REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 79 OF 2013

PETER OMOLO ……………………………………......……………….......….APPELLANT

VERSUS

MATCH MASTERS LIMITED……………………………......…………………RESPONDENT

(Appeal from the original judgment and decree of Hon. C.A Otieno (Ms)

delivered on 18th January, 2013 in Kikuyu CMCC No. 254 of 2011)

JUDGMENT

1. In the Lower Court, the Appellant was the Plaintiff who filed a Plaint dated 27th October, 2011 seeking;

(a) General damages;

(b) Special damages Kshs. 3000/=; and

(c) Costs of the suit and interest on (a) and (b) above.

2. In the Plaint the Appellant averred that on or about 25th March, 2011 he was lawfully working in the course of his employment at the Defendant's premises when the Defendant assigned the Plaintiff duties of greasing the farasi packing machine and while greasing the chain of the said machine pulled his right forth finger thus injuring himself and as a result he suffered loss and damage. Further the Appellant pleaded that it was the duty of the Respondent to take all the reasonable precaution for safety of the Plaintiff while he was engaged upon the same employment, not to expose the Plaintiff to a risk to damage or injury which they knew or ought to have known and to provide a safe and proper system of working and effective supervision of the same.

3. The Appellant stated that the accident was solely caused by negligence and breach of duty of the said terms of employment. The particulars of negligence and breach of statutory duty were;

(a) Failing to make any or adequate precautions for safety of the Plaintiff while engaged upon the said work;

(b) Failing to provide or maintain adequate or suitable appliances and/or protective gears;

(c) Directing and requiring the Plaintiff to carry out the said work without providing him with suitable protective gear;

(d) Employing the Plaintiff without instructing him on the dangers likely to arise in connection with his work, or without providing him with sufficient training and adequate supervision;

(e) Issuing the Plaintiff with defective tools of work;

(f) Exposing the Plaintiff to great risk or danger of which the Defendant knew and/or ought to have known.

4. The Respondent who was the Defendant in the Trial Court denied the claim in totality and filed a Statement of Defence dated 20th January, 2012. It averred that the Plaintiff was sometimes in the year 2010 engaged as a machine operator and was extensively trained on the operations, maintenance, functioning and safety of the machines. The Plaintiff was also issued with and acknowledged receipt of the Defendant's Health and Safety Policy statement.

5. The Respondent further averred that if at all the Plaintiff was ever injured it was because of his negligence the particulars of which are;

a) Failing to follow instructions on the operation and maintenance of the machines while on duty, despite having been trained.

b) Failing to use the provided appliance and devices;

c) Failing to wear the provided protective gear;

d) Willfully inserting his fingers into the moving machines in order to claim compensation;

e) Voluntarily assuming the risk of a known injury;

f) Being reckless and carefree while on duty;

g) Failing to observe the Health and Safety policy and common prudence for his own safety while on duty.

6. The matter was heard and the suit was dismissed with costs to the Respondent in a judgment delivered on 18th January, 2013.

7. Aggrieved by the trial magistrate's judgment, the Appellant filed this appeal on the following grounds: -

i. THAT the judgment was wholly against the weight of evidence

ii. THAT the Learned Trial Magistrate erred and misdirected herself in law and in fact in her entire approach to the evidence adduced before her at the hearing hereof.

iii. THAT the Learned Trial Magistrate misdirected herself in taking account only the evidence of the Respondent and relied on the exhibits which was not pleaded in their list of documents in complete departure, negation and diminution of applicable legal principles thereby occasioned a miscarriage of justice;

iv. THAT the Learned Magistrate erred and misdirected herself in not apportioning liability on the defendant when every evidence adduced showed that the defendant was to a great extent liable.

v. THAT the Learned Trial Magistrate erred and misdirected herself in law and fact in dismissing the appellant suit without regard to oral evidence, medical report, exhibits presented by the appellant and the Respondents.

vi. THAT the Learned Trial Magistrate erred and misdirected herself in law and in fact in delivering a judgment amounting to miscarriage of justice in the circumstances.

8. From the above grounds this appeal is both on liability and quantum and the issues for determination by this Court can be summarized as follows:

a) Whether the Trial Magistrate misdirected herself in her approach to the evidence adduced before her at the hearing hereof; and

b) Whether the Trial Magistrate misdirected herself in not apportioning liability on the Defendant.

9. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions. See in this regard the decisions in this respect **Jabane vs. Olenja [1986] KLR 661, Selle vs Associated Motor Boat Company Limited [1968] EA 123 and Peters vs. Sunday Post [1958] E.A. 424**.

10. It is not in dispute that the Appellant was an employee of the Respondent and that the said accident happened and the Appellant suffered soft tissue injuries on the right index finger. What is in contention is who was negligent and responsible for the accident. When the case came up for hearing on 13/7/2012, the Appellant (PW1) testified that on 25/3/2011 while greasing a machine, it jammed and his right forefinger was injured. He testified that he was putting the grease using his fingers as there were no grease guns and the packing machine did not have a cover. In cross examination PW1 stated that he had already worked in servicing the machines for two months and was a trained technician and confirmed that there were rules to be followed.

11. DW1, a supervisor of the Respondent Company gave his testimony and admitted that the Appellant was their employee and was trained as a technician. The Appellant was properly trained and annexed is a training form duly signed by the Appellant and the technical manager. On the date of the accident the Plaintiff put the machine on, contrary to procedure as he put grease on the machine using his finger. He further testified that after treatment, the plaintiff returned to work without taking any days off and produced the attendance sheet from 24.3.2011 to 28.3.2011and that the Plaintiff recorded a statement that he was to blame for the accident. In cross examination, DW1 stated that the appellant was given an oil can and grease can, that he had gloves on the material day but did not wear them.

12. The Appeal was canvassed by way of written submissions.

13. My re-evaluation of the evidence on records reveals that the Appellant was an employee of the Respondent and on the material day he was working as machine operator and was responsible for greasing the machines. The Respondent has tabled evidence to convince the court that the Appellant was appropriately trained and signed the training form confirming the same. It is also not in dispute that the Appellant was greasing the machine using his finger on the fateful day.

14. The Appellant has averred and further submitted that the Respondent did not provide him with protective gears including gloves and a greasing machine. Further, PW1 also testified that if the said greasing machine was provided, then he could not have used his finger to grease the machine. No evidence was tabled by the Respondent to controvert this allegation. The Respondent did not table any certificate of issuance of the protective gears and neither did they produce any acknowledgement note from the Appellant confirming receipt of the said protective gears.

15. In the above circumstances, this court forms the opinion that even though the Respondent was able to prove that the Appellant was adequately trained, they did not prove that any protective gears were supplied to the Appellant. It is one thing to provide an employee with adequate training and it is quite another thing to provide the employee with the protective gears necessary for carrying out his duties. On this, the court finds that the trial magistrate misdirected herself in finding the Appellant liable for his injuries when no protective gears including gloves and greasing guns were issued. In his submissions, the

Appellant denied being issued with protective apparels and relied on the case of **Boniface Muthama Kavita Vs. Carton Manufacturers Limited Civil Appeal NO 670 OF 2003**. The Respondents submitted that the Appellant did not prove his case on a balance or probability and relied on the cases of **Oluoch Eric Gogo V. Universal Corporation Limited (2015**) and **Gedion Kemboi Vs. Nyayo Tea Zone Development Corporation** among other authorities quoted. I find the above two authorities not to be relevant in this case reason being that in **Gedion Kemboi case**, the court had found out that the Appellant had not established that the accident occurred when the Appellant was in the course of duty neither was it established that the accident occurred at the work place. which is not the case herein. Whereas in the case of **Oluoch Eric Gogo** the court found that the trial Magistrate erred in dismissing the Appellants claim and upheld his appeal and awarded damages to the Appellant.

16. In line with the foregoing, I find that the Trial Magistrate misdirected herself in not finding that the Appellants had proved their case on a balance of probability which is the standard of prove expected in civil cases. This court finds that the Respondent is liable for the accident to the Appellant since he did not provide protective gears. However the Appellant also equally contributed to the accident since he did not follow the safety guidelines of the Respondent as he was well trained on the same. In the same strength, the Appellant was negligent on his part to use his fingers in greasing the machine when he was adequately trained in safety measures. The liability will therefore be apportioned between the Respondent and the Appellant equally.

17. On the quantum of damages, the law is quite clear and there is no dispute about the principles applicable in an appeal relating to quantum of damages. The assessment of damages is an exercise of judicial discretion by the trial magistrate and an appellate court should be slow to reverse the trial court's award unless it is shown that he acted on wrong principles or awarded so excessive or little damages that no reasonable court would; or he had taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered and, in the result arrived at a wrong result. These principles have been cited and approved in several cases among them; ***Butler v Butler*** **[1984] KLR 225**, ***Butt v Khan*** **[1981] KLR 349**, ***Kemfro Africa t/a Meru Express & Another v. A. M. Lubia & Another*** **[1982 – 88] 1 KAR 72** and ***Mariga v Musila [1984] KLR 257***.

18. PW2 testified that the Appellant suffered cut wounds on the index finger, that they were soft tissue injuries with no long term disabilities. I find that the injuries were minor and that the claim of Kshs. 150,000 by the Respondent in general damages is on the higher scale. This was corroborated by the Respondents testimony of DW1 that the Appellant did not ask for a sick off and continued to work after the injury. I have considered the authorities submitted by both parties on damages.

19. This court is guided by the medical examination of PW2 in assessing the damages. In a similar case to this **Timsales Limited V Penina Achieng Omondi [2011] eKLR** where the Respondent sustained a deep cut wound on the left index finger and severe soft tissue injuries to the left index finger this court awarded Kshs. 60,000/= in general damages. In **Scofinaf Ltd V. Joshua Ngugi Mwaura NRB HCA 742 of 2003,** an awarded of Kshs. 70,000/- was reduced to Kshs. 20,000/- where only the right forearm was injured and had completely healed. In that case the Respondent/Plaintiff continued to work after the injury.

20. Taking into account the extent of the Appellant's injuries, the rate of inflation on the Kenya shilling and in comparison with decided authorities, I award the Appellant Kshs. 100,000 in general damages, Kshs. 3,000 for the medical report and Kshs. 5,000 for the doctor's court attendance. In the end, the Appeal succeeds and the Appellant will have judgment in the sum of Kshs. 108,000/- less contribution of 50% which works down to Kshs. 54,000/-.

21. Since the appellant has succeeded halfway, I award half the costs of the appeal to him.

Dated, Signed and Delivered at Nairobi this **13th** Day of **October, 2017.**

…………………………….

L. NJUGUNA

JUDGE

In the Presence of

…………………………. For the Appellant

…………………………. For the Respondent