REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 306 OF 2018

INTEGRATED PACKAGING LIMITED.....APPELLANT

VERSUS

BENEDICT MUSYOKI MATHEKA.....RESPONDENT

JUDGMENT

1. This appeal arises from the judgment and ruling of the lower court in Milimani CMCC No. 5037 of 2013. The context in which the appeal was filed is that the respondent, then the plaintiff, sued the appellant seeking both general and special damages following injuries he sustained in the course of his employment with the appellant.

2. In his plaint dated 29th July 2013, the respondent averred that at the material time, he was employed by the appellant as a machine operator and that on 15th January 2013, while in the course of his employment and owing to the negligence of the appellant, its servants or agents, the machine he was assigned to work with suddenly malfunctioned and in the process injured his left hand and fingers. These claims were denied by the appellant in its statement of defence dated 10th October 2013.

3. After a full trial, the learned trial magistrate *Hon. M. Chesang* (Mrs) *(RM)* rendered her judgment on 15th April 2016 and found the appellant liable at 100% and awarded the respondent damages as follows:

i. General damages - KShs.900,000

ii. Loss of earning capacity - KShs.960,000

iii. Special damages - KShs.3,000

4. On 23rd June 2016, the appellant filed a Notice of Motion seeking review and setting aside of the trial court's decision on grounds that the court lacked jurisdiction to entertain the suit in the first place. In its ruling dated 14th October 2016, the trial court dismissed the application with costs for lack of merit. This ruling is what triggered the filing of this appeal.

5. In its memorandum of appeal, the appellant advanced six grounds of appeal in which it basically complained that the trial court erred in law in finding that a Magistrate's Court presided over by a Resident Magistrate had jurisdiction to hear and determine "work injury" claims; that the award of general damages for pain and suffering in the sum of KShs.900,000 and those for loss of earning capacity amounting to KShs.960,000 were manifestly excessive and not based on the evidence on record. The appellant also faulted the learned trial magistrate's decision to dismiss its application dated 22nd June 2016 on grounds that it disclosed grounds of appeal instead of review.

6. By consent of the parties, the appeal was prosecuted by way of written submissions. Those of the appellant were filed on 25th September 2019 while those of the respondent were filed on 29th October 2019.

7. I am alive to the fact that this is a first appeal to the High Court and therefore, it is an appeal on both facts and the law. I am also cognizant of the duty of a first appellate court which as held in ***Selle & Another V Associated Motor Boat Company Limited, [1968] EA 123*** is to:

> ***"…. reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect…."***

8. Having considered the pleadings, the grounds of appeal, the evidence on record as well as the written submissions filed by the parties, I find that although the appellant in its submissions challenged the validity of the trial court's finding on liability, that finding was not contested in any of the grounds set forth in its memorandum of appeal. In the circumstances, under *Order 42 Rule 4* of the *Civil Procedure Rules*, the appellant is estopped from canvassing the issue on appeal. This notwithstanding, I have read the evidence on record and the trial court's judgment. In my view, there is nothing to suggest that the trial court erred in arriving at its decision on liability.

9. From the grounds of appeal, the evidence on record and the parties' rival written submissions, I have distilled three main issues for my determination which are:

i. Whether the trial court had jurisdiction to hear and determine the respondent's suit.

ii. If the answer to issue number (i) above is in the affirmative, whether the trial court erred in its decision on quantum.

iii. Whether the trial court erred in dismissing the Notice of Motion dated 23rd June 2016.

10. Turning to the first issue, the appellant submitted that the trial court should not have heard the respondent's suit from the very beginning since it lacked jurisdiction to do so. The appellant relied on the celebrated case of ***Owners of Motor Vessel "Lillian S" V Caltex Oil (Kenya) Limited, (1989) KLR 1*** where the court held that jurisdiction is everything and without it, a court has no power to make one more step.

11. In his submissions in rejoinder, the respondent urged the court to find that the appellant's challenge on the trial court's jurisdiction was an afterthought since it submitted itself to the court's jurisdiction throughout the proceedings without any objection and only raised the issue when the suit was concluded. The respondent asserted that the trial court had jurisdiction to determine the suit in accordance with its mandate conferred by Gazette Notice Supplement No. 196 of 2015 – *The Magistrate's Court Act, 2015*.

12. I note that in its application dated 23rd June 2016, the appellant sought orders for review and setting aside of the trial court's proceedings, the resultant judgment and decree on grounds that by virtue of Gazette Notice No. 9243 of 2011, work injury claims could only be heard and determined by magistrates of the rank of Senior Resident Magistrate and above and that therefore, *Hon. Chesang* who was then a Resident Magistrate lacked jurisdiction to adjudicate on the matter.

13. While it is true that Gazette Notice No. 9243 of 2011 designated all Magistrate Courts presided over by magistrates of the rank of Senior Resident Magistrate and above as Special Courts mandated to hear and determine cases involving employment and labour relations including work injury claims, I agree with the respondent that the said Gazette Notice was nullified by the enactment of the *Magistrates Court Act, 2015* (the *Act*) which came into force on 2nd January 2016.

14. *Section 9 (b)* of the above *Act* gave the Magistrates' Court jurisdiction to hear and determine claims relating to employment and labour relations which in my view include work related injury compensation claims. It is common knowledge that the Magistrate's court is presided over by magistrates of different ranks. The term "magistrate" is defined in *Section 2* of the *Act* to mean "*…**a Chief Magistrate, a Senior Principal Magistrate, a Principal Magistrate, a Senior Resident Magistrate or a Resident Magistrate appointed in accordance with Article 172 (1) (c) of the Constitution and includes a person appointed to act in the particular office."***

15. Given the foregoing, I find no merit in the appellant's claim that the learned trial magistrate lacked jurisdiction to hear and determine the respondent's suit. I also find no basis for the appellant's argument that the trial court erred in giving retrospective application to *Section 9* of the *Act.* A perusal of the *Act* shows that it came into force on 2nd January 2016. The court record shows that the proceedings forming the basis of the trial court's impugned judgment took place after that date and judgment was delivered on 15th April 2016.

16. Regarding the appellant's complaint that the trial court erred in applying *Section 9 (b)* of the *Act* when its operation and implementation had been stayed in ***Malindi Law Society V Attorney General & 4 Others, [2016] eKLR***, I find that the appellant failed to substantiate this claim by availing a copy of the conservatory orders allegedly issued in the aforesaid petition. The law is that he who alleges must prove. Besides, the record does not show that in the course of the hearing, the appellant brought the issue of the alleged stay orders to the attention of the presiding magistrate. And one wonders how or why the appellant would have proceeded to fully participate in the proceedings if it was aware of the existence of the alleged stay orders.

17. From the material placed before me, am unable to make a finding of fact that there were such orders in force at the time the suit was heard and determined.

18. In view of the foregoing, I am satisfied that the appellant has failed to prove its claim that the trial court lacked jurisdiction to hear and determine the respondent's suit. Going by the provisions of *Sections 2* and *9 (b)* of the *Magistrates Court Act, 2015*, I find that the trial court as constituted had jurisdiction to hear and determine the suit.

19. Before addressing the appeal on quantum, I wish to deal with the appellant's grievance that its application for review was wrongly dismissed by the trial court. A perusal of the application discloses that it was premised on O*rder 45 Rule 1* of the *Civil Procedure Rules, 2010.* It was seeking to have the proceedings and judgment set aside on grounds that the trial magistrate who heard and determined the suit lacked jurisdiction to do so.

20. In its ruling, the trial court held as follows:

"…I agree with the plaintiff that this is not a matter for review under order 45 rule 1 of the Civil Procedure Rules, 2010 but

ought to be a matter of appeal where legal arguments can be made. Consequently, I find that the application lacks merit. I hereby dismiss it with costs."

