REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 344 OF 2015

TONONOKA ROLLING MILLS LIMITED.....APPELLANT

-V E R S U S –

JACKSON WAMBUA NZIOKA.....RESPONDENT

(Being an appeal against the judgement and decree of the Chief Magistrate's Court at Nairobi in CMCC no. 2726 of 2010 delivered by Hon. D. W. Mburu on 9th July 2015)

JUDGEMENT

1) Jackson Wambua Nzioka, the respondent herein, was employed by Tononoka Rolling Mills Ltd, the appellant herein, as a furnace charger. On 18th February 2018, the respondent was involved in an industrial accident while in the course of the appellant's employment while loading a scrap metal into the furnace.

2) The respondent suffered burn injury on the heel of the left foot as a result of the accident. The respondent consequently filed a compensatory suit against the appellant before the Chief Magistrate's Court, Milimani.

3) When the suit came up for hearing, the parties recorded a consent order on liability in which the appellant agreed to shoulder 80% while the respondent took 20% responsibility.

4) Learned counsels appearing in the matter made written submissions to settle the issue on quantum. In the end, Hon. D. W. Mburu assessed damages as follows:

a. General damages	ksh.350,000/=
b. Special damages	ksh. 1500/=
Gross total	ksh.351,500/=
Less 20%	ksh. 70,300/=
Net balance	ksh.281,200/=

c. Plus costs and interest at court rates.

5) The appellant was unhappy about the award therefore it preferred this appeal whereof it put forward the following grounds in its memorandum:

a) THAT the learned magistrate erred in law and in fact by failing to take into consideration and consider the submissions of the defendant's advocate so as to arrive at a just conclusion.

b) THAT the learned magistrate erred in law and in fact by failing to consider the medical reports filed by the plaintiff and the defendant's doctor that state that the plaintiff had completely healed leaving no permanent incapacity when arriving at his decision.

c) THAT the learned magistrate erred in law and in fact in awarding general damages that are inordinately high considering the nature and extent of injuries sustained by the respondent, and considering past awards made by other courts for injuries similar to those sustained by the respondent, further, when the evidence tendered before him indicated that the respondent's

claim did not warrant such an award.

6) When the appeal came up for hearing, learned counsels appearing in this appeal recorded a consent order to have the appeal disposed of by written submissions. I have considered the rival written submissions. It is the submission of the appellant that the award given to the respondent is inordinately high and is not commensurate with the nature of the injuries the respondent sustained. It is also pointed out that the award is way above comparable awards.

7) The respondent on the other hand is of the submission that the award should not be disturbed because the trial court took into account the relevant principles in arriving at its decision. It is also of the submission that the trial court took into account the inflationary trends in arriving at the award.

8) The Court of Appeal restated the principles to be considered by an appellate court before interfering with the decision of the trial court on quantum in **Kemfro Africa Ltd t/a Meru Express Service =vs= A. M. Lubia and Olive Lubia (1982-88) 1KAR 72**7 where at p. 730 Kneller J.A stated *inter alia* 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 by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that 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."**

9) The record shows that the injuries sustained by the respondent were stated in the medical report of Dr. Wangatta dated 25.3.2009 and consistent to what was pleaded in the plaint. The medical report prepared by Dr. R. P. Shah dated 19.2.2013 was also in agreement with that of Dr. Wangatta that the respondent had suffered superficial burns around the heel of the left foot. It is apparent from the submissions filed before the trial court that the respondent had asked the trial court to award him a sum of ksh.1,000,000/=. He relied on two authorities namely: **M.C Ojwang =vs= Total Westend Service Station Nakuru H.C.C.C no, 161 of 1998** where the claimant was awarded ksh.800,000/= for burns on the face, left arm and on the left thigh.

10) The second case was that of **George Thambura =vs= Taab Construction Nakuru H.C.C.C no. 288 of 1996** in which the claimant was awarded ksh.600,000/= for burns on the chest face and both hands.

11) The appellant on its part urged the trial court to award the respondent a sum of ksh.90,000/=. The appellant cited various authorities in which courts awarded figures between ksh.50,000 and ksh.75,000/=.

12) In the case of **Western Sugar Co. Ltd =vs= Zebedayo Kivai Sallamba (2013) eKLR** the claimant was awarded ksh.60,000/= for superficial burn.

In **Daniel Mwenda Muriuki =vs= Steel Plus Ltd (2012) eKLR**, the court awarded ksh.50,000/= for burns on his left ear by a hot slug metal.

In the case of **Eldoret Steel Mills Ltd =vs= Moenga Obino (2014) eKLR** the court awarded ksh.75,000/= for burns suffered on the hand.

13) The trial court considered the rival proposal and authorities and found that a sum of ksh.350000/= was adequate compensation.

14) I have on my part re-evaluated the submissions and the authorities cited by both sides. It is apparent from the judgement of the learned principal magistrate that the authorities cited by both sides were not analysed. Prima facie, the authorities cited by the respondent were in respect of more serious injuries compared to the injuries the respondent sustained. I find the authorities cited by the appellant to be in respect of near similar injuries. In the circumstances, I can safely say that those authorities are in respect of comparable awards in respect of near similar injuries as those obtaining in this case. Had the learned Principal Magistrate taken the aforesaid fact he would have come to different finding. In view of this find, I am convinced that I am entitled to interfere with the trial court's decision on quantum.

15) Taking into account the inflationary trends since 2014, I think an award of ksh.180,000/= is a reasonable compensation as general damages for a burn injury on the heel of the left foot. In the end the appeal is allowed. Consequently the award of ksh.350,000/= is set aside and is substituted with an award of ksh.180,000/=. The award of ksh.1,500/= as special damages remains undisturbed since no appeal was preferred. The aforesaid figure will be subjected to 20% contribution.

16) For the avoidance of doubt, judgment on appeal is as follows:

i. General damages ksh.180,000/=

ii. Special damages ksh. 1,500/=

Gross amount ksh.181,500/=

Less 20% contribution ksh. 36,300/=

Net amount ksh.145,200/=

iii. Interest at court rates from the date of judgement of the trial court 9th July until full payment

iv. In the circumstances of this appeal, each party should meet its own costs of the appeal.

v. The respondent to have costs of the suit based on the award on appeal.

Dated, Signed and Delivered in open court this 28th day of February, 2019.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent