IN THE COURT OF APPEAL

AT NAKURU

(CORAM: GACHUHI, GICHERU & KWACH JJ A)

CIVIL APPEAL NO 22 OF 1988

ARKAY INDUSTRIES LIMITED…….…. APPELLANT

VERSUS

ABDALLA AMANI……..……RESPONDENT

(From a Judgment of the High Court al Eldoret (Aganyanya J) dated 24th April 1987 in Civil Case No 81 of 1986)

JUDGMENT

The appellant, Arkay Industries Limited, was in the year 1985 engaged in the processing of edible oil. It was located at the Industrial Area, Eldoret. In the month of June, 1985, the respondent, Abdalla Amani, was employed by the appellant as an expeller cleaner at a monthly salary of Shs 612/-. His duties included removing oil cake from the cleaner and putting it in tins. After doing this, he could then stand on a table and pour oil cake into the processing machine. In the course of doing this, some oil cake poured on the table and thereby made it slippery.

On 14th November, 1985, the respondent was on duty. In the course of this duties, he stood on the table mentioned above to pour the oil cake into the processing machine which was in motion. That table was slippery. He slipped. As the processing machine was not fenced and there was nothing he could hold on to, his left hand fell into the moving machine. His left mid-finger was amputated and his left index finger was mangled. The latter was later amputated in hospital where he was an in-patient from 14th November, 1985 to 2nd December, 1985. After his discharge from hospital, he continued to receive treatment as an out-patient up to the month of May, 1986.

The respondent's level of education was up to form 3 and had CPE and KJSE cerfificates. He was left-handed. At the time of trial of his suit against the appellant in the superior court, he was about 24 years old. He was married and had one child. Since the injuries mentioned above, he complained that he could not do "*shamba*" work which required the use of two hands. He was therefore without any employment. He was, however, learning to use his right hand.

According to the medical report dated 23rd October, 1986 which was tendered in evidence at the trial of the suit against the appellant by Dr AN Oganda (PW 1), apart from the amputation of the two fingers referred to above, the respondent had a long longitudinal plantar scar and rugged scars on dorsum of the left hand. His left ring finger had limited function as it could not extend fully. To Dr Oganda, the respondent's disability was 16%.

For the injuries set out above, the respondent blamed the appellant in its failure to have any protective or fencing around the dangerous part of its processing machinery and for its failure to have any regard for the safety of its workers working with sharp and dangerous machines. The respondent also blamed the appellant for failing to provide ladders or other secure equipment and tools for working with machines that required such apparatus due to their height from the ground and for lack of proper supervision of workers working in dangerous places or with dangerous machines. Because of these failures the respondent claimed general damages from the appellant for the said injuries.

The appellant denied liability and blamed the respondent for the accident which, according to the appellant, occurred due to the respondent's negligence. To the appellant therefore, the respondent was not entitled to any damages arising from the injuries in this accident.

In his judgment, the trial judge found that on the evidence adduced before him, the machinery in question was of the nature that required compliance with section 23 (1) of the Factories Act, Chapter 514 of the Laws of Kenya, hereinafter called, the Act. Failure to comply with the provisions of this subsection , according to the trial judge, amounted to gross negligence on the part of the appellant. He therefore held the appellant liable for the injuries suffered by the respondent as a result of the accident above mentioned.

As regards the quantum of damages, the trial judge had this to say:

"The plaintiff is left-handed and is 24 years old. He has not been employed since he was laid off by the defendant.But this is not to say the plaintiff will never get employment. Though he is left-handed, he can still train and successfully too – to use his right hand and still get employment. I cannot therefore, find that he has lost earning years, but as he is not highly educated, the only job he could easily obtain is manual but whoever wished to engage him will have to think twice on realizing the plaintiff has lost 2 fingers on his left hand."

He further went on to observe that he was of the view that:

"seeing that the table on which the plaintiff was going to step on to do this job was slippery with oil, he had to take extra care, say by wiping off the oil before using it or by placing thereon a sack before using it so as not to slip. But stepping thereon in the slippery nature in which it was, the plaintiff took a great risk and was partly to blame for this accident. I apportion his blame at 25%."

The trial judge then awarded the respondent a global sum of Shs 200,000/ - as general damages for pain, suffering and loss of amenities. Out of this sum, Shs 50,000/- was deducted on account of the respondents contributory negligence and Shs 6,490.40 was deducted being the workmen's compensation already paid to the respondent by the appellant. The balance was Shs 143,509.60 for which the trial judge entered judgment in favour of the respondent together with interest and costs.

Against these decisions, the appellant preferred this appeal to this court and put forward five grounds of appeal. At the hearing of this appeal, the appellant abandoned ground two of its grounds of appeal and argued the rest of the grounds together. Principally, these grounds concerned liability and the award of general damages.

Counsel for the appellant argued that the respondent was an expeller cleaner and had a duty to clean the table he stood on before he climbed onto it. In any event, being an expeller cleaner, the question of guard rails to the appellant's offending machinery did not arise as the respondent had no business to be in contact with the said machinery. Nonetheless, according to counsel for the appellant, even if the appellant was negligent from the evidence available before the trial judge, liability should have been apportioned equally. In regard to the general damages awarded to the respondent, counsel for the appellant contended that the same was too high and in response to the respondent's cross-appeal, he submitted that section 23(1) of the Act did not impose strict liability.

