondent will have costs of the lower court suit.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JULY 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

