REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAKURU

Civil Appeal 279 of 2004

BETWEEN

JOHN OUKO YOGI ……APPELLANT

AND

SPIN KNIT CO. LTD …….....RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Nakuru (Kimaru, J.) dated the 20th day of September, 2004

in

H.C.C.A. No. 117 of 2000)

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JUDGMENT OF THE COURT

During 1997 ***John Ouko Yogi***, the appellant was employed as a machine operator by the respondent. He was operating the machine on 3rd May, 1997 when it cut his left hand finger whereupon he sustained serious injuries. He filed a suit in the Chief Magistrate's Court at Nakuru where he claimed both special and general damages from the respondent on the ground that it did not take all reasonable precautions for his safety at its place of work and that it had exposed him to the risk of injury. The case was heard by the Resident Magistrate *(E. Ominde)* who delivered her judgment on 14th July, 1998 wherein she dismissed the appellant's claim. His appeal to the superior court (*Kimaru Ag. J.)* was similarly dismissed on 20th September, 2004 with costs, hence this second and final appeal.

The brief facts of the case as attested to by the appellant were that on the material day he was working on a ring frame machine which makes thread during a night shift when his left hand finger got stuck therein as he removed some waste material there from. The finger was then cut. According to his evidence there was no implement to be used to remove the waste from the machine and this is why he used his left hand to do so. During cross-examination he admitted that there was a metal pole or hook provided which could be used to cut the waste in the machine but not to pull it out.

One ***Justus Kigami*** (DW1) testified for the respondent and stated that the appellant was himself negligent in the manner he operated the machine on the day of the accident because he failed to use the hook provided to remove the waste from the machine thus placing himself at the risk of the accident which occurred. He also referred to safety notices pinned around the place where appellant worked warning him

and other workers of the danger inherent in operating the machine and the safety training the appellant underwent. The witness ended his evidence by saying the appellant was the author of his own misfortunes. In cross-examination he stated that workers were under instructions not to use their bare hands to remove waste from the machine. After the appellant and the respondent had testified and the submissions made the learned Resident Magistrate wrote a brief judgment in which she rendered herself thus:-

> ***"Taking into account in evidence on record in its totality my observation at the scene, the submissions of counsels on the issue of liability, it is my opinion that the doctrine of*** *Volenti Non Fit Injuria* ***must apply in this case.***
>
> ***I accordingly find that the plaintiff herein was the author of his own misfortune and therefore he cannot be heard to blame the defendants. I find that his cause of action is misconceived and accordingly I dismiss his suit in its entirety. Each party is to bear its own costs."***

That judgment was very brief but it referred to the evidence adduced before the trial court by either side. As can be observed, the learned magistrate dismissed the appellant's case. His appeal to the superior court was also dismissed. It is this second dismissal which has given rise to the present appeal grounded on the memorandum of appeal filed herein on 17th November, 2004. It listed 4 grounds of appeal as follows:-

> 1. *THAT the learned Judge of the superior court erred in law in upholding the subordinate court's finding that the doctrine of Volent Non Fit injuria applied in dismissing the appellant's first appeal when the said doctrine was inapplicable in the circumstances of the case.*
>
> 2. *THAT the learned Judge of the superior court erred in law in dismissing the appellant's appeal without paying any due regard to the fact that the appellant had proved his case to the required standard in the subordinate court.*
>
> 3. *THAT the learned Judge of the superior court erred in law in upholding the subordinate court's finding that the respondent had discharged its obligation by providing the appellant with safe system of work while no such evidence existed.*
>
> 4. *THAT the learned Judge of the superior court erred in upholding the subordinate court without having regard to its duty as a first appellate court of re-evaluating evidence afresh in face of glaring inconsistencies*.

The appeal came up for hearing on 28th September, 2010 when counsel for the parties addressed us. ***Miss Ateya***, learned counsel for the appellant submitted that the doctrine of *volenti non fit injuria* on which the trial court relied to dismiss the appellant's case was not applicable and that the appellant had proved his case on a balance of probabilities. She also submitted that the first appellate court did not re-evaluate the evidence adduced before the subordinate court. ***Mr. Murimi***, learned counsel for the respondent opposed the appeal and submitted that the superior court re-evaluated the evidence adduced before the subordinate court and that the appellant was negligent when he used his bare hands to remove the waste instead of using the hooks provided for the purpose. He also submitted that the appellant ignored the notices at his place of work which gave warnings in this regard. He concluded his submissions by stating that the respondent had provided a safe system of working for the appellant.

