REPUBLIC OF KENYA

THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 66 OF 2012

HAJJI ISMAEL T/A YASMIN CAFÉ……APPELLANT

-VERSUS-

ABRAHAM AKOKO…….……RESPONDENT

JUDGMENT

1. The respondent **Abraham Akoko** (then plaintiff) had sued the appellant **Haji Ismael T/a Yasmin Café** (then defendant) seeking general and special damages for injuries suffered when he worked at the appellant's café in Nakuru. His case was that he was going about his duties as a cook sometimes on 13th February, 2010 when he got burnt by hot cooking oil. He sustained burns on the left hand which caused him temporary disability. His claim was that the appellant had failed to provide a safe working system, any precaution and had exposed the plaintiff to risk or injury which he (the appellant) knew or ought to have known.

2. In a judgment delivered on 22nd May, 2014, the court found the case proved and apportioned liability at 90:10% in favour of the respondent. It awarded Kshs.50,000/= general damages and 5,000/= special damages.

3. The appellant was aggrieved by this judgment and appealed on the following grounds:-

i. That the learned trial magistrate relied on wrong principles of law and fact in arriving at her decision.

ii. That the learned trial magistrate erred in law and fact by reaching to a judgment and order that was not proved on a balance of probability.

iii. That the learned trial magistrate erred in law by shifting the burden of proof to the appellant.

iv. That the learned trial magistrate erred in law and fact in both liability and quantum by finding the appellant liable.

v. That the learned trial magistrate erred in law and fact by ignoring submissions adduced.

vi. That the learned trial magistrate erred in law and in fact in allowing herself to be guided by immaterial and irrelevant facts that did not form part of issues of determination.

4. It is my duty as the first appellate court to assess and re-evaluate the evidence before the lower court and draw my own conclusions. In so doing I must bear in mind that I have neither seen nor heard witnesses and therefore make allowance for the same. **See Selle Vs. Associated Motor Boat Company (1968) E.A 123 and Williamson Diamonds Ltd Vs. Brown (1970) EA 1.**

5. The present appeal has proceeded by way of written submissions. From the grounds of appeal and the parties' submissions, I consider the main issue in this appeal to be whether or not the respondent's case was proved on a balance of probability. A connected issue is whether the trial court shifted the burden of proof to the appellant (then defendant).

6. The appellant has set out instances which according to him support the submission that the case was not proved. Firstly, they submit that the respondent (then plaintiff) did not prove that he was an employee of the appellant. Secondly, that while there was proof that the respondent was indeed injured, there was no prove that he sustained the injuries at the café allegedly owned by the appellant.

7. The respondent on the other hand submits that the employment relationship was admitted by the appellant and that the appellant acknowledged that the respondent got injured at the place of work.

8. The trial court had stated in its judgment that the plaintiff had not produced any documentary evidence to support the claim that he was employed in Yasmin Café. This would have been fatal to his case had the appellant not acknowledged that the plaintiff indeed worked at the restaurant. From the evidence, the appellant's dispute was only limited to whether or not he owned the business. He testified that the business belonged to his aunt one Sakina Ibrahim. The appellant was however the person that the plaintiff knew to be the owner of the business. He is the person to whom he reported and ran the business.

9. The fact that the business was owned by one Sakina Ibrahim was a fact especially within the knowledge of the appellant and the burden of proving it rested with him under **Section 112** of the **Evidence Act.** It would not be correct therefore as submitted by the appellant to state that the trial court shifted the burden of proof to the appellant. Whereas the burden of proof rested with the plaintiff, matters within the special knowledge of the appellant could only be proved or disproved by him. The court was entitled to consider all the evidence before it. I would therefore dismiss the ground that the appellant was not the owner of the café on this score.

10. The appellant has argued that there was no prove that the respondent was injured at the place of work. This appears to be an afterthought as the medical evidence was produced by consent of the parties and no objection or issue arose as to whether the respondent was injured at the work place or not.

11. The trial court found the case proved and awarded damages of Kshs.50,000/= while apportioning liability at 90:10 in favour of the respondent. The appellant has not made any submissions on quantum having submitted that there was no causal connection between the injuries sustained by the respondent and the alleged negligence of the appellant. They have asked the court to quash the finding on liability.

12. The respondent on the other hand has urged the court to uphold the award submitting that the same was arrived at on correct principles.

13. In principle, an appellate court should not disturb an award by the trial court. It can only do so if satisfied that the trial court in assessing damages took into account an irrelevant factor or left out a relevant one or if the award was so inordinately low or so inordinately high that it must be an erroneous estimate of the damage. **See Kemfro Africa Ltd t/a Meru Express Services, Gathogo Kanini –Vs- AMM Lubia & another (1982 – 1988) IKAR 777.**

14. Dr. Kiama who examined the respondent found superficial scars on the dosal surface of the left hand. He classified the injuries which had recovered by then as harm with temporary incapacity of one week. He stated in cross-examination that the patient was not incapacitated in any way.

15. In awarding Kshs.50,000/=, the trial court failed to take into consideration that the injuries were not substantial and did not cause any permanent incapacity. It is a principle of law that damages are not meant to enrich the plaintiff but rather, to as nearly as possible, return them to the state they were in before. I consider, that the award of Kshs.50,000/= was inordinately high in the circumstances. I would reduce it to Kshs.30,000/=. The liability shall remain as apportioned by the trial court at 90:10 in favour of the respondent.

The award will therefore work out to:

Damages:	30,000/=
Special Damages	5,000/=
Total	35,000/=
Less 10% contribution	3,500/=
Total	31,500/=

16. As the appellant has partially succeeded in this appeal, he will have 50% of the costs of the appeal while the respondent shall have 50% of the costs in the lower court and interest at court rates from the date of the award.

Orders accordingly.

Judgment delivered, dated and signed at Nakuru

This 20th day of March, 2018

R. LAGAT KORIR

JUDGE

In the presence of:-

Emojong Court Clerk

N/A for appellant

Ms. Moenga holding brief for Ms. Mukira for respondent