REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO.249 OF 2011

(Appeal from the judgment of Hon. WERE (SRM) dated and delivered on

18TH November , 2011, in the original Keroka SRMCC No.208 of 2009)

KIPKEBE LIMITED.....APPELLANT

VERSUS

SAMWEL N. NYATOERA.....RESPONDENT

JUDGMENT

1. The respondent herein, who was the plaintiff before the lower at Keroka in Keroka SRMCC 208 of 2009 sued the appellant (then the defendant) for special and general damages arising out of an industrial accident that was alleged to have taken place on 12th June 2006 while the respondent was working at the appellant's tea factory. The respondent's case was that as he was in the process of hanging a sack of tea leaves on a hook when a chain cut off and hit him on the thumb thereby causing him injuries.

2. The appellant attributes his injures to the negligence of the appellant whom he claimed had failed to keep him safe at work by failing to provide him with the requisite training on the job, supervising the work and generally, providing a safe system of work.

3. The appellant filed a defence in which it denied that it was liable for the respondent's injuries. The appellant also denied that the respondent was at his place of work on the date he alleged that he was injured. The appellant further pleaded that if indeed the respondent got injured at work, then the injuries were caused by his own negligence exhibited in the course of his duties and circumstances beyond the control of the appellant. The appellant blamed the respondent for executing his duties recklessly and contrary to the express instructions given by the supervisor on duty.

4. After hearing the case, the trial magistrate found that the appellant was **100%** liable for the respondent's injuries and awarded the respondent **Kshs. 130,000/=** general damages, and **Kshs. 6,500/=** special damages. It is the judgment of the trial that has triggered the instant appeal by the appellant in which it has listed the following grounds of appeal:

> 1. **"The learned Trial Magistrate erred both in fact and in law when the same entered judgment in favour of the Respondent whereas the Respondent failed to discharge the burden of proof to the requisite standard.**

2. **The learned trial Magistrate erred in law and in fact by proceeding to assess and award the Respondent damages whereas the Respondent failed to prove that he sustained any and/or the purported injuries, in view of the fact that medical evidence adduced were insufficient and of no probative value.**

3. **The Learned trial Magistrate erred in law and in fact by awarding the Respondent general damages in the sum of Kshs. 130,000/=, together with special damages, which damages were excessive in the circumstance and not proved at all.**

4. **The learned trial Magistrate erred in law and in fact by holding the Appellant liable at 100% whereas the evidence on record did not disclose any negligence or breach of any duty of care on the part of the Appellant and neither was the same proved or at all.**

5. **That learned trial Magistrate erred in law and in fact by failing to dismiss the Respondent's suit with costs to the Appellant."**

5. When the appeal came up for directions on 12th June, 2014, parties agreed to canvass their arguments by way of written submissions.

Appellant's submissions

6. Through their lawyers M/s O. M. Otieno & Co. advocates, the appellant submitted that the respondent did not prove that he was injured while on duty as the treatment note that he relied on as exhibit 2 did not originate from the appellant's dispensary since the appellant's name was not entered in the appellant's register of employees on duty on the material day.

7. According to the appellant, the respondent did not discharge his burden of proof as stipulated under **Section 107** and **108 of the evidence Act**.

8. The appellant also submitted that the respondent did not prove negligence or breach of contract on the part of the appellant as he did not avail to the court, a copy of the alleged contract of employment so as to enable the court ascertain the terms thereof that the appellant was alleged to have breached.

9. The appellant contended that since the respondent had been its employee for about 11 years prior to the alleged accident, he ought to have known and/or anticipated the risks involved in his nature of work and should therefore not have agreed to work without protective clothing.

10. Lastly, the appellant submitted that the award of **Kshs. 130,000/=** general damages made to the respondent was excessive and not in tandem with the limits set out by previous comparable decided cases. The appellant proposed that the court ought to have made an award of between Kshs. 20,000/= to 30,000/= general damages and as such, the award of Kshs. 130,000/= was inordinately high and unjustified.

Respondent's Submissions

11. T.O. Nyangosi & Co. Advocates for the respondent submitted that the respondent proved his case against the appellant to the required standard by producing treatment notes in support of the injuries the suffered and a payslip (Exhibit 1) as proof of the existence of the employment contract.

12. On quantum, the respondent submitted that the award of Kshs. 130,000 made to him for general damages was commensurate with the injuries he had suffered and that the trial court observed the principles set out by the Court of Appeal in awarding general damages.

Analysis and Determination

13. After going through the record of appeal, the parties respective submissions and the authorities cited, I

note that the issues that require this court's determination are as follows:

a. **Whether the respondent was injured at work.**

b. **Whether the respondent proved that the appellant was liable for his injuries.**

c. **Whether the award of damages was excessive.**

14. As a first appellate court, this court will resolve the above issues by re-evaluating the evidence adduced before the lower court with a view to arriving at its own independent findings over the same.

