REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 463 OF 2013

THERMOPAK LIMITED…………………APPELLANT

VERSUS

JOSHUA BERNARD AWINO……………RESPONDENT

(Being an appeal from the Judgment of Hon T.S Nchoe, Senior Resident Magistrate Ag (SRM) at the Chief Magistrate's Court at Milimani in Civil Case No 2911 of 2011 delivered on 1st August 2013)

BETWEEN

JOSHUA BERNARD AWINO ….PLAINTIFF

VERSUS

THERMOPAK LIMITED …….DEFENDANT

JUDGMENT

INTRODUCTION

1. In his decision of 1st August 2013, the Learned Trial Magistrate, T.S Nchoe (Mr) Senior Resident Magistrate Ag (SRM), entered judgment in favour of the Respondent against the Appellant on a hundred (100%) basis as follows:- **General Damages Kshs 1,000,000/=**

Less of future earnings	**Kshs**	**500,000/=**
Special Damages	**Kshs**	**1,500/=**
		Kshs 1,501,500/=

Plus costs and interest thereon.

2. Being dissatisfied with the said judgment, on 29th August 2013, the Appellant filed its Memorandum of Appeal dated 28th August 2013. It relied on eight (8) Grounds of Appeal.

3. The Appellant's Written Submissions were dated 6th August 2018 and filed on 10th August 2018 while those of the Respondent were dated and filed on 9th October 2018.

4. When the matter came before the court on 30th October 2018, the Respondent requested it to render its decision based on its Written Submissions which he relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

5. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and

hearing their evidence first hand.

6. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123** and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

> **"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"**

7. Having considered the parties' respective Written Submissions, it was apparent to this court that the issues that had been placed before it for determination were as follows:-

> **1. Whether or not the Learned Trial Magistrate erred when he found the Appellant wholly liable for the injuries that the Respondent sustained.**
>
> **2. Whether or not the quantum that was awarded to the Respondent was so manifestly excessive as to amount to an erroneous estimate of the loss that he suffered.**

8. The court therefore found it prudent to deal with the said issues under the separate and distinct headings shown herein below.

I. LIABILITY

9. Grounds of Appeal Nos (1), (2), (3) and (4) were dealt with under this head as they were all related.

10. The Appellant argued that the primary objective of pleadings is to avoid parties being ambushed during trial. It relied on the case of **Galaxy Paints Co Ltd vs Falcon Guards Ltd [2000] eKLR** where it was held that courts will only pronounce themselves on issues that generally flowed from the pleadings.

11. It submitted that the Respondent was bound by his pleadings and he could not therefore have introduced fresh evidence that was not contained in his Witness Statement because by doing so, it was denied an opportunity to controvert his evidence.

12. It pointed out that the Respondent contradicted himself in his evidence. It said that in his pleadings, he had stated that the machine he was using jammed due to a mechanical fault as a result of which its blades fractured and cut off his four (4) fingers. However, in his oral testimony in court, he had testified that the supervisor told him to return the injector rod and that further, he switched off the machine before returning the rod.

13. It therefore submitted that since the Respondent had acted negligently, then he ought to bear sixty (60%) per cent liability, if at all but all in all, it urged this court to find that he was wholly liable for the injuries that he sustained.

14. On his part, the Respondent averred that all the Witness Statements were adopted as evidence-in-chief. However, in Cross-examination, Douglas Momanyi (hereinafter referred to as "DW 1") and Daniel Kanyoto (hereinafter referred to as "DW 2") contradicted themselves.

15. He was categorical that the Appellant owed him a duty of care when performing his duties and consequently, the Learned Trial Magistrate did not err when he found it wholly liable but actually proceeded on the correct principles in reaching his finding. He placed reliance on the case of **Mwanasokoni vs Kenya Bus Services Ltd [1985] eKLR** where it was held that an appellate court should only disturb a finding of fact if it was based on evidence or the trial court proceeded on a wrong principle in arriving at the conclusion he did.

