



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 725 of 2006

Editorial Summary

1. *Civil Appeal*
2. *Subject of Subordinate Court case*

TORT/CONTRACT

- 2.1 *Industrial accident*
- 2.2 *Work place injury*
- 2.3 *Male adult – employee aged 23 years old
in 2003*
- 2.4 *Employee working with a flower sizing machine.*
- 2.5 *Sustained cuts to 3rd and 4th fingers
(12th April 2003)*
- 2.6 *Paid workman's compensation Ksh. 2,700/-*
- 2.7 *Employee served employer on 21st April 2005*
- 2.8 *After trial, hon magistrate entered judgement
in favour of the respondent/original plaintiff on
26th September 2006.*
- 2.9 *Award:*
 - General damages:*
 - i) *Pain and suffering* *Ksh. 50,000/-*
 - Special damages:*

ii) Medical report Ksh. 2,000/-

Liability
ration 60% to plaintiff

40% to defendant

for not providing gloves.

3. Appeal 25th October 2006:

3.1 Hon. Magistrate erred in law and fact in finding
appellant 40% liable for accident.

3.2 ... in failing to dismiss the respondent's suit.

3.3 ... in failing to appreciate the ... value of the
written submissions and authorities.

3.4 ...wrongfully exercising her discretion
in awarding respondent costs of suit and interest.

4. Submissions:

By appellant:

4.1 Evidence – a discrepancy to the pleadings.

4.2 Judgment be set aside and suit dismissed.

By respondent:

4.3 Trial magistrate court in its findings.

4.4 Suit has merits.

5. Held:

i) Appeal allowed.

ii) Suit dismissed.

iii) Injuries – soft tissue

iv) Probable award Ksh. 5,000/-

6. Case Law:

7. Advocates :

i) M/s Wanjama & Co Advocates for appellant/

II THE APPEAL

4. The grounds of appeal being that the Hon. Magistrate erred in law and fact:

5.1 ...in finding the appellant[employer] 40% liable for the accident.

5.2 ...in failing to dismiss the respondent's suit.

5.3 ... in failing to appreciate ... value of the written submissions and authorities.

5.4 ... in wrongfully be examining her discretion in awarding the respondent costs of the suit and interest.

5. The employer prayed that the judgment of the chief magistrate be set aside. That the respondent's suit against the appellant be dismissed in its entirety with costs of (both the subordinate court and the appeal).

6. Any further relief as the High Court on appeal deem fit to grant was prayed for too.

III BACKGROUND

7. This is an industrial accident case. It is not disputed that the employee respondent had been assigned work of sizing flowers with a sizing machine. With his left hand, he would operate and or switch on the machine and with his left hand, he would handle the flowers. The machine had a power saw, it used electricity and would eject flowers.

8. He would place the flowers in the machine with his hands. At no time was he ever provided with protective equipment, in this case, gloves. Suddenly his supervisor shouted. He turned his head suddenly to look when he was suddenly cut by the machine with his right hand.

9. He was rushed to the manager's office, administered first aid then given money to go to hospital. At the hospital he was given medicine and his wounds attended to with (elastic) plaster.

10. He continued working for the appellant, employer until the year 2005. This was two years after the incident of the accident. Thereafter he served his employer.

11. The plaint filed on the 21st April 2005 alleged that the employer had a duty of care. It was implied in his contract that this statutory duty required the employer to take reasonable care of the plaintiff whilst he was in employment. He also pleaded that the defendant/employer owed the plaintiff/employer a common law duty of care.

12. The pleadings further revealed the facts that on 12th April 2003, the plaintiff and others were in the grinding hall cutting the stems of harvested flowers "When a stem blocked the machine and while trying to unblock the machine, cut his two fingers of the right hand hence causing him serious injuries, loss and damage."

13. Particulars of the breach of statutory duty and or negligence was pleaded, namely:

13.1 That the employer assigned the employee duties without due care and attention.

13.2 Exposing the employee to risk ... which they knew or ought to know.

13.3 The employer failed to ensure that the machine the employee was using was in good condition thus endangering the life of the plaintiff.

13.4 The employer ordered the plaintiff to perform dangerous duties without any form of protection such as leather gloves and boots.

13.5 Forcing the employee to work in a hazardous environment.

14. When a plaintiff gives evidence, he or she requires to establish that the defendant employer was negligence. The particulars of negligence in the original plaint clearly showed that the cause of negligence was due to the said machine provided for by the employee was wanting. That it was the machine that was not in good condition and therefore put the employee at risk. That he was made to perform dangerous duties. In so doing this duty, he neither wore protective clothings such as leather gloves and boots. The trial magistrate declined to entertain any amendments to the pleadings, it being prejudicial.

15. Whereas the employer in this appeal stated the evidence before court was at a discrepancy with the pleadings, the trial court stated that through the pleadings stated that the injury sustained was as a result of a stem blocking the machine. When the employee attempted to unblock the stem, his fingers were cut. The employee insisted in his evidence that he cut his fingers when he tried to look at his supervisor.

16. It is my opinion that the employee's advocate would have applied to amend the pleadings and thereafter claim the supervisor's distraction, by calling him suddenly amounted to negligence.

17. Unfortunately, the pleadings and particulars were never amended. The Hon. Trial Magistrate saw nothing wrong herein and was of the view that negligence by the employer was not with the machine as pleaded but the failure to provide gloves for the employee to wear. Contributory negligence on the part of the employee was attributed at 60%. The employer was found 40% liable.

18. The employee's advocate entirely supported the findings of the trial magistrate.

19. I would find that the learned magistrate erred in finding that contributory negligence on the part of the employer was proved. The issue was the machine used. That it was defective. The employee established in evidence, the accident had nothing to do with the machine. The fault lay with the supervisor distracting him.

20. I would therefore agree with the submissions of the employer that no negligence was established by the employee against the employer for being negligent.

21. The issue of no gloves provided should not be ignored. The employer's advocate stated flowers required to be held by the hand. Gloves to my opinion is required to be supplied to the worker. In this case although the employee was the one who was negligent.

The cause of the accident is not the wearing of gloves and or boots but the supervisor distracting him.

22. I would find that the liability against the employer was not established. That the appeal against liability be and is hereby allowed. Judgment against the employee is set aside and the subordinate court's suit be and is hereby dismissed.

23. The law requires that this court give a probable award in the event the employee was successful in his case.

Quantum:

The injuries sustained is said to be;

- i) The index finger (the finger next to the thumb) and
- ii) The middle finger.

24. Injuries according to the medical legal report being cuts to the third and fourth finger.
25. There was a residual permanent scar on the fourth finger.
26. The injuries sustained was soft tissue in nature and moderate in degree.
27. The report was prepared by Dr S.K. Mwaura, a physician MB CHB PGD Nairobi.
28. The employee stated at the time he gave evidence that his finger had completely healed.
29. The award of Ksh. 50,000/- was high. A reasonable award of Ksh. 5,000/- would have sufficed and taking into account Ksh. 2,700/- already paid as workman's compensation to the employee.
30. I would dismiss the case. The appeal be and is hereby allowed with the costs to the appellant in the High Court. There be costs to the appellant/original defendant in the subordinate court.

DATED THIS 13th DAY OF JULY 2012 AT NAIROBI

M.A. ANG'AWA

JUDGE

Advocates :

- i) *M/s Wanjama & Co Advocates for appellant/
original defendant*
- ii) *M/s Wakahora & Co Advocates for respondent /
original plaintiff*