



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
APPEAL NUMBER 5 OF 2015

BETWEEN

VICTOR NDEGE MANASE.....APPELLANT

VERSUS

ASHTON APPARELS [EPZ] LIMITED..... RESPONDENT

[An Appeal from the Judgment of Hon. H. Adika, Resident Magistrate Mombasa, dated 22nd October 2010, in C.M.C.C Number 4117 of 2003]

BETWEEN

VICTOR NDEGE MANASSEH.....

PLAINTIFF

VERSUS

ASHTON APPARELS [EPZ] LIMITED

DEFENDANT

Rika J

Court Assistant: Benjamin Kombe

M. Ananda & Company Advocates for the Appellant

Muturi Gakuo & Kibara Advocates for the Respondent

JUDGMENT

1. The Appellant filed C.M.C.C Number 4117 of 2003 against his Employer, on the 23rd September 2203. He was employed by the Respondent as a Press-man, whose role was to iron apparels. He claimed that on or about 26th February 2003, he was instructed by the Respondent to stick some labels on carton boxes, using toughbond. After doing this he was instructed to remove the stains from his hand, using gun petrol. As he was doing so, the gun petrol burnt him. He suffered chemical burns of the soft tissue of the

last two phalanges of the right index, leading to loss of the right index finger. He blamed the Respondent for the accident and sought from the Trial Court orders against the Respondent for general and special damages.

2. The Trial Court dismissed the Claim with costs to the Respondent. The Appellant lodged an Appeal at the High Court in Mombasa, registered as Civil Appeal Number 24 of 2008. This was transferred to the Employment and Labour Relations Court by the High Court on the ground of jurisdiction. Parties recorded a consent order on the 11th September 2015, to have the Appeal considered and determined on the strength of their submissions.

Grounds of Appeal

3. The Appellant relies on the following grounds:

- The Trial Court adopted the wrong standard of proof.
- The Trial Court relied only on the evidence of PW3, and disregarded medical evidence.
- The Trial Court erred in relying on the evidence of the Defence Witnesses.
- The Trial Court erred in disregarding the evidence of offer made by the Respondent to settle the Claim on 50% shared liability.
- The Trial Court erred in failing to find the Respondent had an obligation to provide a safe system of work.

Appellant's Submissions

4. The Appellant submits there was no contradiction in the evidence of PW3 [Clinical Officer]. She initially treated the Appellant at Upendo Clinic on 26th February 2003. The Appellant was referred to Coast General Hospital on 12th May 2003. This evidence was corroborated by PW1 [the Doctor], who confirmed the Appellant was referred from Upendo Clinic to Coast General Hospital for specialized treatment.

5. The Appellant was injured at work. He was not provided with protective gear. It was not correct as held by the Trial Court, that no-one explained to the Court what gun petrol, which burnt the Appellant's fingers, was. PW1 in his evidence told the Court gun petrol is like acid, and used to remove stains from apparels. The Appellant himself explained that the stain remover is white petrol, which is removed using an electric gadget called gun petrol. One pressed the gun petrol and white petrol came out. The Appellant told the Court he was advised by the Supervisor to use the stain remover to clean his hands, which led to the burn and eventual amputation of his fingers. He was not provided with gloves.

6. It is submitted the Appellant was not provided with a safe system of work. He was not closely supervised. He was never trained in his work. The Appellant was employed as a Press-man, to iron clothes, but on the particular occasion had been diverted to labeling. He had not been trained and had no experience in the work that led to his injury.

7. The Defence Witnesses were not credible. DW1 testified he did not know the Appellant. DW2 stated he was the Human Resources Manager and that the Appellant did not report the injury to him. He further alleged the Appellant told him he had bacterial infection and showed DW2 a swollen finger. DW2 testified the Appellant told him he was using traditional herbs. This was false testimony in light on the medical records from Upendo Clinic and the Coast General Hospital.

8. The Appellant urges the Court to find persuasion in ***Mombasa H.C.C.C. Number 209 of 2007 between Amani Kufaa Bakari v. Wananchi Marine Products [K] Limited*** where it was held, *inter alia*:-

- The Employer has an obligation to make the conditions of employment absolutely safe for the Employee, but will not be responsible for the Employee's negligence.
- In measuring the degree of care, one must balance the risk against measures necessary to eliminate the risk.

9. Further the Appellant relies on *Nakuru H.C.C.A Number 38 of 1995 between Sakoro Saw Mills Limited v. Benard Muthimbi Njenga* and *Nairobi H.C.C.C Number 6212 of 1990 between Peter Abuya v. Vipingo Estate Limited*, which held that the Employer's obligation includes warning the Employee against unusual dangers as well as making the place of employment as safe as the exercise of reasonable skill and care would permit.

10. The Appellant urges the Court to allow the Appeal, and grant general damages at Kshs. 500,000 and special damages as pleaded.

Respondent's Submissions

11. The Respondent submits the Trial Court correctly found the Appellant had not explained what gun petrol is. His case hinged on the fact that he was advised by a Supervisor to use this substance. He did not prove his case on the balance of probabilities.

12. The Trial Court adequately evaluated the evidence of the Clinical Officer. This evidence was unreliable because PW3 stated she did not see chemical burns on the Appellant, and that she did not treat such wounds at the Clinic, yet she injected the Appellant thrice. The Trial Court did not only rely on the evidence of the Defence Witnesses; the evidence of the Appellant, including medical evidence was evaluated.

13. Respondent's evidence was that it was white petrol, not gun petrol, which was used as a stain remover. The Assistant Human Resources Manager explained that Respondent's Employees use water and soap to remove stains from their hands. The Trial Court correctly concluded that the Appellant had not established his case on the balance of probabilities. The Respondent relies on the Court of Appeal of Kenya decision in *Ephantus Mwangi v. Duncan Mwangi Wambugu [1984] e-KLR*, in persuading the Court that an Appeal Court should interfere with the findings of the Lower Court, only if such facts are based on no evidence, or misapprehension of the evidence; or the Judge is shown to have acted on the wrong principles in reaching the findings he did. The Court is urged not to interfere with the findings of the Trial Court, and dismiss the Appeal with costs to the Respondent.

The Court Finds:

14. The Appellant was employed by the Respondent Textiles Company as a Press-man. His duty was to iron apparels. His employment and job description was confirmed by Assistant Human Resources Manager George Ochieng' [PW3]. Although his work was to press garments in preparation for packing and export, the Appellant explained in very clear language that he was asked to work overtime by a Supervisor named Jeram on 25th February 2003. The overtime work entailed sealing boxes. He finished this extra work and was asked by another Supervisor to assist with sticking of the labels on the packages.

15. The labels were stuck to the packages using tuff bone; a type of glue such as is used in making shoes. [The Court thinks Parties were referring to tuff bond, an industrial adhesive, used for the kind of work the Appellant was assigned]. Nevertheless, at the end of the assignment, the Appellant's hands were stained with this industrial adhesive. He was advised by the Supervisor to remove the adhesive using white petrol, a stain remover, which was ordinarily used in removal of garment stains. He explained this white petrol was in the gun petrol, which was sprayed on the object from which the stain was intended to be removed.

16. Part of the reasons why the Claim was dismissed centred on the evidence relating to gun petrol. The Trial Court states at page 57 of the Record that '*As a matter of fact, no one has explained to this Court what gun petrol is and if it has any acidic effect.*' The Appellant states in his grounds that this was not the case.

17. The Court agrees with the Appellant, that the Appellant himself, in his own understanding of the industrial tools of trade in use at his workplace, explained what gun petrol is. At page 43 of the proceedings, he explains the substance used in removal of stains was white petrol. This liquid was put in

an electric gadget, which the Appellant called gun petrol. When pressed, gun petrol ejected the white petrol and removed the stain. PW1, Dr. Patel testified the Appellant was injured by gun petrol, which is like acid.

18. There was sufficient evidence on the substance and object through which the Appellant sustained his injury. If the description of the industrial tools by the Parties was insufficient, it was open to the Trial Court to seek the assistance of sources such as Industrial Dictionaries, to have a clearer picture of what the Parties were referring to. Such sources would reveal that Textile Industries use Utility Cleaning Spray Guns, variously referred to as Petrol Guns [not Gun Petrol], Spot Cleaning Guns, Stain Cleaning Guns, and Water Guns. These are used in removal of oil stains and other stains from textile fabrics and garments. The Appellant explained in his evidence that he was asked to use an electric gadget called gun petrol, to remove the adhesives from his hands.

