**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 272 OF 2018**

**AFRICA APPARELS EPZ LIMITED.....APPELLANT**

**-VERSUS-**

**JOHN NAMISI KIVEU.....RESPONDENT**

*(Being an appeal against the judgment and decree of Hon. D.O. Mbeja (Mr.) (Senior Resident Magistrate) delivered on 30th May, 2018 in MILIMANI CMCC NO. 8637 OF 2016)*

**JUDGEMENT**

1. The respondent who was the plaintiff in CMCC NO. 8637 OF 2016 instituted a suit against the appellant by way of the plaint dated 2nd November, 2016 and sought for reliefs in the nature of general damages for pain and suffering and loss of amenities, special damages in the sum of Kshs. 3,000/, costs of the suit and interest thereon, for negligence and/or breach of contractual duty of care.

2. The respondent pleaded that he was at all material times an employee of the appellant, working as a H/standing OP.

3. The respondent pleaded in his plaint that sometime on or about the 24th day of May, 2016 while he was engaged in the lawful course of his employment, a machine was suddenly turned on, thereby injuring him.

4. The respondent attributed his injuries to negligence on the part of the appellant by setting out its particulars in his plaint.

5. Upon service of summons, the appellant entered appearance and filed its statement of defence dated 27th February, 2017 to deny the respondent's claim.

6. When the suit came up for hearing before the trial court, the respondent testified whereas the appellant did not summon any witnesses.

7. Upon close of the hearing, the trial court on 30th May, 2018 entered judgment as follows:

**i) Liability 80:20 in favour of the respondent**

**ii) Quantum**

**a) General damages for pain, suffering and loss of amenities Kshs. 200,000/**

**Less 20% contribution Kshs. 160,000/**

**b) Special damages Kshs. 3,000/**

**Total award Kshs. 163,000/**

8. The appellant has now moved this court by way of an appeal against the aforesaid judgment by putting forward the following grounds of appeal in its memorandum of appeal dated 20th June, 2018:

***(i) THAT the learned trial magistrate erred in law and fact in finding that the respondent was injured while on duty in view of his own evidence that he was on leave on the material date.***

***(ii) THAT the learned trial magistrate erred in law and fact in finding that the appellant was 80% liable for the respondent's***

***injuries in view of the fact that employment and breach of contract were not proved by evidence.***

***(iii) THAT the learned trial magistrate erred in law and fact in finding that the respondent was working on the material date and disregarded the appellant's submissions and evidence while arriving at his judgment.***

***(iv) THAT the learned trial magistrate misdirected himself in law and fact in failing to note that the respondent failed to prove the particulars of breach of contract and negligence pleaded in the plaint.***

***(v) THAT the learned trial magistrate erred in law and fact in holding that the appellant was 80% to blame for the occurrence of the suit accident contrary to trite rule of evidence that allegations of negligence, breach of contract and statutory duty must be proved strictly which the respondent did not do.***

***(vi) THAT the learned trial magistrate erred in law and fact in holding that the respondent had strictly proved his allegations of injury yet the factual evidential material, evidence and testimonies before him did not amount to the same or support and justify such a holding.***

***(vii) THAT the learned trial magistrate erred and misdirected himself in law and fact in holding that the respondent was injured while on duty on the material date yet no treatment notes or documentary evidence was proved.***

***(viii) THAT the learned trial magistrate erred in fact and ended up misdirecting himself in awarding exorbitant quantum of damages of Kshs. 200,000/ by failing to appreciate that the injuries were not sustained while on duty.***

***(ix) THAT the learned trial magistrate erred in law in making such a high award on damages as to show that the magistrate acted on a wrong principle of law.***

***(x) THAT the learned trial magistrate's award on damages was so high as to be entirely erroneous.***

***(xi) THAT the learned trial magistrate's award was made without considering the medical evidence before the court and failed to appreciate the nature of injuries sustained by the respondent and failed to be guided by authorities on comparable awards and hence ended up making an excessive award.***

***(xii) THAT the whole judgment on quantum and liability was against the weight of evidence placed before the court.***

9. This court called upon the parties to put in written submissions on the appeal. In its submissions dated 12th March, 2020 the appellant argued that there was no basis for the trial court to apportion liability as it did since the respondent had not proved the particulars of negligence and/or breach of statutory/contractual duty of care pleaded in his plaint.

10. The appellant further argued that the trial court did not take into account the evidence to show that the respondent was on sick leave for a period of 10 days thereby making it impossible for him to have been in the appellant's premises on the date of the accident or to have sustained the injuries pleaded while in the course of his employment with the appellant.

11. According to the appellant, the respondent failed to discharge the burden of proof against it, and it was therefore improper for the trial court to arrive at the finding it did on liability. The appellant went on to contend that it had at all material times supplied its employees; including the respondent; with the necessary protective gear and a safe work environment, hence the respondent ought to have been found solely liable for any injuries sustained, in the event that he proved that the same were sustained while in the course of his employment.

12. In view of the foregoing, the appellant urges this court to disturb the finding of the trial court on liability and in turn dismiss the respondent's suit.

13. On damages, it was the submission of the appellant that the trial court did not consider the authorities cited by the parties in awarding general damages and that there is no indication as to how the sum awarded was arrived at.

14. It was also the submission of the appellant that the trial court did not take into account the fact that the injuries sustained by the respondent were soft tissue in nature and left no permanent incapacity, thereby arriving at an inordinately high award.

15. In response, the respondent who filed submissions on 19th June, 2020 in support of the decision arrived at by the trial court, argued that he had brought evidence to show that he had sustained the injuries while at work and that he did not know that the leave sheet bore a different date from the date on which the incident took place. The respondent added that in any event, the appellant did not call any evidence to rebut his testimony hence its pleadings and submissions could not be deemed to constitute evidence.

16. The respondent further argued that the trial court did not err in not considering the documents filed by the appellant since the same were never produced in court as evidence. Reliance was placed on the following holding in the case of **Delta Haulage Services Ltd v Complast Industries Limited & another [2015] eKLR:**

***"…it is clear and I so hold that for a document to be said to form part of evidence at a trial, the same must be availed at the trial, a witness should testify on it by identifying the same and thereupon produce the same as evidence. A witness produces a document by stating that he wishes to produce it as evidence or exhibit or rely on it as his evidence. Upon such production, it is then marked as an exhibit. It is only then that a document can be said to have been proved at a trial."***

17. On quantum, the respondent submitted that his injuries were confirmed by the medical evidence tendered before the trial court and that the trial court took such evidence into consideration, in addition to considering the authorities cited by the respective parties, in arriving at a reasonable award on general damages. Furthermore, the appellant quoted the case of **Wiyumiririe Saw Mills v Paul Kariuki [2005] eKLR** in which a plaintiff who had suffered a cut wound on the right hand was awarded a sum of Kshs. 230,000/ on general damages, and the case of **Oluoch Eric Gogo v Universal Corporation Limited [2015] eKLR** where the court awarded a comparable sum of Kshs. 200,000/in the instance of a plaintiff who had sustained injuries to his finger.

18. I have carefully considered the contending submissions on appeal alongside the authorities cited. I have equally re-evaluated the evidence placed before the trial court. It is clear that the appeal lies against both the findings on liability and quantum. I will therefore address the appeal under the two (2) limbs.

19. In regard to the **first** limb on liability represented in grounds (i) to (vi) of appeal, the respondent who in his evidence-in-chief before the trial court, adopted his signed witness statement and produced the documents constituting his bundle as P. Exh 1-6.

20. The respondent went on to testify that he worked for the appellant as a machine operator and that he was injured on his fingers on both hands.

