REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 499 OF 2014

DEVKI STEEL MILLS LIMITED....................................APPELLANT

-VERSUS-

ROBERT APUTO AMARIATI.......................................RESPONDENT

(Being an appeal against the judgment and decree of Honourable J.W. Onchuru (Ag. Principal Magistrate) delivered on 30th April, 2014 in THIKA CMCC No. 1175 of 2010)

JUDGEMENT

1. The respondent, being the plaintiff in Thika CMCC No. 1175 of 2010, instituted the suit against the appellant. In his plaint dated 5th November, 2010 the respondent sought for general and special damages plus costs of the suit and interest thereon.

2. The respondent pleaded that he was at all material times an employee of the appellant and that sometime on or about 30th July, 2010 while in the course of his employment, the respondent together with other colleagues was asked to transfer acid containers when one of the containers burst and spilled acid solution which were then inhaled by the respondent, causing him to sustain severe injuries.

3. The respondent in his plaint blamed the appellant for breaching its statutory duty of care owed to him at all material times, and for negligence.

4. Furthermore, the respondent set out the particulars of the injuries he sustained as a result and relied on the *res ipsa loquitur* doctrine.

5. Upon being served with summons to enter appearance, the appellant filed its memorandum of appearance and statement of defence denying the particulars of negligence and breach of statutory duty of care. The appellant further pleaded contributory negligence on the part of the respondent and set out its particulars in its defence. Also, the appellant denied the respondent's entitlement to the reliefs sought in his plaint.

6. During the hearing, two (2) witnesses testified in support of the plaintiff's case while the appellant relied on the testimony of one (1) witness for the defendant's case. In the end the trial court entered judgment in favour of the respondent as follows:

a) Liability	*100%*
b) General damages	*Kshs.400,000/*
c) Special damages	*Kshs.2,000/*
Total	*Kshs.402,000/*

7. The appellant has now lodged an appeal against the judgment and its memorandum of appeal dated 6th November, 2014 raises nine (9) grounds of appeal.

8. The appeal was eventually disposed of through written submissions. The appellant's through its submissions dated 25th April, 2019 faulted the trial court for failing to consider the evidence by way of the attendance register and work sheet produced by the appellant's witness to show that the respondent was not on duty at the appellant's premises on the material day, neither did the respondent challenge the witness on the contents thereof.

9. The appellant also argued that the trial court did not summarize the respective parties' cases nor analyze the evidence placed before it prior

to making a finding on the suit. The appellant further challenged the contradictory accounts given by the respondent as to the nature and occurrence of his injuries.

10. The appellant argued that the trial court erred in holding that since a consent order was entered into in Thika CMCC No. 1174 of 2011 involving a different plaintiff, then it follows that the respondent was injured on the material day and consequently, the appellant ought to be held liable.

11. On quantum, the appellant contends that the award made on general damages was not commensurate with the nature of injuries sustained by the respondent, thus urging this court to substitute it with the sum of Kshs.150,000/.

12. The respondent has argued that since the plaintiff in Thika CMCC No. 1174 of 2011 was injured on the same day as himself and liability admitted by the appellant, it goes without saying that the said appellant was properly found liable for the injuries suffered by the respondent as they arose out of the same accident.

13. It is also the respondent's submission that the award on general damages was fair and further urging this court to consider the case of **Esther Wavinya v Redlands Roses Ltd (Nairobi Civil Appeal No. 548 of 2009)** where the High Court awarded a sum of Kshs.600,000/ to a party who had been exposed to chemical substances. In the end, the respondent urged that the trial court's judgment be upheld.

14. I have carefully considered rival written submissions on appeal after re-evaluating the evidence placed before the trial court.

15. The competency of the appeal is challenged on the basis that the appellant did not comply with court orders to the effect that the appellant was granted leave to appeal out of time on condition that the sum of Kshs.200,000/ which constitutes part of the decretal amount of Kshs.500,000/ should be released to the respondent and the remaining sum of Kshs.300,000/ be deposited in a joint interest earning account.

16. The record shows that the respondent had filed an application dated 8th September, 2015 to that effect and the court ordered *inter alia*, that the earlier order be complied with within 30 days from 25th July, 2016.

17. Going the record, the appellant filed another application seeking an order that the Kshs.200,000/ be released to the respondent and which order was granted by the court on 9th November, 2017 and the respondent's firm of advocates were ordered to avail its relevant bank details to enable such release. According to the appellant, the said firm of advocates did not comply with the said order.

18. Having taken the above into account, I am of the view that the deposit of the decretal sum has since been overtaken by events, the appeal having been heard and is now at the determination stage. In that case, I see no need to dwell any further on the subject and will save time by now addressing the merits of the appeal.

