



IN THE COURT OF APPEAL

AT MOMBASA

(coram: nyarangi, gachuhi & apaloo JJA)

CIVIL APPEAL NO. 86 OF 1986

BETWEEN

YASINIAPPELLANT

AND

KENYA CARGO HANDLING SERVICES LIMITED.....RESPONDENT

JUDGMENT

(Appeal from a Judgment of the High Court at Mombasa, Bhandari J)

March 17, 1988 **Gachuhi JA** delivered the following Judgment.

The appellant filed a claim in damages before the High Court arising from injuries sustained while discharging cargo from the hatch of a ship in the course of his employment. He had his terminal phalanges of the left middle and ring finger amputated. After that he worked for two years and then his services were terminated on the advice of the company doctor.

The judge in dismissing the appellant's claim held that the cause of the said accident was not the fault of any of the defendants nor was it the result of any neglect of duty, contractual or otherwise of the second defendant (the second respondent) as the employer. The first defendant, the Kenya Port Authority, having been exonerated of any liability, though served with the notice and the records of appeal, did not participate in the appeal.

The facts of the case are that the plaintiff was employed as a dock worker by the respondent. On 7.4.81 he along with other workers were instructed to go on board *MV Ipollitus* for the purpose of discharging fertilizer bags from the ship's hatch. The mode of discharge was by a crane owned by the first defendant and which was operated by another an employee of the first defendant. The plaintiff and his co-workers were arranging the bags in stacks of 25 bags each on a board which had slings around them. Once a board had been fully loaded the slings were placed on the crane's hook and the board was hauled up and away. The operation of discharging the cargo was being carried out under the watchful eye of a serang or headman.

On that day two stacks were being hoisted up at one go and a third stack beside them due to being pushed by those hoisted started to tumble over. The plaintiff who was nearby in an attempt to save the falling stacks tried to push away the loaded stacks going up and in so doing his two fingers of the left hand were caught and crushed as the sling around the bags tightened up and slipped towards the plaintiff's fingers.

The first defendant's defence was a complete denial of liability and stood firm that there was no negligence on its part and that the work was supervised by a headman. The second defendant's defence was that the appellant was all alone the author of the calamity he fell in it and that there was no risk or danger, had the appellant allowed the stacks to tumble over. Second defendant further claimed that there was no danger to other workers in the hatch.

The appeal hinges on whether or not there was negligence by the employer in the manner in which the fertilizer was discharged from the ship or whether the appellant was solely negligent or whether there was any contributory negligence by the appellant.

The defendants having stood firm in their defences that there was no negligence on their part, did not offer any evidence. The size of the hatch is not given. The area left open for the crane to lift the bags through and away is not shown. Was there any danger then which the appellant was trying to avert at the time the incident occurred?

The appellant states that as the two stacks were being hauld up, they rubbed against another stack which started to tumble over. On seeing this, he pushed the two stacks away from the tumbling stack. His fingers were caught by the rope as it tightened. Was he negligent in doing so or was he doing just like any other fellow worker would have done at the moment of time when this occurred?

Before I attempt to answer whether the appellant acted negligently or not, I have to look at the situation as pertaining at the time.

1. What was the appellant's duty?
2. What was he trying to prevent?
3. What were the instructions given to them for this easily anticipated problem?

The appellant's duty was to arrange the bags on the board ready for lifting by the crane. At the time of lifting, he must be sure that his position as well as those of co-workers was free from any danger. He was to ensure the smooth lifting of the bags by the crane and to take all measures for the smooth working in the hatch. In the absence of anything to the contrary this is what was expected of him. Then what did he do? As the crane was in the process of lifting the bags the load swung and pushed another stack which started to tumble. He tried to push the load being lifted away. This was his reaction to prevent the bags from tumbling. Should he have left it? Imagine, that this was a natural reaction to prevent any possible danger that may be caused by the crane. If one stack was disturbed it could tumble over and it could have fallen either on the appellant or other co-workers. A bag of fertilizer is quite heavy, capable of injuring any-one who may be near the stack. If all 25 bags tumble over someone, injury would be severe.

Another observation is whether the crane does swing as it is going up, and in that movement, if the hook or the edge of the board, caught up a bag from the tumbling stack and hoisted with other bags, there is a danger of that hooked bag falling on the appellant or any other co-worker and causing injury. These are the imminent dangers when the crane is hoisting cargo from the ship. The appellant may have foreseen this danger when he was trying to push the hoisted bags away from the third stack. The crane driver would not know the position of stacks in the hatch. In my view, the appellant was not acting negligently in pushing away the bags which were being hoisted from the tumbling stack when his fingers were caught by the sling and got injured as he tried to avert a possible problem.

It is claimed that the stacking was under the supervision of a serang. What were the instructions given to workers as to what they should or should not do for safety to themselves? Was it right to have the bags stacked close to each other so as to be disturbed by the crane? There is no evidence to show what the instructions were and whether it had lifted several times; no evidence whether throughout the operation the bags were stacked close to each other or whether throughout the operation the bags were stacked close to each other or whether there was a time the stacks were spaced. The only evidence there is indicates that the stacks were stacked close to each other under the supervision of a serang at the time of the incident.