19. Such instructions did not comprise a safe system of work. Gun sprays and the industrial chemicals used in removal of garment stains, are not meant for removal of stains from the human skin. It was not safe in the first place, to instruct the Appellant to label the packages using industrial adhesives, without the benefit of gloves. The instructions to the Appellant to label the packages and to wash off the stains in his hands by use of a Petrol Gun, both were acts by an Employer which smacked of negligence.

20. There was clear medical evidence showing the Appellant was injured while at work. Dr. Patel and the Clinical Officer at Upendo madam Priscilla gave convincing evidence on the Appellant's injury and treatment. There were no material contradictions, and on the balance of probabilities, the Trial Court should have returned a finding in favour of the Appellant on the medical evidence. It was not necessary that Priscilla was able to observe chemical residue when she treated the Appellant. It was not believable as narrated by the Defence Witnesses that the Appellant was seeing a herbalist, with all the conventional medical evidence on record present. This Court does not similarly believe an industrial adhesive, could be washed off with plain water and soap, and agrees with the Appellant that he was advised to use the Petrol Gun. The Court finds the evidence by the Claimant was adequate to warrant grant of damages.

21. The Respondent/ Employer did not meet its obligation to the Respondent, under the principles enunciated in the decisions cited above [*Amani Kufaa Bakari, Sokoro Saw Mills, and Peter Abuya*]. The Court is satisfied the Trial Court erred in evaluation of the evidence presented by the Appellant; and reached the wrong conclusion that on the balance of probabilities, the Appellant did not establish his Claim. The evidence tendered by the Employer did not attempt to show what safe system of work was availed to the Appellant. The Court finds the Respondent was negligent and 100% liable for the accident and injury occasioned to the Appellant.

Damages

22. The Appellant pleaded for special damages of Kshs. 2,000 in his Complaint and did not amend his Complaint subsequently, to ask for further special damages. **The Court grants special damages at Kshs. 2,000.** The Appellant asked for general damages of Kshs. 500,000 in his submissions before the Trial Court. The Respondent asked the Court, if the Claim was successful, to assess and grant general damages at Kshs. 70,000.

23. The Medical Report presented by Dr. Patel shows the Appellant suffered chemical burns of the soft tissue, of the last two phalanges of the right index finger. The soft tissue and the skin of the finger peeled off gradually. This led to amputation of the last two phalanges. The Appellant lost part of his right index finger. He had weak grip. He had permanent disability assessed at 8%. Other fingers were found to be normal.

24. In *Mombasa H.C.C.C Number 99 of 1999 between Shadrack Zacharia Omaiyo v. Road Services Limited*, the Plaintiff suffered loss of two fingers with a permanent disability at 17%. He was granted Kshs. 385,000 as general damages. The Appellant relied on this decision in asking for an assessment of Kshs. 500,000.

25. The Respondent relied on ***Mombasa H.C.C.C Number 843 of 1987 between Joseph William v. Kenya Cargo Handling Services Limited & Anor.*** In urging the Trial Court for assessment of general damages at Kshs. 70,000. The Plaintiff in this decision suffered injuries to the right middle and ring fingers. He was granted general damages at Kshs. 100,000.

26. Taking into consideration these decisions; the time when the decisions were made; the dip in the value of the shilling and in the purchasing power; and the injuries suffered by the Appellant, ***the Court grants the Appellant general damages assessed at Kshs. 200,000.***

IN SUM, IT IS ORDERED:-

- a. ***The Appeal is allowed.***
- b. ***The Appellant is granted general damages at Kshs. 200,000 and special damages at Kshs. 2,000- total Kshs. 202,000- to be paid by the Respondent to the Appellant within 30 days of the delivery of this Judgment.***
- c. ***The principal sum to attract an interest of 14% per annum from the date of Judgment, if unpaid within the given 30 days.***
- d. ***Parties shall meet their costs of the Trial and the Appeal.***

Dated and delivered at Mombasa this 18th day of March, 2016

James Rika

Judge