19. From my reading of the grounds of appeal, the same are against both liability and quantum, hence I will determine the appeal under these two (2) limbs.

20. The limb on liability was raised under grounds 1, 2 and 4 of the appeal. Turning to the evidence tendered before the trial court, the respondent vide his evidence as PW2 testified that he joined the appellant as an employee sometime in September, 2007 and that on the material day; while working in the kitchen; he and an employee named Thomas Mutunga were assigned with the duty of offloading items from a container and that as they did so, the respondent inhaled and was burnt on the legs by acid which leaked out of the container.

21. The respondent explained that he was treated at the appellant company's clinic and went home, and that 5 days later, he was taken to Plainsview Hospital and admitted for 5 days.

22. The respondent blamed the appellant for his injuries, stating that it did not provide him with a gas mask and gloves. The respondent further stated that the acid ought to have been lifted with forklifts as opposed to being carried by workers.

23. During cross examination, the respondent averred that his hands were injured and that it is the appellant's supervisor who told them to lift the acid containers and that he was not aware that the acid would injure him. He also clarified that both he and Thomas received treatment from the appellant's clinic and that he did not carry any of the treatment notes issued to him when he visited Plainsview Hospital.

24. Erastus Mwanzia Nzioka who was DW1 gave evidence that he worked in the HR Department at the appellant company since 1996 and that the nature of his work entailed maintaining employee records, including those of injuries sustained in the course of employment.

25. The witness stated that on the material day, he was on duty and that the respondent was not at work since his name does not appear on the attendance register for that day. Moreover, the witness stated that employees were not allowed to off-load acid containers but that this was done by forklifts and overload cranes.

26. On being cross examined, DW1 averred that the respondent's name did not appear on the list of injured employees on the material day and that he was never called as a witness in the Thika CMCC No. 1174 of 2011 instituted by Thomas Mutunga, whom the respondent claims to have been with at the time of the injury.

27. In finding the appellant liable, the learned trial magistrate reasoned that the attendance and injuries registers do not bear either the name of the respondent or that of Thomas Mutunga.

28. From the foregoing, it is not in dispute that the respondent was at all material times an employee of the appellant though the evidence

presented before the trial court does not clarify the nature of his employment or the department he worked in.

29. The issue which commends itself to be considered is whether the respondent proved his case on a balance of probabilities and whether the learned trial magistrate's finding was founded.

30. After a careful re-evaluation of the evidence what comes out clearly is that the respondent claims to have been injured while in the course of his employment duties while the appellant argues that the respondent was not on duty on the material day. It is noted that at one point in his testimony, the respondent stated that he was in the company of other employees, including Thomas Mutunga, when the acid burst out of the container and splashed on him. He further disclosed that a few of them were equally injured in the process. However, the respondent did not call any of the said colleagues to corroborate his account of events.

31. It is also noted from his testimony that the respondent was treated at the appellant's clinic and that he was issued with treatment notes; however, none of them were tendered as evidence before court, neither did the respondent call any evidence to support this averment. In the case of **Eastern Produce (K) Limited (Kaitet Estate) V Joseph Lemiso Osuku [2006] eKLR** the court dealt with a similar scenario and stated inter alia as follows:

> ***"Though it was necessary for the respondent to ensure that his evidence about the accident, and the fact that he fell while on duty was corroborated he did not offer additional evidence to support that line of evidence, neither did he furnish proof to show that he was actually treated at the company's dispensary soon after the accident, or that he was also treated at Nandi Hills District Hospital thereafter. Unfortunately that omission proved fatal to his case."***

32. In my view, the respondent ought to have established that he was indeed at the appellant's premises and in the course of his employment when he was injured since this was strongly refuted by the appellant. It would appear there is no evidence to either show that he was on duty on the material day or that he was injured while in the course of his employment.

33. It is also noted that the respondent stated that he made a report to the supervisor once he was injured, but neither of the parties called the supervisor to shed light on this position.

34. It is apparent that the respondent placed reliance on the outcome of Thika CMCC No. 1174 of 2011a suit instituted by Thomas Mutunga against the appellant wherein the parties recorded a consent on liability in the ratio of 90:10. There is nothing to indicate that the aforesaid case was intended to apply as a test suit so as to offer guidance to the trial court in making a finding on liability. Thomas Mutunga was never called as a witness in the present case.

35. On its part, the appellant through its witness produced copies of attendance and injuries sheets to reinforce their position that the respondent was neither working nor injured in the appellant's premises. There is nothing to indicate that the respondent challenged such evidence as being inadequate.