16. According to the Respondent's oral testimony, on 3rd September 2010, he was on night duty and was assigned Auto foaming machine No (5) that made panets and disposal cups. He was working with another person. As they continued working, he noticed that the injector rod had fallen from its place. He reported the matter to his Supervisor who told him to return the said injector rod. He switched off the machine. As he was returning the injector rod, the machine turned itself on and pulled his hand and chopped off his four (4) fingers. He stated that his immediate Supervisor was Mwaluku and he sent Kanyoto to call him.

17. In Written Submissions, he had submitted that on the material date, he was operating the aforesaid machine when the injector rod fell off. As he tried to return it, the machine jammed and in the process, it chopped off his four (4) fingers. He blamed the Appellant for the accident for having failed to keep the machine in sound working condition.

18. On being Cross-examined, he stated that the machine could jam when switched off. He was emphatic that the injector rod could not be returned if the machine was running. He stated that he had told the person who recorded his statement what he told the court.

19. DW 1 was the Appellant's Production Supervisor on the material date. He denied having received a report of a defective machine. He testified that in case of a defective machine, the operator would stop the same and inform the supervisor. If an injector rod fell off, the operator was required to switch off the machine and replace the rod. He was categorical that there was no way a machine which had been switched off could restart itself. He did, however, aver that if power was suddenly switched off, the machine could move down **(sic)**.

20. DW 2 testified that on the material date, the Respondent switched off the machine but he did not ask him why he did so. His evidence was that when he heard the Respondent scream, he did not know whether the machine had been switched off. This was the same evidence that he adduced when he was Cross-examined.

21. It is trite law that an employer owes a duty to ensure that an employee has a safe working environment, that the tools an employee is using to carry out assigned work are in good working condition, that an employee has the skills to operate the tools and to provide supervision to such an employee amongst other duties. On the other hand, an employee is also under a duty to follow instructions while operating machines or tools, to have regard for his own safety by not putting himself in danger, carrying out his assigned work with due care and attention amongst other duties.

22. Having analysed the evidence that was adduced during trial, it was apparent that it was one party's word against the other. Whilst the Respondent testified that the machine started itself as he was returning the injector rod, DW 1 was emphatic that it was impossible for a machine that had been switched off to start itself.

23. As it was evident that the machine was defective, the injector rod having falling off, the Appellant could not escape liability. This is because before the Respondent was assigned the duty, it was its responsibility to ensure that the machine was not defective but in good working condition. The defectiveness of the machine was the genesis of the problem as the same could not have chopped off the Respondent's fingers as he was returning the injector rod had it been in good working condition. Indeed, the Respondent had testified that the machine had fallen previously.

24. Having said so, this court noted from the Respondent's evidence that he had been a machine operator for four (4) years. He must then have known the dangers of operating the machine. He had also testified that the injector rod could not have been returned if the machine was still running.

25. In view of the inconsistency of his oral testimony and his evidence in his Witness Statement which bound him as was correctly argued by the Appellant, he could not entirely be found to have been blameless. Indeed, his Witness Statement stated that he was operating the machine when its injector rod fell and that as he was returning it, the machine jammed and chopped off his fingers.

26. As his Witness Statement was sketchy, balancing his evidence against that of DW 1, it was this court's view that liability ought to be apportioned at 80%-20% against the Appellant herein.

27. In the premises foregoing, this court found and held that Grounds (1) to (4) were merited and the same are hereby upheld.

II. QUANTUM

A. GENERAL DAMAGES

28. Grounds of Appeal Nos (5) and (6) were dealt with under this head as they were all related.

29. It was not in dispute that the Respondent's 2nd, 3rd, 4th and 5th fingers of the right hand were amputated by the Appellant's machine. The only contention was the quantum of general damages that was awarded to him.

30. He submitted that the quantum he was awarded reasonable compensation for the injuries that he sustained. The Respondent did not refer this court to any cases to support his case. He only pointed out that he had suffered forty (40%) per cent loss of grip.

