REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT ELDORET

CIVIL APPEAL NO. 100 OF 2012

ELGEYO SAW MILLS (K) LTD……..……..APPELLANT

VERSUS

ALFRED KIPCHIRCHIR ROTICH…….....RESPONDENT

(Being an appeal from the original judgment and decree of T. Nzyoki, Principal Magistrate, in Eldoret CMCC No. 1028 of 2010 delivered on 30th August 2012)

JUDGMENT

1. The appellant is aggrieved by the judgment and decree in the Principal Magistrates Court dated 30th August 2010. The appellant was the defendant in the lower court. The respondent had filed a suit claiming special and general damages. He testified that he was an employee of the appellant. He claimed that on 10th December 2009, he was assigned duties of grading wheat. His evidence was that the shaft or rollers trapped his jumper; pulled him towards the rotating parts; and, crushed his arm. His right thumb was amputated. He blamed the appellant for failure to give him gloves and aprons; or, failing to provide a safe working environment.
2. The appellant denied the claim *in toto*. The lower court found that the appellant was 80% liable while the respondent was liable at 20%. The learned trial Magistrate then assessed general damages for pain and suffering at Kshs 300,000; loss of earning capacity and future earnings at Kshs 914,940; and, special damages of Kshs 2,000. The respondent was also awarded costs and interest.
3. The appellant has lodged a memorandum of appeal dated 26th September 2012. There are thirteen grounds of appeal. They can be condensed into five: First, that the trial court erred by finding the appellant guilty of contributory negligence; secondly, that the award of general damages was inordinately high; thirdly, that there was no evidential or factual basis for awarding damages for loss of earnings; fourthly, that the salary or multiplicand applied were erroneous; and, lastly that the impugned decision was founded on wrong principles.
4. This a first appeal to the High Court. It is thus an appeal on both facts and the law. I am required to re-evaluate all the evidence on record and to draw independent conclusions. There is a caveat because I have neither seen nor heard the witnesses. See *Peters v Sunday Post Limited* [1958] E.A 424, *Selle v Associated Motor Boat Company Ltd* [1968] EA 123, *Williamson Diamonds Ltd v Brown* [1970] EA 1, *Mwanasokoni v Kenya Bus Services Ltd* [1985] KLR 931.
5. Both parties filed written submissions. Those by the appellant are dated 13th February 2015; those by the respondent are dated 3rd November 2014. On 22nd September 2015 I heard further arguments from both learned counsel. I have considered the grounds of appeal, the pleadings in the lower court, the evidence in the trial court and the rival submissions.
6. It is common ground that the respondent was employed by the appellant. On the material date, he was assigned duties to grade some wheat. He had worked on the machine for one and a half years.

The appellant's witnesses DW1 and DW2 confirmed that the respondent was feeding the machine with wheat. DW1 said the respondent was a general worker; and, he was not supposed to operate the machine. When the accident occurred, DW1 and DW2 were present. When the respondent cried for assistance, DW1 stopped the machine, reversed the pulleys and freed the respondent. The two witnesses for the appellant confirmed that the respondent's sweater or jumper was caught up by the pulleys as he positioned a bag to collect the end product. They also confirmed that the respondent's thumb was crushed by the machine. DW2 conceded that the respondent had not been given protective clothing. DW1 opined that a person should not operate the machine in long-sleeved garments such as the sweater the respondent was wearing.

7. There is thus no contest about the occurrence of the accident or that the respondent's thumb was amputated. Doubt is completely removed by the respondent's testimony; the evidence of Dr Aluda (PW1); that of the clinical officer (PW3); and, that of Dr. Lelei (PW4). What was in contest was whether the appellant was negligent. Paraphrased, whether the respondent was entirely to blame for the accident.
8. The respondent said that the shaft did not have a protective cover or guard rail. The appellant's witnesses did not rebut that evidence. As I have stated, the respondent was not provided with an apron or gloves. Granted the circumstances of the accident, I doubt very much that they would have made any *material* difference. The accident, as the learned trial magistrate found, was not caused by the absence of those items: it occurred when the respondent's *long-sleeved* sweater was trapped or grabbed by the pulleys. The evidence of DW1 that a person should operate the machine with short-sleeved clothing was not irrelevant. I am also alive that the respondent had worked on the machine for *one and half years*. I cannot then say that he was unaware of the risks. DW2 said the company would train its workers on the use of the machines. There was no specific evidence that the respondent himself was trained. But I note that the respondent had not pleaded that in the particulars of negligence.
9. From that evidence, the appellant was a general worker. He was not employed to operate or handle the machine. That was *not* his work. His duties were limited to grading or feeding wheat into the machine; and, collecting the end product in the sack he positioned on the machine. In cross examination he conceded that he had done those tasks for well over a year and a half. His long-sleeved jumper got caught up by the machine. As the work entailed working around the machine, there were inherent dangers from its moving parts. There is a sense then in which the employer could have secured the rotating parts with some guard railing. On the other hand, there was an implied term of the contract that the respondent took the risks *incidental* to his contract. He was *aware* of the dangers of working in close proximity to the rotating parts. It was then the appellant's primary duty to keep a safe look out.
10. The duty of the employer to ensure the safety of an employee is not *absolute*; it is one of *reasonable care* against a foreseeable risk or one that can be avoided by taking reasonable measures or precautions. It would be unreasonable to expect an employer to be his employee's insurer round the clock. See *Halsbury's Laws of England* 4th edition volume 16 paragraph 562, *Mwanyule v Said* [2004] KLR 1, *Arkay Industries Ltd v Amani* [1990] KLR 309, *Eldoret Steel Mills Limited v Moenga Obino*, High Court, Eldoret Civil Appeal 3 of 2011 (unreported).
11. I cannot say the employer had taken *all reasonable* precautions to provide a safe working environment in this case. An obvious intervention would have been to secure the rotating parts with some protective guard rails. There was no evidence that that could not be done on the machine or that such alterations would compromise its operations. The appellant's supervisor was present before the accident occurred. He should have noted that the respondent had a long-sleeved sweater or that he was not appropriately kitted out. But like I stated, it would be *unreasonable* to expect an employer to be his employee's insurer round the clock. I cannot also blame the respondent entirely for carelessness.
12. From the evidence and my analysis so far, there was *no* basis for blaming the employer *more* than the employee. I would apportion liability equally in the circumstances. See *Woods v Durable Suites Ltd* [1953] 2 All ER 391, *Devki Steel Mills Limited v Joseph Mulwa* Nairobi, High Court Civil Appeal 658 of 2002 [2004] eKLR, *Statpack Industries v James Mbithi Munyao*, High Court Nairobi, Civil Appeal 152 of 2003 [2005] eKLR, *Eldoret Steel Mills Limited v Moenga Obino*, High Court, Eldoret Civil Appeal 3 of 2011 [2014] eKLR. I will thus set aside the judgment on liability and order that both parties share liability at 50% each.

13. I will now turn to quantum of damages. The appellant contends that the award was exorbitant. As a general rule, an appellate court will not interfere with quantum of damages unless the award is so high or inordinately low or founded on wrong principles. See *Butt v Khan* [1982-88] KAR 1, *Arkay Industries Ltd v Amani* [1990] KLR 309, *Karanja v Malele* [1983] KLR 42, *Akamba Public Road Services Ltd v Omambia* Court of appeal, Kisumu, Civil Appeal 89 of 2010 [2013] eKLR.
14. From the medical report of Dr. Aluda dated 10th September 2010, the plaintiff suffered a traumatic amputation of the right thumb together with its metacarpal bone. The respondent suffered severe pain during and after the accident. The doctor testified that although the wound had healed, the loss of the thumb was permanent and the respondent *"cannot hold objects firmly with his right hand"*. The doctor indicated in his report that the respondent is *right-handed*. That evidence is uncontroverted. The injuries were thus severe. Considering the nature of employment of the appellant as a general or manual worker, they had obvious corollaries.
15. The learned trial magistrate awarded a sum of Kshs 300,000 for pain and suffering. The court relied on the case of *Mumias Sugar Company v Waudo*, Kisumu, Court of Appeal, Civil Appeal 91 of 2003 [2007] eKLR. In that case the plaintiff had suffered a traumatic amputation of the small right finger, crush injury to the fourth right finger and soft tissue contusion and bruises to the thigh. An award of Kshs 200,000 was upheld.
16. The appellant's counsel urged me to find that an award of Kshs 150,000 is sufficient in this case. I disagree. The award of damages is at the *discretion* of the trial court. I can only interfere if the lower court applied the *wrong principles* and arrived at an *unjust* decision; or the award is manifestly high or inordinately low. *Butt v Khan* [1982-88] KAR 1. The award of Kshs 300,000 may seem high. But considering the permanent injuries and consequences, I cannot say the award is exorbitant or founded on wrong principles. I decline to disturb the award.
17. I will now turn to the award for loss of earnings. At page 108 of the record, the respondent testified he was 24 years at the time of the accident. From his pay slip (exhibit 13) he was earning a basic salary of Kshs 3,812.25. The trial court used the basic salary and a multiplicand of 20 years to assess loss of earnings. I think the trial court mixed up two distinct heads of damages: Loss of future earnings (which must be proved by evidence); and loss of earning capacity (which is assessed as general damages). See *Mumias Sugar Company v Waudo*, Kisumu, Court of Appeal, Civil Appeal 91 of 2003 [2007] eKLR, *Butler v Butler* [1984] KLR 225.
18. The respondent was 24 at the time of the accident. His *net* pay was 2,042.25. That can be misleading because the respondent was deducted a sum of Kshs 1,500 as an *advance*. The only other deductions were a sum of Kshs 270 for NSSF and NHIF benefits. The correct baseline thus remains Kshs 3,812.25 per month. The respondent testified that he could barely use his right hand except to eat. He was *right-handed*. The accident thus diminished his earning capacity. Dr. Aluda did not assess the degree of disability but testified that the respondent could not hold anything with his right hand. Dr. Lodhia assessed the disability at 25% while Dr. Lelei (PW4) assessed it at 50%. Granted that evidence, the multiplicand of 20 years applied by the trial court was *not* unreasonable. The trial court was thus right in applying the sum of Kshs 3,812.25 and arriving at the figure of Kshs 914,940. I thus decline to interfere with the award for *loss of earning capacity*. I am satisfied the respondent incurred special damages of Kshs 2,000 for the medical report by Dr. Aluda. The special damages were specifically pleaded in the plaint and strictly proved.
19. The upshot is that this appeal succeeds only on liability for negligence. I set aside the judgment on liability and order that both parties share liability at 50% each. The appeal against quantum of damages is dismissed. In the result, the appellant shall pay the respondent Kshs 1,216,940 *less* 50% liability which is to say Kshs 608,470. The appellant shall also pay interest and costs of the suit in the lower court. As each party has succeeded in part in the appeal, each party shall bear its own costs of this appeal.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 19th day of January 2016.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:-

Mr. Isidi for Mrs. Khayo for the appellant instructed by Nyairo & Company Advocates.

Mr. Oduor for Mr. Wambora for the respondents instructed by D.L. Were & Were Company Advocates.

Mr. Lesinge, Court clerk.