REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 173"B" OF 2010

KEN-KNIT COMPANY LIMITED ..... APPELLANT

-VERSUS-

DAVID BARASA WAKOLI ..... RESPONDENT

(Being An appeal from the Judgment of the Hon. G. Mmasi, Senior Resident Magistrate, delivered on 31 August 2010 in Eldoret CMCC No. 804 of 2007)

JUDGMENT

[1] This is an appeal from the Judgment of the Learned Senior Resident Magistrate, **Hon. Grace Mmasi** delivered on **31 August 2010** in **Eldoret Chief Magistrates Court Civil Case No. 804 of 2007**. The suit had been filed by the Respondent herein, **David Barasa Wakoli**, against the Appellant, **Ken-Knit Company Limited** for General and Special Damages plus costs and interest on account of an industrial accident wherein the Respondent allegedly sustained while at his workplace on **21 July 2002**.

[2] It was the contention of the Respondent before the lower court that he was an employee of the Appellant as a winding machine attendant; and that at around 9.00 p.m. on the date aforementioned, while on duty, he received instructions from his supervisor, one **Francis Nyongesa** to ferry a bale that weighed approximately 400-500 kilograms; and that in the course of ferrying the bale with four other employees, they got overwhelmed by its weight and it slipped and occasioned him serious injuries.

[3] The Appellant denied the claim and, and in particular, it denied the occurrence of the accident as alleged; and after hearing the parties, the Learned Trial Magistrate found in favour of the Respondent and entered judgment in his favour on liability at 100%. The lower court accordingly awarded Special Damages of **Kshs. 2,000/=** and assessed General Damages due at **Kshs. 80,000/=.** Being aggrieved by the decision, the Appellant filed this appeal on the following grounds:

[a] That the Learned Trial Magistrate erred in law in holding the Appellant 100% liable when the evidence was insufficient to prove the same;

[b] That the Learned Trial Magistrate erred in law and in fact in awarding excessive damages for the injuries allegedly sustained;

[c] That the Learned Trial Magistrate erred in law and in fact in failing to consider and determine all the issues raised in the pleadings, evidence and submissions contrary to the provisions of **Order XX Rule 4** of the **Civil Procedure Rules**;

[d] That the Learned Trial Magistrate erred in law and in fact in basing the Judgment on extraneous matters which were not pleaded by the Respondent;

[e] That the Learned Trial Magistrate erred in law and in fact in failing to dismiss the Respondent's case against the Appellant with costs for failing to prove his case on a balance of probability as expected by law;

[f] That the Learned Trial Magistrate erred in law and in fact in using the wrong principles of law to establish negligence against the Appellant;

[g] That the Learned Trial Magistrate erred in law and in fact in failing to hold the Respondent wholly or substantially liable in negligence yet the Appellant adduced overwhelming evidence in proof thereof;

[h] That the Learned Trial Magistrate erred in law and in fact in failing to hold that no accident occurred as alleged by the Respondent.

In the premises, the Appellant prayed for the appeal to be allowed and the Judgment of the lower court to be reversed and the Decree set aside with costs.

[4] The appeal was canvassed by way of written submissions, which were filed herein on **25 June 2018** and **26 June 2018**, respectively. On liability, it was the submission of the Appellant that the Respondent, knew very well the job he undertook to perform, and that he accordingly assumed the risks that came with the job. It was further the argument of the Appellant that the Respondent was under obligation to prove a connection between the injuries he sustained and the negligence or acts of omission on its part. Counsel for the Appellant relied on the case of **Statpack Industries vs. James Mbithi Munyao [2005] eKLR** for the proposition that the Respondent was under obligation to prove a causal link between the negligence alleged against the Appellant and the injuries that he suffered; which burden was not discharged.

