



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 98 OF 2011

KENNEDY MUTINDA NZOKACLAIMANT

-VERSUS-

BASCO PRODUCT (KENYA) LIMITEDRESPONDENT

M/s. Muigai for Claimant.

Mr. Omondi for Respondent.

JUDGMENT

The Claimant instituted this suit by way of a Memorandum of Claim dated 25th January, 2011. The Claimant seeks general damages for pain and suffering in respect of injuries he suffered in the course of his employment, refund of National Social Security Fund (NSSF) deductions for the period 2003 – 2009 which were remitted in the sum of Kshs.22,400/= and payment in lieu of leave days not taken for the year 2008 and 2009 in the sum of Kshs18.983/=. He also claims refund of transport cost to hospital in the sum of Kshs.1,440/= and payment for medical report in the sum of Kshs.2,000/=.

The facts leading to the suit may be summarized as follows:

On or about 31st January, 2008, whilst on duty, the Claimant sustained serious injuries to his index finger caused by a pressing machine which he used in the course of his duties.

The Claimant filed a medical report prepared by **Dr. Moses Kinuthia** dated 12th November, 2010 which indicates that he had suffered crush injury with fracture of the middle phalanx right index finger. That he was attended at the Nairobi West Hospital where modes of treatment including:

- a. X-ray revealed the above.
- b. Wound repair
- c. Immobilization of fracture in plaster cast and
- d. Analgesics and antibiotics application.

The conclusion of the doctor was that the Claimant has suffered grievous harm which caused him pain, suffering and blood loss. That the injuries suffered were consistent with the mode of injury and more importantly, the crush injuries right index finger resolved with a permanent malunion and hence angulation of the finger. The total permanent incapacity was assessed at 2% (two percent).

The Respondent filed a medical report by one **Dr. Ashwin Madhiwalla** who examined the Claimant on 8th March, 2011 and he confirmed that the Claimant suffered an injury which resulted in fixed deformity

at distal inter phalangeal joint. He assessed the injury to have caused permanent disability of 2%. This report largely is in agreement with that submitted by the Claimant. The Claimant paid Kshs.2,000/= for the medical report and a receipt of Kshs.2,000/= made out by the doctor on 16th November, 2010 was presented in support of the claim of this amount.

The Claimant also produced a letter of employment as a machine operator dated and signed on 4th May, 2009, a copy of his pay slip for January, 2009 indicating his basic salary was Kshs.8,191/= and house allowance of Kshs.1,229/=. He also received a milk allowance of Kshs.575/= and overtime. The slip shows that NSSF deductions were made from his salary.

A letter from Nairobi West Hospital indicating that the Claimant attended outpatient clinic from 31st June, 2006 on various dates was also produced in court.

A statement of account from NSSF was produced showing that the Claimant was registered on 17th April, 2003 and indicated contributions were made from May, 2007 to May, 2009. He claims refund of money not remitted from 2003 thereof. The statement shows the employer at the time of registration was the Respondent, a fact not contested.

The Claimant further told the court that he was not given leave in 2008 and 2009 and was not paid in lieu thereof and thus claims Kshs.18,983/= in respect thereof.

The Claimant did not produce a receipt in respect of the claim for transport to and from hospital in the sum of Kshs.1,440/= though a document for outpatient treatment was produced.

The Respondent filed a Statement of Response dated 28th February, 2011 on 8th March, 2011 wherein the claim is denied in toto and specifically denies that the Claimant was on 31st January, 2008 seriously injured in the course of his duties in the manner described in the Memorandum of Claim or at all and the Claimant is put to strict proof thereof.

In the alternative it is pleaded that the Claimant was the author of the injury suffered due to his negligence in the manner he operated the machine by failing to adhere to laid down safety procedures and rules and thereby exposing himself to reasonably foreseeable risk of harm and injury.

The Respondent further states that the Claimant was compensated for his injuries under the **Workmen's Compensation Act, Cap 236** of the Laws of Kenya and this amount was duly deposited with the Labour Office on the 5th December, 2008.

A copy of settlement form dated 4th August, 2008 is attached to the response indicating that a cheque for Kshs.12,790.27cts will be made out to the Labour Office Industrial Area, Nairobi.

In terms thereof the computation is calculated at 2% incapacity for 60 months as follows: $Kshs.8,164 \times 60 \times 2 = 9796.80$ and; half difference between monthly earnings at the time of accident and earnings subsequent to accident for the period 31st January, 2008 to 22nd February, 2008 in the sum of Kshs.2993.47cts.

On 5th December, 2008, payment of Kshs.26,122/= was remitted to the Labour Office in respect of the claim and 4 other employees. His portion was Kshs.12,790.27cts.

On 2nd December, 2008, the Claimant wrote to the Respondent disagreeing with the computation made by the Ministry of Labour and he requested for a fresh valuation.

The Respondent further states that the one year contract for the Claimant ended on 30th August, 2009 but states that he absconded from work upon receipt of his salary in July, 2009.