21. In cross-examination, the respondent gave evidence that the sick leave sheet was written by his clerk and it remains unclear why the same bore the date of 21/05/2016 and not 24/05/2016, the latter being the date on which he suffered his injuries.

22. The respondent further gave evidence that the robot machine which caused his injuries was faulty and that the appellant did not provide him with protective gear upon request. He then stated that he had worked for the appellant on contract for a period of two (2) years prior to the accident.

23. In his judgment, the learned trial magistrate reasoned that the respondent had proved that he was an employee of the appellant and that he was injured while in the course of his employment, the appellant having failed to provide him with the necessary protective gear. The learned trial magistrate cited, inter alia, the provisions of **Section 18** of the **Occupational Safety and Health Act NO. 15 OF 2007** which reads as follows:

> ***"(1) An occupier of non-domestic premises which have been made available to persons, not being his employees, as a place of work, or as a place where the employees may use a plant or substance provided for their use there, shall take such measures as are practicable to ensure that the premises, all means of access thereto and egress therefrom available for use by persons using the premises, and any plant or substance in the premises provided for use there, are safe and without risks to health.***
>
> ***(2) A person who has, by virtue of a contract, lease or otherwise, an obligation of any extent in relation to the—***
>
> ***(a) maintenance or repair of a place of work or any means of access thereto or egress there from; or***
>
> ***(b) prevention of risks to safety and health that may arise from the use of any plant or substance in the place of work, shall for the purpose of subsection (1), be deemed to have control of the matters to which his obligation extends."***

24. The learned trial magistrate went ahead to reason that the respondent was partly to blame for his injuries since he had worked for the appellant for a considerable period and was therefore aware of the risks involved in performing his tasks, thereby settling for a finding of liability in the ratio of 80:20 in favour of the respondent.

25. The first facet under this limb has to do with whether the respondent proved the particulars of negligence and/or statutory/contractual duty of care. The High Court in the case of **Nickson Muthoka Mutavi v Kenya Agricultural Research Institute [2016] eKLR** offered the elements to the tort of negligence/breach of statutory duty in the following order:

> ***a) Existence of a legal duty***
>
> ***b) Breach of such duty***
>
> ***c) Causation***
>
> ***d) Damage/Injury***

26. The above elements were reaffirmed by the Supreme Court in the case of **Kenya Wildlife Service v Rift Valley Agricultural Contractors Limited [2018] eKLR.**

27. It is clear from the foregoing that in order for his claim to succeed, the respondent had the duty of satisfying the aforementioned elements.

28. It is clear from the evidence tendered before the trial court that the respondent was at all material times an employee of the appellant. The respondent even produced a copy of his employment contract as **P. Exh 3.** Taking this position to mind, it therefore follows that by law, the appellant owed the respondent the statutory and contractual duty of care, as seen in the provisions of **Section 6** of the **Occupational Safety and Health Act NO. 15 OF 2007** which provides that:

***"(1) Every occupier shall ensure the safety, health and welfare at work of all persons working in his workplace.***

***(2) Without prejudice to the generality of an occupier's duty under subsection (1), the duty of the occupier includes—***

***(a) the provision and maintenance of plant and systems and procedures of work that are safe and without risks to health;***

***(b) arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;***

***(c) the provision of such information, instruction, training and supervision as is necessary to ensure the safety and health at work of every person employed;***

***(d) the maintenance of any workplace under the occupier's control, in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks to health;***

***(e) the provision and maintenance of a working environment for every person employed that is, safe, without risks to health, and adequate as regards facilities and arrangements for the employees welfare at work;***

***(f) informing all persons employed of—***

***(i) any risks from new technologies; and***

***(ii) imminent danger; and***

***(g) ensuring that every person employed participates in the application and review of safety and health measures."***

29. Having established the above, it is now for me to ascertain whether the respondent was at his work place and in the ordinary course of his employment on the material date, in order for the duty of care to arise.

