REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 221 OF 2011

KENYA KNIT GARMENTS (EPZ) LIMITED.....APPELLANT

VERSUS

PATRICK MUOMO MWOLOLO.....RESPONDENT

(An appeal from the Judgment of Hon. S.R. Wewa, Senior Resident Magistrate delivered on 18th October, 2011 in Kaloleni Senior Resident Magistrate's Court Civil Case No. 279 of 2010)

JUDGMENT

1. The appeal herein arises from an award that was made by the Hon. Magistrate in favour of the plaintiff (respondent) in the sum of Kshs. 100,000/= general damages, less 20% contribution. The defendant (appellant) was found to be 80% liable for the injuries sustained by the respondent.

2. The appellant being aggrieved by the decision of the lower court filed the following grounds of appeal:-

(i) That the Learned Senior Resident Magistrate erred in law and in fact in holding the defendant 80% to blame for the accident contrary to the evidence before her;

(ii) That the Learned Senior Resident Magistrate erred in failing to hold that the plaintiff was wholly responsible for the accident when there was clear evidence on record that he was not careful and mindful of his own safety whilst engaged upon the said work and did not follow instructions;

(iii) That the Learned Senior Resident Magistrate erred in failing to either dismiss the plaintiff's claim wholly with costs or to hold that the plaintiff was substantially to blame for the accident and not just 20%;

(iv) That the Learned Senior Resident Magistrate erred in failing:-

(a) To appreciate the significance of various facts that emerged in the evidence of the plaintiff and the defence witness;

(b) To consider or properly consider all the evidence before her and/or;

(c) To make any or any proper findings on the evidence before her; and

(d) To hold that the plaintiff had departed from his pleadings; and

(v) That the Learned Senior Resident Magistrate erred in failing to consider or properly consider the written submissions filed by Counsel for the defendant and the authorities cited therein.

3. The appellant prays for:-

(i) The Learned Senior Resident Magistrate's Judgment dated 18th October, 2011 to be set aside or varied; and

(ii) Costs of the appeal and the proceedings in the court below.

4. Mr. Mwambonje, Learned Counsel for the appellant submitted that the appeal rests on the issue of liability which was apportioned at 20% as against the appellant and 80% against the respondent. Counsel argued that the accident the subject of the suit was wholly caused by the respondent as he admitted in his evidence on pages 23 and 24 of the record of appeal to having caused the accident. Counsel relied on the case of **Eastern Produce (K) Limited vs Joseph Wafula Mwanje**, Eldoret HCCA NO. 86 of 1999 where the court found that the plaintiff was in full control of the operation of the machine and the author of his own misfortune.

5. Mr. Mwambonje further submitted that the lower court erred in apportioning liability. He cited **Stapack Industries vs James Mbithi Munyao** [2005] eKLR, where the court was of the view that the respondent did not lead any evidence to connect his injuries or accident to an act or omission on the part of the appellant.

6. He contended that the respondent herein did not show how the appellant caused the accident. He therefore prayed for the appeal to be allowed and for the Judgment and decree to be set aside.

7. On his part, Mr. Mwangunya, Learned Counsel for the respondent urged the court to re-evaluate the evidence of the trial court and find that the appellant owed the respondent a statutory duty under employer's liability. Counsel cited the case of **Oluoch Eric Gogo vs Universal Corporation Limited** [2015] eKLR, where the Judge referred to the case of **Mumias Sugar Co. Ltd. vs Charles Namatiti**, CA 151 of 1987.

8. It was submitted that in this case there was breach of employer's liability. In distinguishing the case of **Eastern Produce (K) Limited vs Joseph Wafula Mwanje** (supra), Counsel indicated that the court found that since the plaintiff therein was using a slasher, it was not a work based injury.

9. It was further submitted that in **Stapack Industries vs James Mbithi Munyao** (supra), there was breach of duty but there was no finding of negligence. It was argued that in a work based injury case what the court considers is if the employer was in breach of providing a safe working environment. Counsel for the respondent prayed for the appeal to be dismissed with costs.

10. In responding to the submissions made by Counsel for the respondent, Mr. Mwambonje stated that on the prayer for workman's compensation, the appellant had not prayed for the same in the plaint but had prayed for general damages.

ANALYSIS AND DETERMINATION

The issue for determination is if the Hon. Magistrate misdirected herself in the apportionment of liability.

11. The duty of the first appellate court was enunciated in the case of **Sumaria and Another vs Allied Industrial Limited** [2007] 2 KLR 1, as follows:-

> ***"Being a first appeal, this court is obliged to reconsider the evidence, re-evaluate it and make its own conclusions. A Court of Appeal would not normally interfere with a finding of fact by the trial court unless:***
>
> ***(a) It was based on no evidence; or***
>
> ***(b) It was based on a misapprehension of the evidence; or***
>
> ***(c) The judge was shown demonstrably to have acted on the wrong principle in reaching the finding he did."***

12. The proceedings before the lower court were brief. Patrick Muomo Mwololo, the respondent testified as PW1. It was his evidence that he reported to work at 7:30 a.m., on 20th July, 2010 and his Supervisor, Reuben Karisa allocated him work and showed him how to operate a machine that was used for putting buttons on garments. He stated that at 11:30 a.m., when he inserted a button in the machine, it failed to operate.