36. Further to the above, the appellant's witness indicated that the acid containers were transported using fork lifts and cranes, which contradicts the respondent's testimony that human labour was applied in transferring the containers. The respondent did not controvert the appellant's evidence.

37. The learned trial magistrate stated that the evidence adduced by the appellant inferred that the respondent was not on duty on the material day and that no record was made of his injuries. However, the trial magistrate went ahead to find that the respondent had proved his case on a balance of probabilities. That finding appears not supported by the evidence, the trial magistrate erred.

38. I am convinced that the respondent had not proved his case to the required standard, hence there was no basis for the learned trial magistrate to have found the appellant liable.

39. I not turn my attention to the award on general and special damages.

40. It is rite law that an award of damages can only be interfered with on appeal in the following instances as established in ***Kemfro Africa Ltd t/a Meru Express Services 1976 & Another [1976] v Lubia & Another (No. 2) [1985] eKLR*** thus:

> 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.***

41. In this appeal, the medical report dated 16th August, 2011 prepared and produced by Dr. Jane Ikonya (PW1) stated the respondent's injuries as being:

> -Bronchitis
>
> -Gastritis
>
> -Burn wounds on the hands

42. According to the aforementioned medical report, the injuries sustained by the respondent were termed as moderate harm and that the same had healed, leaving no permanent incapacity. It was also mentioned that in making her report, the good doctor relied on an earlier medical report dated 14th October, 2010 by Dr. Kinuthia. I have perused the record of appeal as well as the lower court file and it would appear a copy of the medical report by Dr. Kinuthia was not availed for this court's reference.

43. However, a 2nd medical report by Dr. Ashwin Madhiwala dated 18th February, 2011 was produced as Exhibit 3 by the appellant. That particular report mentioned the respondent's injury as acid fume inhalation-bronchitis and gastritis. Further to this, the doctor indicated that there were no mouth burns or injury consistent with acid ingestion and pointed out that the inhalation of acid fume healed well and left no permanent disability.

44. The respondent urged the trial court to award Kshs.700,000/as general damages and Kshs.500,000/ for loss of capacity to earn in the future. On its part, the appellant proposed the sum of Kshs.150,000/ under this head, citing the case of **Joshua Anam Mikele v Shum Gebrezghir Yendego (HCCC NO. 3443 OF 1991)** where an award of Kshs.80,000/ was made to a plaintiff who had sustained soft tissue injuries to the gluteal area and left knee. The appellant also urged the trial court to award Kshs.2,000/ as special damages both pleaded and proved.

45. In the end, the trial court awarded Kshs.400,000/ under the head of general damages.

46. I have reviewed the impugned judgment and come to the conclusion that the learned trial magistrate considered the proposals of parties. The learned trial magistrate made reference to the authority of **Zakayo Chamwama Busakha v Spice World Limited [2008] eKLR** which he said was cited by the respondent. I have reviewed the said submissions and noted that no authorities were cited in this regard.

47. I have reconsidered the authority cited by the appellant and in my view the case does not constitute comparable injuries thereby making it irrelevant. In the circumstances, the learned trial magistrate ought to have gone a step further in considering comparable awards previously made but there is nothing to show that he did.

48. I have considered comparable awards in a bid to determine whether the assessment of general damages was inordinately high as argued by the appellant. In **Capwell Industries Ltd v Nerbert Njue Njuki [2016] eKLR** the High Court upheld an award of Kshs.500,000/ made to a plaintiff who had suffered chest complications resulting from inhalation of dust/fumes emitted from machines while in the course of his employment. Also, in the case of **Primarosa Flowers Limited v Diana Mwende Kimani [2019] eKLR** the High Court on appeal upheld an award of Kshs.200,000/ for a plaintiff who had sustained respiratory problems caused by inhalation of chemicals at her employer's work site.

49. From the abovementioned, I am satisfied that despite the fact that the learned trial magistrate did not reveal that he had considered comparable authorities, I am persuaded that his award of Kshs.400,000/ as general damages was not so inordinately high as to deserve interference.

50. I also observed that the appellant had challenged the award of special damages. However, upon re-evaluation of the evidence and submissions placed before the trial court, I am satisfied that the trial court awarded Kshs.2,000/ which was pleaded, proposed and proved by the appellants. I therefore find no basis in disturbing the assessment of damages.

51. In the end, the appeal is allowed. Consequently, the judgment delivered on 30th April, 2014 is hereby set aside and substituted with an order dismissing the respondent's suit against the appellant with costs to the appellant.

Dated, Signed and Delivered at Nairobi this 25th day of October, 2019.

………….…………….

J.K. SERGON

JUDGE

In the presence of:

………………………………. for the Appellant

………………………………. for the Respondent