21. I wish to point out that although *Order 45 Rule 1* of the *Civil Procedure Rules* empowers a court to review its judgment, decree or order, the provision sets out the circumstances under which the court should exercise its power of review. To succeed in an application for review, an applicant must prove any one of the following grounds:

a). That he has discovered new evidence which after the exercise of due diligence was not within his knowledge or was not available at the time the order was made;

b). That there was a mistake or error apparent on the face of the court record;

c). That there was sufficient reason warranting the review sought; and

d). That the application was made timeously.

22. In this case, in the affidavit supporting the motion, the appellant did not claim that it had come across any new evidence or that there was an error apparent on the face of the court record that would have warranted the review sought. The application was solely premised on the ground that the trial court lacked jurisdiction to determine the suit. In my view, a challenge on a trial court's jurisdiction especially when such a challenge is made after a suit is concluded is a matter of law which can only be ventilated on appeal.

I am thus unable to fault the trial court's findings that the motion fell outside the ambits of review. It is thus my finding that the motion was properly dismissed for lack of merit.

23. Turning now to the appeal on quantum, I wish to state at the outset that the award of damages is at large. It is dependent on the discretion of the trial court but that discretion must be exercised judiciously in accordance with the law and the facts of each case.

24. As a general rule, an appellate court ought to be slow to interfere with awards made by a trial court. The circumstances that would warrant an appellate court's intervention were succinctly outlined in ***Kemfro Africa Limited T/A Meru Express Services & Another V Lubia & Another, [1987] KLR 30*** where the Court of Appeal expressed itself as follows:

"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held to be that; it must be satisfied that either the judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that short of this the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. …"

25. In its submissions, the appellant contended that the learned trial magistrate applied the authority of ***James Thiongo Githiri V Nduati Njugua Ngugi & 2 Others, [2014] eKLR*** which was not relevant to the respondent's suit and that the court misapprehended the evidence on the respondent's injuries and thus arrived at an erroneous award of general damages in the sum of KShs.900,000 which was inordinately high. In the appellant's view, an award of KShs.200,000 would have been sufficient.

26. According to the plaint, the respondent sustained the following injuries:

i. Compound fracture of the left index finger at the middle phalanx.

ii. Fracture of the left middle finger at the proximal interphalangeal joint.

iii. Deep cuts on the left hand.

iv. Loss of the nail of the left thumb.

v. Profuse hemorrhage.

27. In his evidence, *Dr. Okere* testified that he examined the respondent on 24th April 2013. He confirmed that the respondent sustained the injuries pleaded in the plaint and that his middle finger was stiff as well as his left index finger which had limited movements. He opined that the respondent had suffered permanent incapacity assessed at 25%.

28. The respondent on his part supported the trial court's decision on quantum arguing that the awards were proper as they were based on the evidence on record.

29. I have read the respondent's written submissions filed in the lower court as well as the trial court's judgment. I find that the respondent did not specifically indicate whether he was relying on the authority of ***James Thiongo Githiri V Nduati Njugua Ngugi & 2 Others, [supra]*** to support his proposal for an award of KShs.1,500,000 as damages for pain and suffering or his proposal for damages for loss of earning capacity.

30. In her judgment, the learned trial magistrate considered the injuries sustained by the respondent but did not assign any reason for awarding general damages amounting to KShs.900,000. This was an error on the trial magistrate's part. She ought to have justified the

award by disclosing the reasons that informed her decision. As matters now stand, the decision appears to have been made arbitrarily.

31. Though the parties did not avail to the court any authorities to assist it decide whether or not the amount awarded to the respondent was either too high or low, I have through my research identified two persuasive authorities namely, ***Sino Hydro Corporation Ltd V Daniela Atela Kamuda, [2016] eKLR*** where the plaintiff was awarded in the lower court KShs.1,000,000 as general damages for injuries which resulted to amputation of the middle and ring fingers of the right hand. The amount was reduced to KShs.600,000 on appeal. In ***Kenya Steel Fabricators Limited V Tom Moki, [2018] eKLR***, the plaintiff was awarded general damages of KShs.350,000 in the lower court for fracture of the right index finger which on appeal was reduced to KShs.260,000.

