REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 102 OF 2018

COMPLY INDUSTRIES LIMITED...APPELLANT

-VERSUS-

JOSEPH KURIA KABUTU...RESPONDENT

(Being an Appeal from the Judgment of Hon F. Munyi (Senior Resident Magistrate)

delivered at Nakuru on the 12th day of July 2018 in Nakuru CMCC No. 1040 of 2016

between Joseph Kuria Kabutu v Comply Industries Limited)

JUDGMENT

1. This appeal arose from suit filed by the plaintiff against the defendant seeking general and special damages for the injuries he sustained on 27th August 2011 while working for the defendant.

2. After hearing, the trial magistrate apportioned liability at 20:80 and awarded kshs.700,000 as general damages for pain and suffering and special damages of kshs.18,050 making a total of kshs.718,050 less 20% net being kshs.574,440.

3. The appellant/defendant being dissatisfied by the determination filed this appeal on the following grounds:-

i. The Learned Trial Magistrate erred in law and fact in wholly failing to address herself to the fact that the Respondent’s claim was statute barred as addressed in paragraph 2 and 3 of the statement of defence.

ii. The Learned Trial Magistrate erred in law and in fact in wholly ignoring the Appellant’s submissions on the issue of limitation despite the fact that the Plaintiff’s was clear statute barred. The cause of action arose on the 27th of August 2011, the suit was filed on the 16th of September 2016 within the province of **Section 90** of the **Employment Act, 2007, Section 4 (2), 27 and 28** of the **Limitation of Actions Act** the suit was clearly a non-starter.

iii. The Learned Trial Magistrate erred in law and in fact in wholly failing to address herself on the principles applicable in a claim for negligence. The Respondent admittedly was an experienced power-saw man of many years wholly relied upon by the Appellant on his task only for the Trial Magistrate to hold that the Respondent was not trained on how to fell trees with large branches as if a power-saw man is expected to fell trees without branches.

iv. The Learned Trial Magistrate analyses of the evidence and the principles applicable in a claim for negligence is rather simplistic and goes against the weight of the evidence and the authorities cited before her which properly guided the Trial Court on the appropriate conclusion to arrive at.

v. The evidence at hand and the authorities cited cannot lead to the conclusion arrived at by the Trial Magistrate which is wholly erroneously. An employer cannot be held liable is a power saw man wholly in control of his task negligently fells a tree that ends up landing on him.

vi. The Learned Trial Magistrate erred in law in awarding excessive damages not in tandem with decided authorities.

4. Parties agreed to proceed by way of written submissions.

THE APPELLANT'S WRITTEN SUBMISSIONS

5. The Appellant filed written submissions dated 17th of September 2019 and urged the court to consider the following issues:-

i. Whether the Claimant/Respondent's suit was statue barred at the time of filing.

ii. Whether the Claimant/Respondent proved causation with regard to his claim of negligence against the Appellant.

iii. Whether the Claimant/Respondent proved his claim for injury at all or to the required standards.

iv. Whether the Claimant/Respondent has proved the Appellant's negligence in the occurrence of the accident.

6. On whether the Claimant/Respondent's suit was statue barred at the time of filing, the Appellant submits that the Respondent filed his Plaint on the 16th of September 2016 while he was injured on or about the 27th of August 2011. The Cause of Action arising and filing of the suit amounts to 5 years and 20 days and the action being founded on tort may not be brought after the end of three years from the date on which the cause of action accrued as provided in **Section 4 (2) of the Limitation of Action Act.**

7. The Appellant submitted that the Respondent blamed the Appellant of having breached its duty towards the Respondent or its contract with the Respondent; and **Section 27 (1) of the Limitation of Actions Acts** provides that when a person pleads breach of duty, whether the duty arises by virtue of a contract or written law he has to bring the claim within 3 years from the date when the cause of action accrued, unless he has obtained leave of Court to file the same out of the stated period of time.

8. The Appellant refereed to the case of **Maria Mosocho v Total Kenya Limited [2013]** where the court held that the causes of action based on breach of employment contract or contract of service was provided for in general under **Section 4 of the Limitation of Action Act** and it was 6 years. **Section 90 of the Employment Act** was amended to provide a limitation period of 3 years in actions based on breach of contract of service or arising out of the Employment Act as held in **Rajab Shireng Washiali v Mumias Sugar Co. Ltd [2014] and Fred Mudave Gogo v G4S Security Service (K) [2014]** that the Employment Act of 2007 puts a limitation period to 3 years.