[5] It was accordingly the submission of the Appellant's Counsel that the Learned Trial Magistrate erred in believing the Respondent and yet the job he was assigned was a mundane job which did not require any skill; and that to succeed in his claim, the Respondent needed to explain from where they were pushing the bale, how high the bale was and how it then fell; none of which was explained by the Respondent. It was further argued that, although the Respondent contended that the Appellant did not provide him with any protective apparel, namely helmet and gloves, he did not go further to demonstrate that the job he was doing required such protective apparel; and how the protective apparel would have aided him, given that the alleged cause of the injury was the weight of the bale. Counsel relied on **South Nyanza Sugar Co. Ltd vs. Enock Mauti Nyandoro [2011] eKLR** in this regard and urged the Court to find that the Respondent did not establish his claim to the requisite standard; and therefore that the Learned Trial Magistrate erred in awarding damages which, in any case, were excessive in the light of the injuries sustained.

[6] The Respondent's Counsel on the other hand, was of the posturing that the Learned Trial Magistrate correctly found that the Respondent was injured on **21 July 2007** while on duty at the Appellant's premises, and that pointed out that there was sufficient evidence before the lower court to show that the accident would have been averted had there been adequate man-power to lift the bale. Accordingly, it was argued that the Learned Trial Magistrate correctly found the Appellant 100% liable. Counsel further added that it was imperative that the Respondent be provided with protective apparel, which the Appellant failed to do.

[7] On quantum, the Respondent's submission was that the Trial Magistrate correctly assessed the general damages payable at **Kshs. 80,000/=;** and that the award was well founded, given the medical evidence presented before the lower court; and therefore that the Respondent had proved his case before the lower court on a balance of probability as required by law. Counsel relied on the cases of **Isinya Roses Limited vs. Zakayo Nyongesa [2016] eKLR** and **Oluoch Eric Gogo vs. Universal Corporation Limited [2015] eKLR** in support of the Respondent's submissions.

[8] This being a first appeal, it is the duty of this Court to re-evaluate the evidence that was presented before the lower court and make its own conclusions thereon; a principle that was aptly expressed in **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123,** thus:

> **"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."**

[9] Before the lower court, the Respondent testified as **PW1** and told that court that he was, at all times material to the suit, an employee of the Appellant; and that he was on duty on **21 July 2007** at 9.00 p.m. when he received instructions from the supervisor, one **Francis Nyongesa**, to push a bale of yarn. According to the record of the Respondent's evidence, the bale was about 400-500 kilograms in weight and they were assigned to push it with four other colleagues. It was thus the evidence of the Respondent that, while pushing the bale, they were overwhelmed and the bale slipped and hit him on the right side of his body; and that he received injuries on the right side of his face, right ear, upper molar which got cracked and chest. He thereafter went for treatment at **Uasin Gishu District Hospital**. He subsequently saw **Dr. Aluda** who prepared a Medical Report dated **28 July 2007.** The Respondent produced as exhibits a letter dated **21 August 2007** his Pay Slip for the month of **June 2007** to confirm that he was an employee of the Appellant. He blamed the Appellant for the accident, in failing to provide him with protective apparel, namely a helmet and gloves; and in not assigning a sufficient number of employees to carry the bale.

[10] Dr. Aluda testified as **PW2** before the lower court and he confirmed that on **28 July 2007**, he had occasion to examine the Respondent, who presented a history of having been injured while on duty on **21 July 2007**. He relied on the treatment notes that the Respondent had been issued with at **Uasin Gishu District Hospital** and, upon examination was of the opinion that the Respondent had suffered blunt trauma to scalp, upper teeth, right ear and chest which were still tender; and that as a consequence was experiencing headaches, though the injuries were continuing to heal. He produced his Medical Report as an exhibit along with a receipt for **Kshs. 1500/=** which he was paid for his services.

[11] The Respondent's last witness was **Patrick Kiprono (PW3),** a Clinical Officer at **Uasin Gishu District Hospital**. His evidence was that he received the Respondent at the hospital on **27 July 2007** after having sustained injuries while on duty; that he was treated for soft tissue injuries and was released to go back home. He expected the Respondent's injuries to be completely healed with time.

[12] The Appellant called two witnesses, namely **Hesbon Aoko Bunyo (DW1)** and **Benson Wanyonyi (DW2).** The evidence of **DW1** was that he was on duty with the Respondent on **21 July 2007**; and that they worked together as machine operators until 1.00 p.m. when the Respondent asked for permission to go and sort out a domestic problem. According to **DW1**, the Respondent left at 1.30 p.m. and never returned until **23 July 2007**. In cross-examination, **DW1** stated that, as a machine operator, he did not require to be provided with protective gear as the machine they were operating with the Respondent is not dangerous.

[13] DW2 largely agreed with the evidence of **DW1** and added that they were working together on **21 July 2007**; and that they were under the charge of the Respondent. He added that they worked together until 1.30 p.m., when the Respondent went to ask for permission to go and sort out a domestic problem. It was his evidence that the Respondent specifically told him that he had some domestic problems that he needed to attend to; and that he weighed his production for that day and then left the premises after obtaining permission from the Shift Manager. He next saw the Respondent on **23 July 2007**.

[14] It is therefore manifest from the evidence that was adduced before the lower court that there was no dispute that the Respondent was an employee of the Appellant; or that he was on duty on the **21 July 2007**. Accordingly, the issues framed by the Learned Trial Magistrate were:

> **[a]** Whether the Plaintiff was injured while on duty on that day;
>
> **[b]** Whether the Appellant was liable to the Respondent in tort for those injuries;
>
> **[c]** Whether the Plaintiff was entitled to damages.

[15] These are, in essence, the issues around which the 9 Grounds of Appeal revolve, as noted by Counsel for the Appellant in his written submissions. Hence, he rightly summed up the issues to be only two, namely: liability and quantum; and as was observed in **Statpack Industries vs. James Mbithi Munyao [2005] eKLR,** the burden was on the Respondent to prove his allegations on a balance of probabilities. Here is what the Court had to say in the **Statpack Industries Case**:

> **"It is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone's negligence. An injury *per se* is not sufficient to hold someone liable."**

The question to pose therefore is whether, on a reconsideration of the evidence adduced before the lower court it can be concluded that the Respondent was indeed injured while on duty at the Appellant's premises for which the Appellant is liable in law.

[a] Whether the Plaintiff was injured while on duty on that day;

[16] The Respondent's evidence before the lower court was simple and straightforward. That while on duty at the Appellant's premises at about 9.00 p.m. working on the yarn-conveying machine, he received instructions from the supervisor, **Francis Nyongesa** to go and carry a bale for manufacturing yarns with four others; and that while pushing the bale, they got overwhelmed, and as a result, the bale slipped and hit him on the right side of his body, thereby occasioning him injuries. In response to that evidence, the Appellant adduced evidence to show that the Respondent was on duty in the morning hours of **21 July 2007** up to 1.30 p.m. when he was released to go and take care of a domestic problem that he had. Neither **DW1** nor **DW2** had any idea that the Respondent had been assigned the responsibility of carrying a bale at 9.00 p.m. by **Francis Nyongesa** and therefore could not authoritatively say that no accident occurred at that particular point in time.

[17] Francis Nyongesa, the Respondent's supervisor, was not called to testify before the lower court. No evidence was from any of the four other workers who had been assigned to the task of carrying a bale with the Respondent. It is also noteworthy that whereas both **DW1** and **DW2** testified that there was in place an Attendance Register, the same was not produced before the lower court to show exactly when the Respondent reported on duty and when he clocked off. Similarly, it was the evidence of **DW1** that whenever there occurred an injury at the work place, the same would be recorded in the Report Book and appropriate treatment given, either at the Company's First Aid Unit or at the Nursing Home. No such records were availed to refute the Respondent's allegations. Accordingly, there was plausible and uncontroverted evidence placed before the lower court to show that the Respondent was involved in accident on **27 July 2007.**

[18] There was also uncontroverted evidence before the lower court to show that the Respondent sustained injuries on the head, upper teeth, right ear and chest. The evidence was in the testimony of the Respondent as augmented by the treatment notes and the Medical Report of **Dr. Aluda**, which were produced and marked as the Plaintiff's Exhibits 1, 2 and 3 before the lower court. The Respondent's evidence about his injuries was corroborated by the evidence of **Dr. Aluda (PW2)** and the Clinical Officer, Uasin Gishu Hospital, **Patrick Kiprono (PW3)**. As pointed out herein above, neither **DW1** nor **DW2** was in position to authoritatively testify about what happened at 9.00 p.m. and therefore could not refute the evidence of the Respondent, **Dr. Aluda (PW2)** or the Clinical Officer **(PW3).** Accordingly, I am satisfied that, on the basis of the evidence presented before her, the Learned Trial Magistrate was perfectly entitled to come to the conclusion that an accident did in fact occur at the Appellant's factory on **21 July 2007** at about 9.00 or thereabouts in which the Respondent was injured as was alleged by him.

[b] Whether the Appellant was liable to the Respondent in tort for those injuries;

[18] It was the contention of the Respondent that the accident would have been averted had there been adequate man-power to lift the bale that was said to weigh approximately 400-500 kilograms. It was also the Respondent's case that had he been provided with protective gear, and in particular a helmet and gloves, the possibility of him being injured would have been minimized, if not altogether eliminated. Thus, it was the contention of the Respondent, inter alia, that the Appellant was negligent in exposing him to a risk which the Appellant knew or ought to have known.

[19] The Appellant however countered the Respondents arguments by submitting that the Respondent knew very well the job he undertook to perform and assumed the risks that came with it. According to the Appellant, the job the Respondent was assigned was a mundane job which did not require any skill; and therefore that it was incumbent upon the Respondent to be cautious and ensure his own safety as

envisaged under **Section 13(1)** of the **Occupational Safety and Health Act, 2007**. I note however that that piece of legislation may not be applicable herein, having come into effect on **26 October 2007** after the subject incident occurred.

[20] Nevertheless, the general rule is that the employer is liable for any injury or loss that occurs to his employees while at the work place as a result of the employer's failure to ensure their safety. The Respondent contended before the lower court that had he been provided with a helmet and gloves the injuries would have been averted. He demonstrated that he suffered injuries on the head affecting his scalp, upper teeth and right ear. It is a matter of common sense that a helmet would have protected the Respondent from those particular injuries. However, it is also true that it is not every injury that an employer would be blameworthy for. The Court of Appeal made this point in **Purity Wambui Muriithi vs. Highlands Mineral Water Co. Limited [2015] eKLR** thus:

> **"...as a general rule the employer is liable for any injury or loss that occurs to his employees while at the workplace as a result of the employer's failure to ensure their safety. Does this mean that the employer would always be liable in all circumstances regardless of what caused the accident in question? We do not think so. We say so because where an accident happens due to the employees own negligence it would be unfair to hold the employer liable..."**

[21] Accordingly, the Appellant pleaded contributory negligence against the Respondent in its Defence before the lower court, contending that:

> **[a]** He failed to adhere to set safety rules and precautions;
>
> **[b]** He negligently exposed himself to risk of injury or damages of which he knew or ought to have known;
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> **[c]** He failed to carry with him and/or make proper or any use of the protective devices;
>
> **[d]** He carried out his duties recklessly and negligently;
>
> **[e]** He inflicted injury upon himself.

[22] It is noteworthy however that neither **DW1** nor **DW2** adduced any evidence in proof of these particulars; and, as has been stated herein above, neither the Respondent's supervisor, **Francis Nyongesa**, nor any of his four co-workers with whom he was carrying the bale at the material time, were called by the Appellant to refute the Respondent's allegations. Hence, there was no evidence adduced before the lower court to show, for instance, that the Respondent had been provided with safety apparel but neglected to wear the same; or that negligently exposed himself to risk of injury or damages of which he knew or ought to have known.