15. In his testimony before the trial court, the respondent who testified as PW1, stated that on 12th June, 2006, while working at the defendant's factory, a chain got cut and injured his left thumb on which he sustained a deep cut wound which penetrated up to the bone. He blamed the appellant for his injuries citing its failure to repair or service the machine on which he was working and for failing to provide him with safety clothings, such as gloves, that could have protected him from the injuries.

16. PW2, PETER NYANDERA MOKAYA, a nursing officer working at the appellant's clinic confirmed that he treated the respondent for the said injuries on the thumb on 12th June, 2006. PW2 produced a treatment note as Pexhibit 2 in support of the said injuries and treatment.

17. PW3 Dr. Ezekiel Ogando Zoga testified that he examined the respondent on 6th February, 2011 and prepared a medical report in respect to his findings which he produced as Pexhibit 6. PW3 confirmed that the respondent sustained dislocation and cut wound on the left thumb which had healed well but with reduction of movement.

18. The appellant's evidence before the lower court was presented by DW1 David Kipchirchir Koech a clinical officer at the appellant's company who produced the appellant's dispensary out patient's record as Dexhibit 1. According to DW1, the respondent's name did not feature in the said register as being among the patients who were treated at the said clinic on 12th June, 2006. It was the appellant's case that since the respondent's name did not appear in their patients' register, it followed that the respondent was neither on duty nor injured on the alleged date or at all.

19. While confirming that PW2 was a nursing officer at the appellant's clinic on the fateful day, DW1 also confirmed that he (DW1) was not on duty on the date the respondent was alleged to have been injured.

20. After evaluating the evidence tendered by both the appellant's and respondent's witnesses, the trial court came to a conclusion that the respondent had proved his case against the appellant on a balance of probabilities.

21. I uphold the trial court's findings that the respondent was an employee of the appellant and that he was injured at work and treated on 12th June 2006 as these were facts that were proved through both oral and documentary evidence.

22. In the case of **Ephantus Mwangi & Geoffrey Nguyo Ngatia vs Dancun Mwangi Wambugu [1982-88] KAR 278** a principle was laid that a court of appeal will not normally interfere with a finding on fact by a trial court unless it is based on no evidence, or on misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles. (See also **LAW JA, KNELLER & HANCOX AG JJA in Mkube vs Nyamuro [1983] KLR, 403-415, at 403**).

23. In the instant case, I find that there was cogent evidence by the appellant's own employee PW2 a nursing officer who testified that he treated the respondent for the injuries he sustained, while on duty, on 12th June, 2006.

24. Clearly therefore, the trial magistrates findings were based on cogent and credible evidence. I find no reason to interfere with the trial court's findings that the respondent was injured while on duty as the appellant's employee.

25. On liability, the appellant submitted that the respondent being its long-term employee with experience spanning over 11 years, should have known better than to work without the protective clothing. The appellant appears to justify its failure to provide employees with protective gear with a claim/defence that the employee should have refused to work under those circumstances. In **HALSBURY'S LAWS OF ENGLAND, 4TH EDITION** it stated at **paragraph 662 (p.476)** as follows:-

> ***"The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal connection must be established."***

26. I find the appellant's position that the respondent should have known better and declined work without the protective gear to be not only inhuman but a callous demonstration of a cavalier and uncaring attitude not expected of an employer towards its employees. It has time and again been held, by our courts that the primary duty of every employer is to provide a safe and secure working environment to all its employees.

> In **BONIFACE MUTHAMA KAVITA V CARTON MANUFACTURERS LIMITED CIVIL APPEAL NO. 670 OF 2003 [2015] eKLR Onyancha J** observed that:
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> ***"The relationship between the Appellant and the Respondent as employer and employee creates a duty of care. The employer is required to take all reasonable precautions for the safety of the employee, to provide an appropriate and safe system of work which does not expose the employee to an unreasonable risk."***
>
> According to **Winfield and Jolowicz on Tort 13th Edn.p.203**…Employers liability is defined:-
>
> "***At common law the employers duty is a duty of care, and it follows that the burden of proving negligence rests with the plaintiff workman throughout the case. It has even been said that if he alleges failure to provide a reasonable safe system of working the plaintiff must plead, and therefore prove what the proper system was and in what relevant respect it was not observed."***

27. The principle of law that emerges from the above cases is also applicable to the facts of this case. The respondent pleaded that he sustained injuries due to the negligence of the appellant and enumerated the particulars of breach of duty as follows:

> A. **Failing to make or keep safe at the plaintiff's place of work.**
>
> B. **Employing the plaintiff without instructing him as to the dangers likely to arise in connection with his work or without providing him with any sufficient training in work, or without providing any adequate supervision.**
>
> C. **Failing to provide or maintain safe means of access to the plaintiff's place of work.**
>
> **D. In the premises failing to provide a safe system of work.**

28. Particulars of negligence were also stated as follows:-

> a. **Failing to take any or adequate precautions for the safety of the plaintiff while he was engaged upon the said work.**

b. **Exposing the plaintiff to risk of damage or injury of which they knew or ought to have known.**

c. **Failing to provide or maintain adequate or suitable plaint, tackle or appliances to enable the said work to be carried out safely.**

d. **Failing to take any adequate measures to ensure that the plaintiff was not hurt.**

e. **Failing to provide the plaintiff with any appropriate protective apparatus e.g. gumboots gloves.**

29. In the instant case, the respondent's case was that the appellant failed to repair or service the machine that he was working on and this led to the malfunction of the chain which cut off and injured his thumb. Under those circumstances, there is no way that the respondent can be said to have caused his own injury or to have foreseen the malfunction of the machine so as to escape from the scene. Needless to say, the impact or the extent of the respondent's injuries could have been mitigated or reduced by protective gloves had the appellant cared to furnish the respondent with the same. Undeniably, the respondent was injured while performing his normal duties and it has not been shown the he was negligent in the manner in which he was working. Under those circumstances, the appeal on liability fails and I uphold the trial court's findings that the appellant was 100% liable for the respondent's injuries.

30. In **HCCA 62 of 2002 Simba Posho Mills Ltd vs Fred Michira Onguti [2005]eKLR**, the plaintiff general worker was injured by a machine roller when his supervisor asked him to push maize into a new machine which had just been installed. His right fingers were caught by the machine. The respondent blamed the appellant for his own negligence as the machine's installation had not been completed and a certificate of competence of new machine had also not been issued. It was contended that the appellant was not allowed to fiddle the machines. The trial magistrate apportioned liability and on appeal, **Kimaru J** allowed the appeal and held the employer wholly to blame for the accident and for breach of the statutory duty under the Factories Act.

31. On quantum, the principle is now set that an appellate will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely wrong estimate. (**See Bhutt vs Khan (1982-88) IKARI)**.

32. In this case, the respondent testified that he sustained a deep cut wound on the left thumb that had not fully healed as at 29th November, 2010 when he appeared in court. He still experienced pain on the thumb whenever he was working. As already stated in this judgment, the respondent's treatment notes and medical report were produced as exhibits before the trial court.

33. In **Kemfro Africa Ltd t/a Meru Express Services & Another vs A. M. Lubia & Another (No. 2) (1982-88) I KAR 727 at page 703** the court of Appeal stated as follows:-

"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case at first instance. sThe appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

34. I find that in this case, the trial magistrate took into account the injuries sustained by the respondent as proved through the oral and documentary evidence. The trial magistrate also took into account the resultant effect of the said injuries when he observed as follows:

"He has also proved that he still experiences some pain on the thumb which has affected his

ability to sup (sic) and work properly. An award of Kshs. 130,000/= would in my view be adequate to compensate him as general damages for the pain and suffering due to the injuries sustained as pleaded and their continuing effects as pleaded and proved."

35. The appellant's proposal that the respondent be awarded **Kshs. 40,000/=** was rejected by the trial court on the basis that the authority cited in support of the said proposal being **Sokoro Saw Mills vs Grace Nduta Ndungu (2006) eKLR**, was not clear on the soft tissue injuries sustained by the respondent in the said case.

36. In the instant case, the respondent sustained dislocation of the thumb and deep cut wound thereon that resulted in his inability to properly use the said thumb to grip objects. It is my finding that the award of Kshs. 130,000/= for the said injuries was not excessive as suggested by the appellant.

37. I have considered the injuries suffered by the respondent and also considered the comparable awards. I have also taken note of the fact that by the very nature of the respondent's job as a factory worker of 11 years, he requires the full use of both his hands and fingers. A persistent pain on the left thumb could therefore spell doom to the respondent's ability to earn a living as it would diminish his effectiveness at work.

38. It is therefore my finding that the lower courts award was not inordinately high but was commensurate with the injuries sustained by the respondent and I find no reason to interfere with it.

39. In sum, I find that the appeal lacks merit and I dismiss it with costs to the respondent.

Dated, signed and delivered in open court this 8th day of June, 2016

HON. W. A.OKWANY

JUDGES

In the presence of:

- Miss Angasa for the Appellant
- Ndege for Nyangosi for the Respondent
- Omwoyo: court clerk