As we have indicated above, the respondent cross-appealed. In his crossappeal, he put forward four grounds of cross-appeal which concerned themselves with the appellant's liability being strict under

section 23(1) of the Act and the trial judge's error in finding the respondent guilty of contributory negligence at the rate of 25%.

Counsel for the respondent complained that the trial judge should not have found the respondent guilty of contributory negligence having first found that the appellant had breached the provisions of section 23(1) of the Act. However, he contended that the general damages of Shs 200,000/- awarded to the respondent were fully justified.

Section 23(1) of the Act is in the following terms:

"23 (1) Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced: Provided that, in so far as the safety of a dangerous part of any machinery cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirements of this subsection shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with that part."

The prime concern of this subsection is the safety of every person employed or working on the premises in which the dangerous part of any machinery is situated. Because of this, it imposes an obligatory duty to ensure such safety in the manner provided therein. It does not, however, impose strict liability in negligence for where a plaintiff has taken a risk created by the breach of a statutory duty by a defendant, that risk may amount to contributory negligence if it is one which a reasonable prudent man in the position of such a plaintiff would not take.

In a case such as was before the trial judge, contributory negligence, as was aptly put by Lord FitzGerald in the case of *Wakelin v London and South Western Railway Co* (1887) 12 AC 41 at page 51:

"...consist of the absence of that ordinary care sentient being ought reasonably to have taken for his own safety."

We are not in any doubt that the part of the appellant's machinery in question was of the nature that required compliance with section 23(1) of the Act. The evidence before the trial judge indicated non-compliance with this subsection by the appellant. The latter was therefore in breach of the statutory duty imposed by the said subsection. This breach resulted in the accident in which the respondent sustained the injuries set out above. Hence, the appellant's liability as held by the trial judge cannot be faulted.

In paragraph two of its written statement of defence, the appellant *inter alia* averred that if any accident involving the respondent had occurred at all, it was solely due to the latter's negligence. The trial judge despite holding the appellant liable as we have said *supra*, found the respondent partly to blame for the accident in question. He rated the respondent's blame worthiness in this regard at 25%. From the facts of the case before the trial judge, the respondent embarked on a table on which oil cake had poured and was slippery. He stood on the said table in order to pour the oil cake into the machine referred to above. In the process, he slipped and his left hand fell into the moving machine and thus sustained the injuries the subject –matter of his suit against the appellant in the superior court. He knew the table was slippery and that it was dangerous. Indeed, in his own words, he "was supposed to be careful." Yet, as the trial judge observed, the respondent took no step to wipe off the oil on this table nor place on it a sack before standing on it so as to avoid slipping. In climbing onto this table and standing thereon in the slippery nature in which it was for the purpose of pouring the oil cake into the moving part of the machinery in question, the respondent did not exercise the ordinary care which a sentient being ought to have done for his own safety. He took a risk which a reasonably prudent man in his position would not have taken. He was guilty of contributory negligence and in the circumstances of the case before the superior court, as an appeal court, we are unable to say that the 25% degree of his responsibility in this regard as apportioned by trial judge was manifestly erroneous to merit interference.

The assessement of damages is essentially a matter of judicial discretion as was observed by Nyarangi JA

in the case of *Nyambura Kigaragari v Angripina Mary Aya*, Civil Appeal No 85 of 1983 (unreported) following a similar observation in the case of *Idi Ayub Shabani v City Council of Nairobi & Another*, Civil Appeal No 52 of 1984 (unreported).

"For this court to interfere it must be shown that the sum awarded is demonstrably wrong or that the award was based on a wrong principle or is so manifestly excessive or inadequate that a wrong principle may be inferred."

In awarding general damages of Shs 200,000/- for pain, suffering and loss of amenities, the trial judge took into account that the respondent was left-handed, that he had lost his left mid and index fingers and that his left ring finger had limited function as it could not extend fully. He also took into consideration that the respondent had a long longitudinal plantar scar and rugged scars on dorsum of his left hand. The respondent had been hospitalised for a period of slightly over two weeks and continued to receive treatment as an out-patient for a further period of about 6 months. He was married and had one child. He was about 24 years old. As the trial judge observed, although the respondent was left-handed, he could train to use his right hand and obtain employment. However, since he was not highly educated, the only employment he could easily obtain was manual but whoever would wish to employ him may have second thoughts on realizing that he has lost his left mid and index fingers and that his left ring finger had limited function. Reflecting on all these factors, we cannot say that the award of general damages to the respondent by the trial judge as is set out above was manifestly excessive to warrant reduction.

In the upshot, the appellant's appeal must fail. The same is therefore dismissed with costs to the respondent. Similarly, the respondent's crossappeal fails and is dismissed with costs to the appellant. Orders accordingly.

Dated and Delivered at Nakuru this 1st Day of March, 1990

J.M. GACHUHI

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JUDGE OF APPEAL

J.E. GICHERU

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JUDGE OF APPEAL

R.O. KWACH

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JUDGE OF APPEAL