30. Going by the evidence, it is apparent that a leave sheet was issued by the appellant in favour of the respondent. A copy of the same was adduced as **P. Exh 4** at the trial. Upon re-examination of the same, I note that it is dated 21st May, 2016 and indicates that the respondent's leave days were to commence on 21st May, 2016 and end on 31st May, 2016.

31. According to the respondent, the accident took place on 24th May, 2016. Going by the dates in the leave sheet, the respondent was expected to have been on leave by that time. On being questioned on the same by counsel for the appellant, the respondent in his oral evidence indicated that there could have been a mismatch of the dates. However, I note that the respondent did not bring any credible evidence to show that the dates in the leave sheet were incorrect or to place him at work on the material date.

32. The respondent also did not call the clerk whom he claims filled the leave sheet on his behalf, yet that person would have assisted in clarifying the confusion in dates, if any. Put another way, there is nothing to indicate that the respondent suffered his injuries while at the appellant's premises for the statutory duty of care to arise.

33. It therefore follows from the above that there is no evidence to show any breach of such duty or negligence on the part of the appellant which resulted in the injuries of the respondent; otherwise known as causation.

34. Moreover, I might add that while I am alive to the fact that the appellant did not call any evidence to controvert the respondent's case, the respondent still had the duty to prove his case on a balance of probabilities; this is seen under **Section 107** of the **Evidence Act** which provides that a party ought to prove the existence of facts pleaded for judgment to be entered on such facts.

35. In my view, even in the absence of controverted evidence, the respondent did not prove that he sustained his injuries while in the course of his employment and that the appellant was to blame by virtue of its negligence or by a breach of its duty of care owed to the respondent.

36. I also find this to be a central issue for determination by virtue of the leave sheet produced by the respondent and the line of cross examination pursued at the trial, yet it appears the learned trial magistrate did not address his mind to it in his judgment.

37. Before I make my concluding statements on this limb, I also wish to address another issue which was raised concerning whether the learned trial magistrate considered the appellant's evidence and submissions.

38. Upon studying the lower court record and resulting judgment, I established that the appellant did not summon any witnesses or produce any documents as evidence. This was noted by the learned trial magistrate in his judgment.

39. The law is well settled that neither pleadings nor submissions constitute evidence and a party cannot be heard to rely on them in arguing his or her case. To buttress this point, I refer to the case of **Linus Nganga Kiongo & 3 Others v Town Council of Kikuyu [2012] eKLR** cited by the respondent, in which the High Court rendered itself thus:

***"What are the consequences of a party failing to adduce evidence? In the case of Motex Knitwear Limited v Gopitex Knitwear***

***Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002 Justice Lesiit, citing the case of Autar Singh Bahra and Another vs. Raju Govindji, HCCC No. 548 of 1998 stated:***

***"Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail." "***

40. Such position was reaffirmed by the Court of Appeal in the case of **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR** when it held that:

***"Submissions cannot take the place of evidence…Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all."***

41. From the foregoing, it was improper and un-procedural for the appellant to attempt to argue its case through its submissions. In my view therefore, the learned trial magistrate had no obligation to consider its arguments.

42. Be that as it may, I restate my earlier position that by virtue of the respondent not having proved his case to the required standard, there was really no basis at all for the learned trial magistrate to find the appellant liable. I thus find that the circumstances of this case warrant a disturbance of the trial court's finding on liability.

43. I am now left with the second limb touching on quantum, constituting the remaining grounds (viii) to (xii) of appeal. The legal position is that the award of a trial court ought only to be interfered with under the following circumstances as articulated in the renowned case of **Kemfro Africa Ltd t/a Meru Express Services 1976 & Another [1976] v Lubia & Another (No. 2) [1985] eKLR** quoted by the respondent in his submissions:

***a) Where an irrelevant factor was taken into account.***

***b) Where a relevant factor was disregarded.***

***c) Where the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.***

44. It is noted that the award being challenged is that of general damages for pain, suffering and loss of amenities.

45. The particulars of injuries pleaded in the plaint are: open wounds-both hand fingers, and pain and bleeding. The injuries particularized were confirmed by the police surgeon medical report dated 22nd September, 2016 and the medical report prepared by Dr. G.K. Mwaura dated 10th October, 2016, produced as **P. Exh 2 and 5** respectively. The first medical report noted no permanent incapacity whereas the second report termed the injuries as soft tissue in nature and moderate in degree.