[23] The allegations of contributory negligence were made by the Appellant, and therefore, the burden of proof was on the Appellant to satisfy the lower court on those issues, for **Section 107(1)** of the ***Evidence Act, Chapter 80*** *of the* ***Laws of Kenya,*** is explicit that:

> ***Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

[23] Similarly, **Sections 109** and **112** of the **Evidence *Act*** provide that:

> ***109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.***
>
> **...**
>
> ***112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.***

[24] Hence, the Appellant having failed to discharge the burden of proving the particulars alleged by it, the lower court cannot be faulted for relying on the uncontroverted evidence of the Respondent regarding the circumstances in which the injuries occurred and for invoking the general rule that, in those circumstances. The Appellant was thus rightly found 100% liable to the Respondent for the injuries sustained by the Respondent in the course of discharging his duties on the instructions of his supervisor, **Francis Nyongesa.**

[c] Whether the Plaintiff was entitled to damages as awarded

[25] Having demonstrated that he was injured at his workplace and in the course of executing lawful instructions issued to him by his supervisor, the lower court cannot be faulted for finding that the Respondent was entitled to compensation by way of General and Special Damages. For the soft tissue injuries suffered by the Respondent, the lower court made an award of **Kshs. 80,000/=** as general damages. Needless to say that assessment of damages is at the discretion of the trial court and that an appellate court can only interfere if it is shown that the court acted on wrong principles, or that it awarded so excessive or so little damages that no reasonable court would allow it; or that the court took into consideration matters that it ought not to have taken into consideration or failed to consider matters that it ought to have considered, and as a result arrived at the wrong decision. In **Butt vs. Khan [1981 KLR 349** the court expressed this principle thus:

> **"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low..."**

[26] A perusal of the Judgment of the lower court shows that the Learned Trial Magistrate did consider the nature of the Respondent's injuries and acknowledged that the same were, in the main, soft tissue injuries. She noted that whereas the Respondent's Counsel proposed an award of **Kshs. 250,000/=** for the injuries, the view of Counsel for the Appellant was that **Kshs. 20,000/=** would suffice. She also considered the authorities cited before her, namely **Tudoi Security Services Limited vs. Dauston I Mungoti Mombasa High Court Civil Case no. 33 of 2003** in which **Kshs. 27,000/=** was awarded as general damages; and **Paul Kimani Muna vs. Raphael Ndiaga Gathaiya Nyeri Civil Appeal No. 40 of 2006** in which the Plaintiff sustained injuries on the right scalp, cut on the right knee, cut on the right ankle, cut on the left ankle, two cuts on the left thigh and left shoulders; and was awarded **Kshs. 150,000/=.** She accordingly settled on **Kshs. 80,000/=** reasoning that:

> **"This case can be distinguished from the present case in that the injuries the plaintiff sustained in the instant case were not as severe as the injuries the plaintiff sustained in the above quoted authority but the court observes that awarding Ksh 250,000/= would be on the higher side. Thence the court further observes that awarding Kshs 20,000/= would be on the lower side. Thence judgment is entered for the plaintiff as against the defendant company for both special and general damages. In regard to special damages, the damages pleaded and proved are Ksh 2000/= (Two thousand shillings only). In regard to general damages the court herewith awards the plaintiff Ksh 80,000/= (Eighty thousand shillings only) plus costs of the suit and interest from the date of this judgment."**

[27] Counsel for the Appellant faulted the aforestated finding of the lower court contending that, since the injuries had healed, an award of not more than Kshs. 50,000/= would suffice. He relied on **David Okoka Odero vs. Kilindini Tea Warehouses Ltd [2008] eKLR** wherein an ward of **Kshs. 40,000/=** was made for multiple soft tissue injuries. However, granted that the Respondent's teeth and chest were involved, I would not consider an award of **Kshs. 80,000/=** to be excessive. I however note that, in terms of special damages, what was specifically proved by the Respondent was the payment of **Kshs. 1,500/=** to **Dr. Aluda** for the Medical Report dated **28 July 2007**. It was therefore an error on the part of the Learned Trial Magistrate in holding that the special damage claim of **Kshs. 2000/=** had been proved. I would thus reduce that aspect of the claim to **Kshs. 1,500/=** only.

[28] In the result, having re-evaluated the evidence that was presented before the lower court, I am satisfied that the Learned Trial Magistrate came to the right conclusion and cannot be faulted on the twin issues of liability and quantum, save to the extent aforementioned. I would accordingly uphold the Judgment dated **31 August 2010** and consequently dismiss this appeal with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 24TH DAY OF JULY 2018

OLGA SEWE

JUDGE