9. Further in the case of **Afro Spin limited v Fedelis Gori Civil Appeal 61 of 2009** the gist of the case being that when a party files a suit for personal injury and where he pleads that the personal injury is on account of breach of duty whether the duty arises from contract or from statute he has to file his claim within 3 years. If the same is not filed within 3 years, he had to seek leave to file the suit out of time.

10. On whether the Claimant/Respondent proved causation with regard to his claim of negligence against the Appellant the Appellant submitted the Respondent confirmed that he had the duty to look up and ensure his own safety. The Respondent's duty of care to himself and others is clearly outlined under **Section 13 (1) (a) of the Occupational Safety Health Act** and the Respondent has not shown a causal link between the occurrence of the accident and the Appellant's action. Appellant referred to the case of **Amalgamated Saw Mills v David K. Kariuki [2016] eKLR** where the court held that an employer cannot baby-sit an employee especially in manual tasks that need no special training or supervision. He must work and at the same time take precaution on his own security and safety.

11. Further, in **Statpack Industries v James Mbithi Munyao Nairobi HCCA 152 of 2003** the court held that the burden of proof of any act or allegation is on the Plaintiff. He must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which on a balance of probability, a connection between the two may be drawn; and in **Timsales v Willy Nganga Wanjohi Nakuru HCCA No. 230 of 2004** the court held that the work of pushing a handcart does not entail any exceptional skill that would require expertise or training. The Respondent was aware that he was required to push the said handcart on an even surface within the premise of the Appellant. When a party pleads negligence, he has to prove it.

12. Appellant further cited the case of **Wilson Nyangu Musigisi v Sasini Tea & Coffee Ltd. Kericho HCCA No.15 of 2003** where the court held that the Act mandates an employer to pay an employee in case he is injured while at his place of work. Such compensation is paid on a 'no fault basis'. The employee is not supposed to prove any negligence or breach of statutory duty on the part of the employer.

13. On assessment of damages, the Respondent sustained fractures of the 10th, 11th and 12th ribs and soft tissue injuries to his back. The Trial Magistrate proceeded to award general damages of Kshs.700,000/- for the pain and suffering. The Appellant urged court to look at the case of **Miriam Njeri Murimi v Kenya Broadcasting Corporation [2009] eKLR** where the Court awarded general damages for pain, suffering and loss of amenities at Kshs.450,000/- where the Plaintiff had suffered head injury, fractures ribs L 16 and R1-12, fracture dislocation of the shoulder joint and fracture dislocation of the hip joint. The degree of permanent incapacity was assessed at 12%.

14. Further in **David Kiplangat Sang v Richard Kipkoech Langat and another [2006] eKLR** the Court awarded general damages for pain, suffering and loss of amenities at Kshs 550,000/- where the Plaintiff suffered severe head injury with loss consciousness for 4 days, blunt chest with fracture of two ribs, fracture of the tibia, fibula and left acetabulum with hip dislocation, fracture of the left medial malleolus. The Plaintiff had a limping gait and used a walking stick. The degree of permanent incapacity was assessed at 30%.

15. Also in the case of **George Kiptoo Williams v William Sang and Another [2004] eKLR** the Court awarded general damages for pain, suffering and loss of amenities at Kshs.560,000/- where the Plaintiff suffered cut wound on the occipital region with lacerations on the left temporal region of the head, fracture of the skull on the occipital region, subluxation of the cervical vertebrae C1, C3 and C4 fracture of the 2nd, 3rd, 4th, 5th, 6th, 7th and 8th ribs of the left side of the chest, fracture of the body of the left scapula and cut wound on the left hand and left arm. The degree of permanent incapacity was assessed at 30%.

16. The Appellant further cited the case **of George Kinyanjui T/A Climax Coaches and Equity Bank Limited v Hassan Musa Agoi** the Court of Appeal found an award of Kshs.800,000/- was manifestly high and proceeded to award the Plaintiff Kshs.450,000/- where the Plaintiff had two loose teeth, blunt trauma to the neck and chest, fracture of the left clavicle, fracture of the 4th and 5th left ribs, blunt trauma to the spinal column and right scapula area and dislocation of the left shoulder joint. The doctor who re-examined the Plaintiff confirmed the injuries but found no dental injury; and in **Morris Miriti v Nahashon Muriuki and Kiegoi Tea Factory** the Court confirmed the award of Kshs.300,000/- after taking into account the principles whereof the appellate Court could interfere with an award of damages. The Plaintiff had sustained tender chest posterior and anterior, multiple bruises on the posterior chest and post traumatic fracture of the 3rd and 4th ribs with bilateral haemophreino thorax.

17. The appellant submitted that the award of Kshs.700,000/-should be substituted to a more reasonable award of Kshs.200,000/- and concluded that the Respondent has failed to prove negligence on the part of the Appellant, leading to the occurrence of the accident and therefore the suit should be dismissed; in the event that the Respondent's suit is merited then the general damages awardable should be Kshs.200,000/- as reasonable.

