REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 739 OF 2016

CLIFTONE LODEKI KABAKA.....APPELLANT

VERSUS

STEEL STONE (K) LIMITED .....RESPONDENT

(Being an appeal from the decision of Hon. L.M. Wachira (Mrs) S.P.M. delivered on 11th November 2016 in CMCC No. 5540 of 2015)

JUDGMENT

The appellant brought a suit in the lower court against the respondent claiming damages for injuries sustained when working for the respondent. He blamed the respondent for negligence in that, he was not provided with adequate appliances or protective gear to carry out his work and as a result was exposed to injury which the respondent knew or ought to have known. Additionally, it was his case that he was not provided with a safe system of work and also a safe place within which to work. As a result, he suffered amputation of the left index finger and blamed the respondent for that injury.

The respondent denied the appellant's claim in its statement of defence and instead blamed the appellant for doing unauthorised work, in unauthorised manner and for failing to follow the respondent's laid down safety policy. Further, the appellant was accused of ignoring instructions given to him with impunity, and for failing to switch off the machine while cleaning it. He did not exercise prudence expected of a reasonable worker and therefore caused the said accident.

After a full hearing the trial court apportioned liability equally between the appellant and the respondent. The court then proceeded to make an award of Kshs. 350,000/= general damages plus Kshs. 1,500/= special damages which was then subjected to 50% contributory negligence leaving a balance of Kshs. 175,750/=. The appellant was aggrieved by the said judgment and lodged this appeal.

In the Memorandum of Appeal dated 7th December, 2016 the appellant complained that the trial court failed to appreciate that he had proved his case on a balance of probability, and ignored the submissions and authorities he relied upon. The decision of the court was also alleged to be against the weight of evidence, which occasioned a miscarriage of justice. Further, the lower court was faulted to failing to appreciate the principle of strict liability, and also failed to recognize the principles in the Occupational Health and Safety Act.

It is my duty to reconsider and evaluate the evidence presented before the lower court in order to arrive at independent conclusions. In arriving at the decision leading to apportionment of liability the lower court said as follows,

> **"The defendant has a duty in law to ensure the safety of the plaintiff. The plaintiff states that he had not been provided with protective gear. The defendant has not disputed this. The defendant has a duty to provide the plaintiff with protective gear when he is engaged upon his work. The defendant failed in this duty and will therefore be held partly culpable for injury suffered by the plaintiff.**
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> **However, although the plaintiff wants to wholly blame the defendant for the injuries, evidence on record is that he was actually cleaning the machine while the machine was running. The plaintiff had a duty of care of his own security. It appears that he did not ensure he was safe as he embarked upon his work, and given that the plaintiff was pulling out the cloth from the propeller machine as he states it beats logic to try pull out a piece of cloth and the expense of his own safety. Whichever way the court looks at the circumstances the court is of the view that the plaintiff substantially contributed to the injuries he suffered. …… my finding is that the plaintiff was substantially to blame and I will apportion liability at the ratio of 50:50 against each of the parties."**

From the evidence on record, it is clear that the respondent, as rightly found by the trial court, had a duty of care towards the appellant which

duty was breached leading to injuries sustained. On the other hand, the appellant had a duty to take care of himself and not take risks which could not be attributed to his employer.

He adopted his statement which he had written for purposes of use during the trial. In that statement which appears at page 11 of the record, he said he was charging batteries using the generator. The piece of cloth he was using to wipe the batteries was pulled by the propeller. As he was pulling the piece of cloth away, the propeller belt cut his left index finger.

It is clear that the machine was running. That notwithstanding, he took the risk of cleaning the batteries resulting to the injury he sustained. He was not wearing protective gear because this was not provided by the respondent. D.W. 1 Evans Okoth also prepared a statement which appears at page 38 of the record. He was working with the appellant who was showing him how to clean the machine. He was new at this company. In fact, that was his third day of working but the appellant had been working there for some time.

The appellant offered to demonstrate how to switch on the generator. After the appellant switched on the generator he started wiping it. This witness asked him why he had not switched it off while cleaning. The appellant dismissed this witness saying it was none of his business. Seconds later, this witness was told by the appellant that he had been injured.

This is a case of the appellant as against D.W. 1 who represented the respondent. On my assessment of the evidence, the lower court cannot be faulted for the decision to apportion liability equally between the appellant and the respondent. From the memorandum of appeal, this appeal is against liability only. Even if the appellant had questioned the award of damages, I would have come to the conclusion that the trial court was correct in the award of general damages because it was not inordinately high or low to attract the intervention of the court

The lower court considered the injuries sustained by the appellant, the authorities cited, and that comparable injuries should attract comparable awards. This appeal is therefore dismissed. Each party shall bear their own costs.

Dated, signed and delivered at Nairobi this 19th day of December, 2019.

A. MBOGHOLI MSAGHA

JUDGE