Furthermore, the Respondent avers that all NSSF deductions were remitted and denies the claim for refund from 2003 to 2009.

The Respondent denies the claim in respect of leave not taken in 2008 and 2009 but did not produce written records that the Claimant attended leave for the two (2) years.

The Respondent called on **Fredrick Oguda Aguko** who testified under oath. He said that he was a machine operator and a former colleague of the Claimant. That he had worked in that capacity for 11 years. That he knew the Claimant well and that he got injured on 31st January, 2008 while they worked together.

The Claimant was operating a machine called a seam welder whilst he was using a flagging machine. The two machines work in tandem following each other from the Claimant to him. The Claimant's finger was stuck in this witness's machine and he had to stop the machine for the Claimant to remove his finger. The flagger makes up and down movement. His finger was crushed. The witness narrated that Claimant did not warn him to stop the machine before he went ahead to pick a metal bar hence the accident. He told the court that the Claimant was negligent and thus contributed to the accident. He should have asked for the metal bar from him and not pick it himself whilst the machine was in motion.

He told the court that he had worked for the Respondent in the same capacity since 2003 to-date. The Claimant was employed after him but had gained enough experience in that production line.

Under cross-examination, he told the court that the Claimant usually used a rivet machine not a seam welder but it was not his first time to use the seam welder. That he just heard him scream and he saw the Claimant was hurt.

That they were supposed to use gloves in the course of their work but he could not recall whether the Claimant had his gloves on at the time of the accident.

He agreed that if the two of them did not share the metal bar, the accident would not have occurred. He insisted however, the Claimant should not have reached for the metal bar before asking him to stop the machine.

Both parties filed final submissions in support of their respective positions.

Analysis

The Claimant stated that the Respondent was liable for the injuries he sustained since it was in breach of its statutory duty in failing to provide him with protective working gear as a machine operator.

The Claimant testified that on the material day (31st January, 2008) he was taken to work on a different machine from the one he was used to known as a seaming machine. That he normally used a riveting machine.

That as he was picking a piece of metal with which he was using to roll metal boxes from another machine known as the flagging machine his right finger was crushed by the flagging machine.

He told the court that the Respondent did not provide him with gloves for the work he was doing that day.

This evidence was largely confirmed by the witness for the Respondent Mr. Fredrick Oguda Aguko other than the allegation by the witness that the Claimant ought to have asked him to stop operating the flagging machine before extending his arm to pick the iron rod. According to the witness, the Claimant was negligent in this respect and therefore caused the injury to himself.

It is not in dispute that the Claimant sustained injuries to his index finger in the course of his

employment. It is also not in dispute that at the time of the accident, the Claimant was not wearing protective gloves but his colleague Mr. Fredrick Ogonde Aguko was wearing gloves.

It is also not in dispute that the Claimant was not well used to the machine he had been allocated to use nor is there evidence that he was trained to use it.

The action by the Respondent to allocate him a machine he was largely unfamiliar with to operate without protective gloves largely led to this accident.

The other mistake by the Respondents was to allow the Claimant and Mr. Aguko to share the metal bar. The accident would not have occurred if this provision had been made.

By allowing the two employees to share the rod while operating dangerous machines, the Respondent exposed both of them to danger. Because the Claimant was the less experienced of the two on the workings of the flagging machine, he was consequently injured.

The allegations by the Respondents that the Claimant ought to have asked his colleague to stop the flagging machine to allow him to take the rod and/or ask his colleague to pass over the rod to him appears to fly in the face of the continuous nature of the operational line.

In the court's view, it would have been impractical to turn the machine on and off while passing the rod to each other.

The fact of the matter is that each of them should have had their own rod and protective gear so as to avoid the sort of accident which inevitably occurred.

The Claimant has in the circumstances proven on a balance of probabilities that the Respondent failed to exercise due care and attention to him in the course of his work and thereby is liable for the accident that occurred.

On the converse, the Respondent has failed to show that the accident was solely or partly caused by the negligence of the Claimant.

In **Nakuru H.C.C No. 65 of 2002, Simba Posho Mills Ltd v. Fred Machira Onguti**, where the Respondents similarly suffered crushed fingers while operating a machine at work, and failure by the Appellant to provide a safe working environment the Hon. Justice L. Kimaru held *inter alia*:

“That the Appellant was under a statutory obligation to provide the Respondents with a safe working environment which included not exposing him to tasks which could result in his sustaining injury. The liability imposed upon the Appellant is statutory. The breach of the statutory liability means that the Appellant was strictly liable for any injury its employee sustains in the course of his employment.

The court holds that the Respondent had a statutory duty to provide the Claimant with a safe working environment which included provision of protective gear adequate tools and training.

The Respondent relies on the authority of **Eldoret HCCC No. R33 of 2001 Simeon Ombisi vs. Kimani Ngugi & Daniel Mutheu Kibara** wherein, Hon. Lady Justice J. Gacheche dismissed the plaintiff's case on grounds that he did not give particulars of negligence and never transversed the particulars of negligence as averred by the Defendant.

The Respondent further relies on the provisions of the **Evidence Act Chapter 80** of the Laws of Kenya and in particular, **Section 107 (i)** which provides that he who desires any court to give judgment as to any right or liability dependent on the existence of facts, which he asserts must prove that those facts

exist.

The Respondent further submits that the Claimant bears the burden of prove of the facts he alleges in terms of **Section 107 (ii), 108 and 109**. The Respondent therefore submits that the Claimant has failed to prove the liability of the Respondent and has also failed to traverse the particulars of negligence pleaded by the Respondent and the claim should be dismissed accordingly.

It is the court's considered view that the Claimant has adequately established that he sustained injuries in the course of his employment. That the accident was caused by the Respondent exposing him to a dangerous machine without protective gear, adequate tools to ensure that his work was conducted safely especially under the circumstances because he was not used to the particular machine he was assigned to use on the day of the accident.

Accordingly, the court finds that the Claimant has discharged the onus placed on him on a preponderance of evidence. The Respondent has failed to prove any or contributory negligence on the part of the claimant and the court holds the Respondent 100% liable for the accident which visited the index finger of the Claimant on the material day.

Quantum

The Claimant relies on the case of **Nakuru Civil Appeal No. 9 of 2004, Spin Knit Limited vs. Johnstone Otara**, where the plaintiff suffered soft tissue injuries to his right hand and was awarded Kshs.300,000/= as general damages in 2006. All the fingers were affected but he did not suffer a fracture or permanent disability similar to that suffered by the Claimant.

The Claimant also relies on the case of **Nyeri Civil Appeal No. 2 of 2006, Joseph Wahome Muturi vs. Municipal Council of Nyeri** where the plaintiff suffered a compound fracture of the middle finger and had difficulty in bending and straightening it and the finger was found to be deformed at the second inter phalangeal joint and half tip of left index finger was missing. The court enhanced an award of Kshs.120,000/= to Kshs.180,000/=.

The report of Dr. Moses Kinuthia dated 12th November, 2010 submitted as exhibit 7 concludes that the Claimant suffered total permanent disability assessed at 2% whereas **Dr. Ashwin Madhiwalla** in his report dated 8th March, 2011 agrees that the Claimant has suffered permanent disability of 2% to his right index finger.

The advocate for the Claimant submits that on the basis of the assessed permanent disability, the court awards the Claimant general damages of Kshs.350,000/=.

The counsel for the Respondent relying on **Mombasa Appeal No. 31 of 2003, Kilifi Plantation Ltd vs. Jeth Awuor Odawa** wherein the plaintiff had cuts and wounds on the 1st and 2nd fingers of the left hand resulting in reduced functioning of the left hand was awarded Kshs.160,000/= submits that an award of Kshs.120,000/= would be adequate to compensate the Claimant.

Having considered the facts of the case and the authorities relied upon by both parties. Given that there is an agreement that the Claimant suffered permanent disability of 2% to his right index finger, considering that the authorities relied upon were delivered several years ago, the court awards Kshs.210,000/= as general damages.

Special Damages

Medical Report.

The claim for Kshs.2,000/= refund for the fee paid in respect of the medical report produced by the Claimant is not contested and the same is awarded accordingly.

Payment in lieu of leave days for 2008 and 2009

The Respondent is bound by **Section 274 (1) (f)** of the **Employment Act 2007**, to keep records “*of an employee’s annual leave entitlement, days taken and days due, specified in Section 28.*”

The Claimant alleges that he did not get annual leave for the year 2008 and 2009. In terms of **Section 28** of the Act, he was entitled to a minimum of 21 days leave for each year of service.

The Respondent is bound to produce the records if it disputes the claim by the Claimant that he was not given leave. The Respondent has failed in the circumstances to rebut the claim for payment in lieu of leave for 2008 and 2009. The court awards Kshs.19,418.50cts (12021÷26 days per month x 42 days leave).

NSSF deductions not forwarded:

With regard to this claim, the Claimant has established by the statement of NSSF that he was registered as a member on 17th April, 2008 and the Respondent was the employer. The statement however only shows that contributions were remitted from May, 2007 to April, 2009. The court directs the Respondent to remit to NSSF monthly contributions of Kshs.400/= per month from 17th April, 2003 to April, 2007 within thirty (30) days from the date of this judgment and file with the court proof of such remission.

In the final analysis the Respondent is directed to pay to the Claimant:

- a. *Kshs.210,000/= being general damages for the injuries sustained;*
- b. *Kshs.2,000/= being refund of medical report fees;*
- c. *Kshs.19,418/50 being payment in lieu of leave; and*
- d. *Remit to NSSF total monthly contributions of Kshs.400/= with respect to the Claimant from 17th April, 2003 to April, 2007 within 30 days from the date of this judgment and file with the court proof of such payment.*

Total award payable to the Claimant Kshs.231,418/50cts.

- e. *Costs of the suit.*

Dated and delivered at Nairobi this 30th day of August, 2013.

MATHEWS N. NDUMA

PRINCIPAL JUDGE