RESPONDENT'S SUBMISSIONS

18. In submissions dated 25th of September 2019, the respondent raised the following issues:-

i. Whether the Trial Court erred in law and in fact in failing to address itself to the issue of whether the Plaintiff's claim was statute barred.

ii. Whether the Respondent failed to prove the breach of contract by the Appellant hence liability of the Appellant.

iii. Whether the matter is statutorily barred from being determined in Court under the statute of limitation.

iv. Whether this court should disturb the quantum awarded by the lower Court.

19. On whether the Trial Court erred in law and in fact in failing to address itself to the issue of whether the Plaintiff's claim was statute barred, the Respondent submitted that the Defendant/Appellant withdrew a Preliminary Objection dated 17th of October 2016. This therefore ceased to be an issue for determination in the judgement.

20. On whether the Respondent failed to prove the breach of contract by the Appellant hence liability of the Appellant, the Respondent submitted that evidence on record shows that there was no dispute that the Respondent was an employee of the Appellant as a power-saw man. It was also a fact that the Respondent was injured at his place of work while in the course of ordinary business of felling trees. This was established in Court by the Respondent herein and DW1.

21. The Respondent cited the case of **African Highlands & Produce Co. Ltd v Collins Moseti Ontweka H.C Civil Appeal 38 of 2002** which was cited with approval in the case of **African Highland Produce Co. Ltd v Francis**

B. Mososi [2005] eKLR the gist of the case being that the Appellant was solely liable for the injuries sustained by the Respondent due to the fact that under the Factories Act the failure of an employer to provide protective gear to an employee especially when working in a dangerous environment means that in the event such an employee shall be guilty of breach of a statutory duty. Liability in such an event is strict.

22. The Respondent submitted that the Appellant could not rely on the expertise of the Respondent as a power-saw man to contend that the onus of ensuring his safety in the course of his performing his work was wholly dependent on him. The position was reiterated in the case of **Sokoro Saw Mills v Bernard Muthimbi Njenga (Nakuru HC Civil Appeal No. 38 of 1995)** cited in the case of **Rashid Ali Faki v A. O. Said Transporters [2016] eKLR** where the court held as follows:-

> **"It is the duty of the employer to provide a safe place to work to the employee comprises not merely to warn the employee against unusual dangers known to them… but also make the place of employment as safe as the exercise of reasonable skill and care would permit."**

23. On whether the matter is statutorily barred under the statute of limitation, the Respondent submitted that the matter is a contractual matter and under **Section 4 of the Limitation of Actions Act**, contractual matters can be commenced in Court within 6 years after the act or omission. The substance of the suit occurred on the 27th of August 2011 and it was instituted in Court on the 16th of September 2016. The 6 years had not lapsed and is within the limits of time provided.

24. On whether this court should disturb the quantum awarded by the lower Court, the Respondent cited the case of **Henry Hidaya Ilanga v Manyema Manyoka (1961) EA 713** where the court held that the Appellate Court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at the first instance. Before the Court can intervene, it must be satisfied either that the judge in assessing the damages applied the wrong principles of law or in short of this that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage; the same position

was reiterated in the case of **Butt v Khan (1981) KLR 349**.

25. Further the respondent state that the Appellant has not shown that indeed the Trial Court proceeded on wrong principles in arriving at the quantum awarded and the damages awarded to the Respondent by the trial Court was reasonable and within the purview of the award that the Courts have made for similar injuries; that the Courts generally have judicial discretion as restated in the case of **Patel M. Kariuki v Attorney General [2014] eKLR.**

26. The respondent submitted that the trial Court exercised its discretion and arrived at a reasonable award and cited the case of **Joseph Mwanza v Eldoret Express Kisumu High Court Civil Case 160 of 2004 (unreported)** where the court awarded even a higher figure of Kshs.1,200,000/- to a Plaintiff who suffered 40% permanent disability as the Respondent herein. Respondent urged the Court to find the Appellants to have failed to prove that the trial Court erred in awarding a quantum of Kshs.700,000/- plus special damages of Kshs 18,050/-.

ANALYSIS AND DETERMINATION

27. This being the first appellate court, I am obligated to reevaluate evidence on record and arrive at an independent determination. This I do with the knowledge that unlike the trial court I never got the opportunity to take evidence first hand and observe demeanor of witnesses. For this I give due allowance. There is no dispute that the respondent was the defendant's employee and that he was injured while in employment. I consider the following to be in issue

i. Whether the suit filed in the lower court was time barred.

ii. Whether the respondent proved negligence on part of the appellant.

iii. Whether damages awarded to the respondent are excessive.

(i) Whether the suit filed in the lower court was time barred

28. The appellant argued that the accident occurred on 27th August 2011 and the suit was filed on 16th September 2016 which is over 3 year period provided by section 90 of employment Act 2007, section 4(2), 27 and 28 of the limitation Act. However, on perusal of the court record I note that on 1st February 2017, counsels for the parties herein, record consent to withdraw preliminary objection that sought to strike out the suit on ground that it was time barred. This matter was not therefore litigated on and determined in the lower and in my view, the appellant having chosen to withdraw the objection in the trial court; it should not be raised in the appeal. New issues should not be ligated in the appeal, as the parties never got opportunity to litigate in the lower court. Appeal on this ground cannot therefore stand.

(ii) Whether the respondent proved negligence on part of the appellant.

29. In making a determination on the above issue, I am required to reevaluate evidence adduced before the trial court and arrive at an independent determination. This I do with the knowledge that unlike the trial court, I never had opportunity to take evidence first hand and observe demeanor of witnesses. For this I give due allowance.

30. The appellant argued that the respondent was an experienced power-saw man of many years who was wholly relied on by the appellant on his task and it was erroneous for the magistrate to find that he was not trained.

31. Record show that the respondent stated he cut a tree with 2 big branches, and one branch one fell on him. He said the power-saw was running and he could not therefore have heard it fall on him hitting him causing injuries on the back and 3 broken ribs; he stated that assistant one **John Ndungu** who had been allocated to him but he left without the respondents knowledge.

32**.** Respondent further stated that he started working with power-saw in 1985 and he had 5 years of experience before joining the respondent; he stated that he worked at **Kibuku Saw Mills** and **Timsales** and that he learnt the work on his own at **Kibuku**. He confirmed that the appellant relied on him on anything that related to his job and also depended on him for his own safety. He said he was the one to instruct his assistant **Mr.Ndungu.**

33. He said he had seen that the tree had two tracks at the time he started felling it. He said the crack was on the tree at the time he started cutting it. He said he was the one to determine where the tree would fall. He said the tree had fallen at the time the branch broke. He said he had a duty to look up to ensure his own safety.

34. Evidence show that at the time the respondent sustained injuries, the assistant was not with him to warn him of the falling tree. DW1 in his testimony stated that the respondent was an experienced power-saw operator but confirmed that he did not have an assistant at the time he got injured. From evidence adduced, persons felling trees required an assistant even if they had experience in felling trees to watch for danger that may occur and alert the person-felling tree. The respondent testified that when he started felling the tree, the assistant was present; he further said what fell on him was developed branch. If his assistant were present, he would have warned him that the branch was falling. He further stated that he moved a step forward to avoid the falling branch and it fell on his back.

35. The respondent stated it is noisy when felling trees and in case of danger, the assistant would warn him. In this case, it was confirmed by DW1 that the respondent did not have an assistant. DW1 further stated that there were two trees whose branches held each other and as the one being fell by the respondent was about to fall, it pulled the branch of the 2nd tree which broke on its upper part and fell on him. He said the respondent did not have an assistant. He said he could see him well from where he was. He said they were waiting for each other to fell the tree in turns. He however said it is not a must for power-saw man to have an assistant. DW1 confirmed that as long as he is using the power saw he cannot hear anything.

36. From evidence adduced, it is clear that even if the respondent was experienced in felling trees, he required the presence of an assistant while started to fell the tree to the end to warn him of any danger, which did not happen. The sudden disappearance of the respondent's assistant exposed him to danger, as he was not in a position to hear the branch falling while the power saw was on. On the other hand having been experienced power saw operation, he ought to have seen the likelihood of the branch falling due to impact of power-saw. He therefore had some percentage of blame to shoulder and in my view, apportionment of liability at 20:80 is reasonable. I see no reason to interfere with that finding.

(iii) Whether damages awarded to the respondent are excessive.

37. I have considered the injuries sustained by plaintiff as captured in paragraph 13 above, compared with injuries sustained by parties in the cited authorities, and find the award of kshs.700,000 for pain and suffering is reasonable as compensation for the said injuries.

38. <u>FINAL ORDERS</u>

1. Appeal on both liability and quantum is hereby dismissed

2. Costs of appeal to the respondent.

JUDGMENT dated, signed and delivered via email at Nakuru this 30th day of April 2020

RACHEL NGETICH

JUDGE

<u>TO:</u>

Murimi Ndumia, Mbago & Muchela Advocates – Counsel for Appellant

Ngure Advocates Counsel for Respondent