46. At the submissions stage, the respondent suggested a sum of Kshs. 400,000/ and relied on the case of **Johnstone Mutuku Kilango v Elijah Wambua [2016] eKLR** where the court awarded a sum of Kshs. 250,000/ to a plaintiff with blunt trauma on the right knee, blunt trauma on the right ankle, 3x4 cm bruises on the right shin just below the knee, blunt trauma on the right hip and blunt trauma on the lower back. The respondent also cited the case of **Francis Ochieng & another v Alice Kajimba [2015] eKLR** in which an award of Kshs. 350,000/ was made to a plaintiff who had suffered various injuries including loss of teeth, head injuries, sub-conjuctival haemorrhage and periorbital sccymosis on both eyes.

47. On its part, the appellant had proposed an award of Kshs. 60,000/ and cited *inter alia*, the authority of **Kreative Roses Limited v Olpher Kerubo Osumo [2014] eKLR** where a sum of Kshs.50,000/ was awarded in the case of multiple soft tissue injuries, and **Eastern Produce (K) Ltd (Savani Estate) v Gilbert Muhunzi Makotsi [2013] eKLR** in which the court on appeal awarded a sum of Kshs.70,000/ on general damages for comparable injuries.

48. Ultimately, the learned trial magistrate awarded a sum of Kshs. 200,000/ upon especially considering the aforementioned case of **Johnstone Mutuku Kilango v Elijah Wambua [2016] eKLR** quoted in the respondent's submissions.

49. Upon re-evaluating the evidence on record, I find nothing to indicate that the learned trial magistrate overlooked a relevant factor or considered any irrelevant factors. It is therefore upon me to consider whether the award of damages was manifestly excessive in line with comparable awards made.

50. Upon studying the authorities cited by the parties, I find those cited by the respondent on the one hand to constitute injuries of a slightly more serious nature in comparison to those sustained herein. On the other hand, I find those cited by the appellant to constitute comparable injuries though they were decided a few years back.

51. Further to the above, I considered the more recent case of **Hassan Farid & another v Sataiya Ene Mepukori & 6 others [2018] eKLR** where the High Court sitting on appeal substituted an award of Kshs. 250,000/ with one of Kshs. 150,000/ for a plaintiff who had suffered soft tissue injuries including cut wounds and blunt injuries. I also considered the case of **PF (Suing as next friend and father of SK (Minor) v Victor O Kamadi & another [2018] eKLR** involving a plaintiff with soft tissue injuries such as cut wounds and abrasion wounds to the hand and other body parts and in which the High Court sitting on appeal substituted an award of Kshs. 50,000/ with one of

Kshs. 100,000/ on general damages.

52. In the event that I agreed with the finding of the learned trial magistrate on liability, I would have interfered with the award of Kshs. 200,000/ by substituting it with a more reasonable award of Kshs. 120,000/ upon considering the comparable awards I have cited hereinabove.

53. In the end therefore, I find merit in the appeal and I will allow the same on merit. Consequently, the judgment of the trial court delivered on 30th May, 2018 is hereby set aside and substituted with an order dismissing the suit with costs to the defendant who is the appellant herein. The appellant shall also have costs of the appeal.

**Dated, Signed and Delivered at Nairobi this 24th day of September, 2020.**

**……**

**L. NJUGUNA**

**JUDGE**

In the presence of:

..... for the Appellant

.....for the Respondent