31. On the other hand, the Appellant argued that the sum of Kshs 1,000,000/= awarded for general damages, pain and suffering was manifestly excessive warranting interference by this court. It proposed that a sum of Kshs 500,000/= for general damages, pain and suffering would be reasonable compensation.

32. It relied on the cases of **Victor Ndege Manase vs Ashton Apparels EPZ Ltd [2016] eKLR**, **Eastern Produce (K) Ltd vs Allan Okisai Wasike [2014] eKLR** and **Pyramid Packaging Ltd vs Humphrey W Wanjala [2012] eKLR** to buttress its argument.

33. Having looked at the cases the Appellant relied upon, this court was of the view that the only comparable case to the instant one was the case of **Pyramid Packaging Ltd vs Humphrey W Wanjala** (Supra) where Ngenye J reduced an award of Kshs 700,000/= general damages for pain and suffering to Kshs 650,000/=. Her decision was made almost six (6) years ago.

34. It was this court's view that the Learned Trial Magistrate did not apply wrong principles in arriving at the decision that he did. Bearing the inflationary trends into consideration, the sum of Kshs 1,000,000/= general damages for pain and suffering was not manifestly excessive to have warranted interference by this court.

35. In the premises foregoing, this court found and held that Grounds of Appeal Nos (5) to (6) were not merited and the same are hereby dismissed.

B. LOSS OF FUTURE EARNINGS

36. Ground of Appeal No (7) was dealt with under this head.

37. The Appellant submitted that the award of Kshs 500,000/= being damages for loss of future earnings was unjustified because firstly, the same was not pleaded and secondly, the Respondent admitted during Cross-examination that he was still in its employ on light duties.

38. The Respondent contended that he had submitted that a sum of Kshs 1,000,000/= be awarded under the head of Loss of Future earnings but that he was awarded a sum of Kshs 500,000/= only. It was his averment that he did not need to plead the claim separately from that of

general damages. He therefore urged this court not to disturb the said award.

39. The Respondent did not adduce any evidence to support his claim for loss of future earnings. He testified that he was still in the Appellant's employ and he did not allude to any reduction in his earnings. Notably, the Medical Reports of Dr Cyprianus Okoth Okere and Dr Modi M.Y dated 24th May 2012 and 12th September 2012 did not allude to the Respondent being incapacitated to the extent of not being able to work.

40. A perusal of the Respondent's Plaint dated and filed on 28th July 2011 showed that he sought the following reliefs:-

i. General damages for pain, suffering and loss of amenities.

ii. Special damages…….Kshs 7,000/=

iii. Costs of this suit.

iv. Interest on (i), (ii) and (iii) above.

v. Any other relief that this Honourable Court may deem fit to grant.

41. Notably, there was no claim for loss of future earnings. This was a claim that had to be specifically pleaded before it could be awarded. As was stated in the case of **Galaxy Paints Co Ltd vs Falcon Guards Ltd** (Supra) which this court fully associated itself with, parties are bound by their pleadings. The claim for loss of future earnings therefore ought not to have been allowed. In this regard, this court found and held that the Learned Trial Magistrate applied the wrong principles in awarding the said amount.

42. In the premises foregoing, this court found and held that Ground of Appeal No (7) was successful and the same is hereby upheld.

DISPOSITION

43. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged in court on 29th August 2013 was partially successful. The effect of this was that the judgment that was entered in favour of the Respondent against the Appellant in the sum of Kshs 1,501,500/= is hereby set aside and/or vacated. In its place, it is hereby directed that judgment be and is hereby entered in favour of the Respondent against the Appellant for Kshs 801,200/= made up as follows:-

General damages	**Kshs 1,000,000/=**	
Special damages	**Kshs 1,500/=**	
		Kshs 1,001,500/=
Less 20% Contributory negligence	**Kshs 200,300/=**	
		Kshs 801,200/=

Plus costs and interest thereon at court rates.

44. As the Appeal was partially successful, each party will bear its own costs of the Appeal herein.

45. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **29th** day of **January** 2019

J. KAMAU

JUDGE