13. In attempting to remove the button, the machine hit his finger and the button entered therein. He started bleeding. His colleague by the name Charles went to assist him and he called the Supervisor. He was given First Aid and taken to Rabai Health Centre. He was attended to by a clinical officer who removed the button and stitched the injury. He identified his treatment notes which the court marked as MFI-1. He produced a gate pass bearing his name to show that he worked for the appellant, which he produced as Plf. exhibit 2. He produced a demand letter as plf. exhibit 3. Thereafter, he saw Doctor Adede who examined him and charged Kshs. 2,000/=. He was issued with a receipt. The medical report was marked as MFI 4 and the receipt as MFI 5. It was the respondent's evidence that he did not have gloves but worked with his bare hands. He prayed for compensation, costs and interest.

14. Dr. Ajoni Adede who testified as PW2 indicated that on 2nd August, 2010 he examined the respondent who had sustained an injury at work on 20th July, 2010. He stated that PW1 had a deep cut on the right hand. He examined the respondent after 13 days of him sustaining the injury. The injury was a dry wound measuring 3 centimeters. He concluded that the injuries were soft tissue in nature and there was no disability. He produced the medical report as plf. exhibit 4 and the receipt for the payment of Kshs. 2,000/= as plf. exhibit 5. He also produced a receipt for Kshs. 3,000/= for court attendance as plf. exhibit 6.

15. The appellant's witness before the lower court was Reuben Karisa, DW1, who worked for the appellant as a supervisor. He testified that he allocated work to the appellant on 20th July, 2010 to insert buttons on garments using a snapping machine, which snaps buttons on clothes. DW1 indicated that he went for a call of nature and on going back, he found the respondent injured on the right middle finger, which had a button inserted in it. He administered First Aid on the respondent who was then taken to hospital in Rabai.

16. DW1 produced def. exhibit 1, being a photograph of the snapping machine and explained how it operates. He said that it was not possible for the pedal to have failed to go down and if there was a problem, the mechanic could have been informed. He stated that the pedal could not go down on its own. He was of the view that even if the respondent had gloves, he would still have been injured. He indicated that if one wears gloves, he cannot bind clothes.

17. The evidence on record is clear that the respondent had worked well from 7:00 a.m. to 11:00a.m., when the accident the subject of this appeal arose. He indicated in cross-examination that he was using the machine for the second week at the time the accident happened. He had been trained on how to operate it. He explained that once a button is placed on a garment, the pedal is pressed to lower the piston which joins the button to the garment, but if the pedal is not pressed, the piston cannot move down. The evidence discloses that the respondent inserted the button in its rightful place but on pressing the pedal, the piston did not work. He tried to remove the button but the piston went down and he was injured. It is clear from the evidence that the delay in the mechanism of the piston moving down after the respondent pressed the pedal, is what caused the accident.

18. Although DW1 stated that machines at the appellant's work place were checked every morning and evening, the respondent had worked with the machine for 4 hours before the accident occurred. I am satisfied that the defect in the machine is to a greater extent the cause of the accident. The respondent on the other hand was under obligation to act with due care and attention. Having noted that the piston had failed to come down as expected, he should have sought the assistant of a mechanic instead of attempting to remove the button from where he had placed it on the garment.

19. The case cited by the appellant's Counsel of **Eastern Produce (K) Limited vs Joseph Wafula Mwanje** (supra) eKLR is not applicable in the present circumstances as in the said case, the respondent was injured by a slasher which he was in full control of. The case also cited by the appellant of **Stapack Industries vs James Mbithi Munyao** (supra) eKLR cannot also go to the aid of the appellant as in the said case no evidence was presented before the lower court to enable the court to draw a fair conclusion that the accident was caused by the negligence and/or breach of duty of care by the appellant/employer. The circumstances surrounding this case are different. There is evidence to show that the mechanism of the snapping machine suffered a delay in its operations which led to the respondent being injured.

20. The case relied on by the respondent's Counsel of **Oluoch Eric Gogo vs Universal Corporation Limited** [2015] eKLR, which cited the decision in **Mumias Sugar Co. Ltd vs Charles Namatiti** is applicable in this case. The Court of Appeal held thus:

> ***"An employer is required by law to provide safe working conditions of work in the factory and if an accident occurs while the employee is handling machinery the employer is responsible and will be required to compensate the injured employee."***

21. In this case, the Hon. Magistrate correctly found that the appellant failed to produce its machine record book to show that the machine that the respondent was using on the day in issue had been checked to ascertain that it was in proper working condition.

22. The respondent's Counsel was of the view that if the respondent had been provided with gloves, he would not have been injured. DW1's evidence was to the effect that the respondent would not have been able to do the work he had been assigned if he was wearing gloves. That being so, then the appellant was under obligation to undertake maintenance of its machines to ensure that they were in good working condition.

23. The above analysis drives me to the decision that the Hon. Magistrate's apportionment of liability was proper and the same cannot be faulted. I hereby dismiss the appeal. The respondent is awarded costs of this appeal and of the lower court case. Interest is also awarded to the respondent at court rates.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 27th day of July, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

No appearance for the appellant

No appearance for the respondent

Ms Caren Otene - Court Assistant