When the superior court (*Kimaru, Ag. J.)* wrote and delivered his judgment he had this to say:-

> ***"The finding of the trial magistrate that the appellant was the author of his own misfortune therefore is not misplaced and has foundation. The Appellant embarked on a course of action which he knew or ought to have known would cause injury to him. The decision of the Appellant to embark on the said course of action can only be described as an action of a volunteer who risks his health by undertaking an inherently dangerous activity. The appellant did not care that he would be injured. Where such a person is injured he cannot blame anyone. In the instant Appeal the respondent was able to prove on a balance of probabilities that the appellant in fact engaged in an activity which he had been specifically warned against. I am aware of the decision of*** *Mghosi versus Gayatri Engineer Works [1981] KLR 163* ***where a court of concurrent jurisdiction as this one held that it was not enough for an employer to provide safe working systems or appliances, he required to also ensure that the system is followed and the proper appliances used. In the***

instant Appeal, the appellant was not only trained, but was warned by notices posted near his place of work of the do's and don'ts of operating the said machine. He chose to ignore the said warnings to his peril. He was consequently injured.

From the foregoing, it is evident the appellant's appeal lacks merit and the same is dismissed with costs to the respondent …"

In coming to this decision the learned Judge summarized the evidence adduced by the appellant and by the respondent. He considered the evidence that the respondent had provided the appellant with the metal poles/hooks for removing waste stuck in the machine and the notices posted near the appellant's place of work warning machine operators to switch them off before cleaning them or removing waste therefrom or stop the lever to slow down the motion of the machine. The evidence of DW1 in this regard was re-enforced by the observation of the trial magistrate when she visited the scene to observe the working of the machine. Her observation was as follows:

"The court is taken to the machine No.10 which plaintiff used to operate at the time of the accident. The supervisor who was in-charge of the machine at the time of the accident is also present. The plaintiff shows the court how once he had cut the waste with the piece of metal provided he would have to remove it with his hand without stopping the machine. This is demonstrated when the machine was in motion. The supervisor too demonstrated to court the same procedure with the machine in motion and went further to explain the process with the machine completely stopped and partially stopped. He explained that when there is too much waste there is a lever at the portion of the machine where the waste has collected which is stopped so that the whole line does not stop then waste is removed."

The court further noted the following:

- ***Waste is not cut. It is separated.***
- ***This is because it goes round and round a cylindrical rod and wrap itself round it.***
- ***While in the process of separating it it is sucked*** *(sic)* ***into a plastic pipe (small) turns out just next to cylinder automatically.***
- ***Waste can be removed from a particular profession*** *(sic)* ***of the machine if it becomes too much that is by switching off only this particular portion by operating a lever just above the metal rod.***
- ***One does not have to switch off the whole system.***
- ***There are warning notices to the effect that machine motion once*** *(sic)* ***should only be done when the machine is off.***
- ***A further notice to the effect that waste should not be scattered on the floor and that machines should be operated with a minimum of waste as possible.***
- ***Each machine operator is provided with a metal pole for removing waste.***
- ***Just by observing the machine in motion, it is apparent that it is dangerous and should be handed*** *(sic)* ***with care".***

The learned magistrate captured and accepted all these observations in her judgment. The learned Judge also accepted them on appeal. These were concurrent findings of the two courts below on the evidence and this Court would loathe to depart therefrom.

The appellant's case against the respondent was based on the latter's negligence or its failure to provide a proper working environment for the former. The two courts found no evidence of negligence on the part of the respondent and that it had provided a safe working environment which the appellant himself ignored.

These observations confirmed the respondent's evidence which the trial magistrate favoured to that of the appellant. The first appellate court did likewise. The only dispute the appellant raised over the evidence and the magistrate's observations was that the metal hooks provided were for cutting the waste into small pieces and not for removing it from the machine and that there were no warning notices during the time of the accident. These were factual issues and the trial court believed the respondent's version and rejected that of the appellant. The superior court had no difficulty in agreeing with the trial court finding. Given that scenario, this Court is of the

view that none of the grounds set out in the memorandum of appeal has any merit and agrees with the superior court that the appellant was the author of his own misfortunes and that he did not prove his claim against the respondent on a balance of probabilities. His appeal to the superior court was rightly dismissed. We dismiss this appeal too. However, in view of the fact that the appellant lost his finger at his place of work and that he is no longer in employment, we direct that each party bears his/its own costs of this appeal and those of the superior court.

Dated and delivered at Nakuru this 12th day of November, 2010

E. O. O'KUBASU

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

……..
JUDGE OF APPEAL

D. K. S. AGANYANYA

……..
JUDGE OF APPEAL

*I certify that this is a true copy of the original***.**

DEPUTY REGISTRAR