The serang did not give evidence to the effect that the mode of stacking close to each other was a proper one, and that there was no imminent danger of either a bag being caught up by the hook or the edge of the board. Furthermore, there was no danger even if the stacks tumbles over. Appellant's evidence is that because the stacks were close to each other, he had to push away bags being hoisted to avoid the other stacks falling. In my view the method of stacking bags close to each other may not have been proper and as such created danger to the workers. The Serang was negligent in supervising the stacks of fertilizer bags very close to each other instead of allowing sufficient space for the crane to swing as it goes up and away. In the absence of clear instructions as to how the employees were to carry out their duties the employer is liable for the injuries to his employees.

The second respondent's Advocate argued that even if the serang may have been negligent, his negligence will not bind the employer. He referred to several authorities which are not relevant. There is no rule of law that exempts the employer from a liability to an injury caused to an employee by the act of another employee since the doctrine of common employment was abolished. The respondent is vicariously responsible for the negligence of serang.

In the course of the argument in this appeal, counsel for the respondent introduced a plea of contributory negligence which is a departure from his earlier defence. He placed contributory negligence as to 75% by the appellant. Even if I were to consider that appellant contributed to the accident, I have to be satisfied that he so placed himself in jeopardy while foreseeing the imminent danger to himself of being squeezed between the stacks. In my view, the appellant's view was to avert the danger which we cannot see while reading the pleadings and the evidence but he could see it. Whether this kind of situation has happened before or not we are not told. I have nothing to guide me to hold that the appellant contributed to the injury, because the only evidence I have is that of the appellant. I reject the claim for contributory negligence.

On the question of damages, the High Court assessed the damages. Counsel for the appellant has not quarrel with the damages of Shs 60,000 as assessed. But it has been argued that the judge overlooked to award anything for loss of future earnings. It has been rightly pointed out by the counsel for the first respondent at the trial that there was no claim in the plaint based on loss for future earnings. The prayers in the amended plaint is for special and general and costs. Claim for loss of future earning is part of damage subject to damages being proved. The trial judge found:

"It can be deduced from this that he is fit to do certain types of work which do not require the use of a firm grip by both hands. Of course such work is difficult to find especially for a man who is approaching 50 years of age. The court would have awarded him 75% of his wages that is Shs 750/= per months for the 15 months up to 31-9-84."

The trial Judge must have accepted as proved the claim of loss of earning from the date of filing suit to the date of judgment. He overlooked that the loss of earning does not cease on the date of judgment. As he correctly found that the appellant would not be able to obtain another employment due to his age, he should have taken this into account and assess the damages for loss of future earning in full. Since the retirement age is at the age of 55, future earnings would not be awarded beyond that age. He was said to be 48 years. He had 7 years to go.

I would allow this appeal I would set aside the judgment of the High Court of dismissal of the plaintiff's claim and substitute judgment for the plaintiff and award the damages to the plaintiff as under:

Special damages Shs 12,050

General Damages Shs 60,000

Loss of future earnings Shs 63,000

I would award the costs in this appeal and in the High Court to the plaintiff.

I would award interest on special damages as from the date of filing suit till payment in full at 12% and on general damages from the date of judgment . i.e. 28th October 1985 till payment in full. Costs will carry interest from the date of taxation till payment in full at Court rates.

Nyarangi JA. I had the advantage of reading beforehand the judgment of Gachuhi, J.A. in which he has fully discussed the principal issue which is whether the second defendant by a negligent breach of duty exposed the plaintiff to danger which could fairly and reasonably be regarded as a consequence of the breach. Gachuhi, J.A. has also touched on the subissues involved, which taken together, leave little of value for me to say.

The facts were not disputed.

In the circumstances it seems to me that the figures which Gachuhi JA has suggested for damages are fair. The money will be invested to earn interest.

I agree with the order proposed on costs and on interest on special damages, general damages and on costs. As Apaloo JA agrees, it is so ordered.

Apaloo JA. I also agree. It is clearly the respondent's common law duty to provide a safe system of work for his employees. It seems to me that in building the stacks very close to each other, the risk of collision and the consequent injury to the appellant or his co-workers were reasonably foreseeable. In those circumstances, the conclusion is inescapable that the respondent company exposed the appellant and his fellow workmen to unnecessary risk.

On the evidence, the step taken by the appellant to meet that danger was not unreasonable. If in the stress and agitation of the moment, he took a wrong course to avoid it, he does not thereby become partly responsible for the damage he sustained. In my opinion, the respondent was wholly to blame for the accident.

In the circumstances, I am in respectful disagreement with the learned trial judge that the accident was not occasioned by any fault of the respondent. In my opinion, the contrary is the case. I think therefore that the appellant is entitled to compensation for his loss and injury. With regard to the quantum of that, I agree with the figure and orders proposed by Gachuhi JA.

Date and delivered at Mombasa this 17th day of March , 1988

J.O NYARANGI

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JUDGE OF APPEAL

J.M GACHUHI

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JUDGE OF APPEAL

F.K APALOO

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JUDGE OF APPEAL