32. Considering the above authorities more particularly the ***Sino Hydro Corporation Ltd V Daniela Atela Kamuda, [supra]*** where the plaintiff suffered more severe injuries in the form of amputation of two fingers and taking into account the injuries sustained by the respondent in this case, I find that the award made by the trial court was inordinately high as to lead to an inference that it was based on a completely erroneous estimate of the damage suffered. Taking into account inflationary trends given that the authorities were decided about two years ago, I reduce the trial court's award to KShs.450,000 which in my view would have been sufficient to compensate the respondent for the pain and suffering caused by his injuries. The award of KShs.900,000 is accordingly set aside.

33. Regarding the claim for loss of earning capacity, the appellant relying on the principles enunciated in ***Butler V Butler, [1984] KLR 225*** submitted that the respondent was not entitled to damages for loss of earning capacity considering that *Dr. Okere* had confirmed that the respondent could still continue working only that his ability to use the 2nd left middle finger was limited; that the trial court therefore erred in awarding him damages of KShs.960,000 under that limb.

34. As is expected, the respondent supported the trial court's award but did not make any submissions to demonstrate that the award was justified.

35. The Court of Appeal in ***Butler V Butler, [supra]*** described what constituted loss of earning capacity and differentiated it from loss of future earnings in the following terms:

> ***"i. A person's loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour market or work, as well paid as before the accident are lessened by his injury;***
>
> ***ii. Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages;***
>
> ***iii. Damages under the heads of loss of earning capacity and loss of future earnings, which in English law were formerly included as an unspecified part of the award for pain, suffering and loss of amenity, are now quantified separately and no interest is recoverable on them;***
>
> ***iv. Loss of earning capacity can be a claim on its own, as where a claimant has not worked before the accident giving rise to the incapacity, or a claim in addition to another, as where the claimant was in employment then and/or at the date of the trial;***
>
> ***v. Loss of earning capacity or earning power may and should be included as an item within general damages but where it is not so included it is not improper to award it under its own heading;***
>
> ***vi. The factors to be taken into account in considering damages under the head of loss of earning capacity will vary with the circumstances of the case, and they include such factors as the age and qualifications of the claimant; his remaining length of working life; his disabilities and previous service, if any."***

36. As stated earlier, it is a cardinal principle of law that he who alleges must prove. In this case, in order to succeed in his claim, the respondent had the onus of proving on a balance of probabilities that he had lost his capacity to earn a living owing to the injuries he sustained in the accident.

37. In his evidence before the trial court, the respondent adopted his written statement dated 29th July 2013 which only detailed how the accident in which he injured his fingers occurred. He did not claim or tender any evidence to show that as a result of the injuries, he lost his ability to work either as a machine operator or in any other capacity. In fact, in his evidence under cross examination, he confirmed that after the accident, he continued working for the appellant till May of the following year, a period of over one year.

38. Given the evidence on record, it is clear to me that the respondent failed to adduce evidence to demonstrate that he had lost capacity to work or to earn a living as a result of the injuries sustained in the accident. The trial magistrate's finding that ***"the injuries sustained together with the high degree of permanent incapacity will render him unemployable for a long period"*** is not supported by any evidence on record. The learned trial magistrate erred by failing to properly interrogate the evidence placed before her and thereby arrived at the erroneous finding that the respondent was entitled to an award of damages for loss of earning capacity. The award of KShs.960,000 had no basis in law and cannot be sustained. It is consequently set aside.

39. The award of special damages amounting to KShs.3,000 was not challenged on appeal and the same is confirmed.

40. In the end, this appeal partially succeeds to the extent stated above. The Judgment of the trial court is consequently set aside and is substituted with a judgment of this court in favour of the respondent against the appellant in the total sum of KShs.453,000. Special damages will earn interest from the date of filing suit while general damages will attract interest at court rates from date of the trial court's judgment.

41. The respondent is awarded costs of the suit in the lower court but as the appeal has partially succeeded, each party shall bear its own costs of the appeal.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this 30th day of June 2020.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Wairegi for the appellant

Mr. Okao for the respondent

Ms Mwinzi: Court Assistant