



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Appeal 341 of 2005

C & P SHOE INDUSTRIES LIMITED..... APPELLANT

VERSUS

GILBERT KHABELWA..... RESPONDENT

(From the decree and orders of Mrs. H Omondi Chief Magistrate in Milimani CMCC No. 12056 of 2003)

J U D G M E N T

The Plaintiff/Respondent, in a plaint dated 15th May, 2001, claimed general and special damages against the Defendant/Appellant. The Respondent obtained a judgment in general damages of Ksh.500,000/-, lost earning or reduced capacity of Ksh.493,000/- and special damages of Ksh.2,095/-, together with the costs of the suit. The awards did not please the Appellant who then filed this appeal.

A careful reading of the memorandum of appeal and the written submissions effectively shows that the Appellant admits that the Respondent was its employee, that the accident pleaded by him occurred and that the injuries alleged occurred to the extent that the Respondent indeed lost the use of his right hand permanently to the extent of 60%. The Appellant's complaint is mainly: -

- a) That the negligence that caused the accident was largely contributed by the Plaintiff/Respondent.***
- b) That award of general damages for pain, suffering and loss of amenities of Ksh.500,000/- was excessive.***
- c) That the award of Ksh.493,000/- as lost earnings or reduced capacity to future earnings was not justified, was not properly pleaded and proved and was also excessive.***

The facts of the case are not difficult to understand. Respondent was an employee of the appellant for nine years, working at the Appellant's plastic department where manufactured plastic shoe soles were made. The alleged accident occurred on 30th January, 1999, three days after the Respondent was assigned to work with a new and unfamiliar machinery. His dust overall cloth was, loose and apparently oversize to him. The Respondent apparently was working on the machine when the edge of the overall cloth was caught by the machine's mould which caused him to loss balance. As he reached out with his right hand to balance himself, the same hand was caught up between the machine piston moulds and was crushed, seriously rendering several fingers and the palm unusable. He was taken and admitted to Kenyatta National Hospital for medical treatment which included amputation of some fingers or parts of them.

The medical reports filed by the doctors instructed by the parties showed that the Respondent's incapacity

in the use of his injured hand was up to 60%. His monthly salary was Ksh.4110/-. He was 31 years old. There was undisputed evidence from both sides that the machine which caused the accident, was supposed to be operated by the supervisor who was at the material time in another section of the factory. It was also not disputed that the Respondent/Plaintiff and those who worked close to him knew little of how to operate the machine. Indeed when the accident occurred, the supervisor was away and it was a co-machine attendant who had to switch off the machine on witnessing the accident.

I have carefully perused the evidence on the record as well as the pleadings and submissions. I have also carefully read the trial court's judgment and the grounds upon which it was based. I am aware that it is the duty of this court, sitting as an Appellate court, to reconsider and/or re-evaluate the evidence of the trial court, with the option to arrive at the same or different conclusions from those reached by the trial court.

To the above end, I have carefully re-evaluated the evidence. I have come to the conclusion however, that the trial court arrived at a correct conclusion and finding. There was sufficient evidence before that court that the Respondent was injured in the course of his employment and as he operated a newly installed sole-making machine. There was little or no evidence to show that the Respondent had been given any or sufficient training to work on the new machine. Indeed the Respondent in his testimony before the trial court, denied receiving such training and testified that the accident took place three days after starting to work on it.

Furthermore, the Appellant failed to explain away why he supplied the Respondent with a large and loose overall cloth which was likely to flow into or be caught up by the machine pistons. It ought to have supplied a light and tight-fitting overall which would not easily flow into the pistons. This court, accordingly finds, like the trial court did, that it was largely the cumulative negligence of the Appellant or its agents or servants, that led into and caused the accident in which the Respondent was injured.

The Appellant argued that the Respondent had worked in the factory for 10 years and should have warned himself that a loose fitting overall was a potential danger to work in. That the Respondent should therefore have avoided the occurrence of the accident if he had exercised diligence. I find that argument a little twisted. The cloth was deliberately supplied by the Appellant to the respondent to use it. Was it not the appellant who should have exercised diligence and should have avoided supplying the potentially dangerous overall under its statutory or common-law duty of care? The appellant did not say it supplied the loose overall with a warning to the Respondent to use it with care. Even then, the appellant's responsibility would not have ended there if an accident occurred.

The conclusion this court arrives at and the finding of the court is that the appellant was in breach of its common law and statutory duty of care to the Respondent. It, therefore, should bear the liability arising from that breach.

I have considered the issue as to whether the Respondent contributed to the occurrence of the accident. I am of the view that he cannot escape completely. He wore the overall. He should have been a little more careful. I share to him 5% of the blame.

On quantum the lower court awarded Ksh.500,000/- as general damages for pain and suffering and loss of amenities. It also awarded Ksh.493,200/- as lost earning or reduction capacity to earn.

This court finds Ksh.500,000/- awarded as general damages to be proper. The trial court took into account the seriousness of the injuries relying on the medical reports of Dr. Shah and Dr. Wokabi. The court noticed and took into account the percentage of disability which it found to be 50% to 60%.

In respect to lost earnings, the trial court applied only 10 years although the respondent had 24 years more to the retiring age. The court arrived at a figure of Ksh.493,200/- which would appear to be on the lower side. This court could have applied a higher multiplier than 10 years. However, since there is no cross-appeal the court will not disturb the award.

As to special damages of Ksh.2095/-, the lower court was satisfied that it was pleaded and proved. This

court will not disturb that finding as there are no good reasons given to do so.

In conclusion, it is the finding of this court that this appeal has no merit. It is dismissed with costs except for the reduction of the damages by 5%, to arrive at the total sum of Ksh.945,530.25. Court interest will apply from the date of lower court judgment for general damages and from the date of filing of lower court suit in respect of special damages. Orders accordingly.

Dated and delivered at Nairobi this 3rd day of October, 2012.

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D A ONYANCHA

JUDGE