REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 223 OF 2012

RODGERS O. NYAKARO .....APPELLANT

VERSUS

LENS AGRICULTURAL AGENCIES LTD.....RESPONDENT

(Being an appeal from the Judgment/Decree of Hon. J. MWANIKI Principal Magistrate at Nakuru dated on 5th December, 2012 in Nakuru Chief Magistrate's Civil Case No.1274 of 2010)

JUDGMENT

1. The appeal hereof arises from the judgment of the trial court in an industrial accident whereof the court found both parties equally liable and apportioned liability equally and awarded damages of Kshs.180,000/= for pain and suffering to the appellant. Though paid the total decretal sum, the appellant nevertheless filed the appeal and preferred several grounds of

2. The appeal is opposed, and both parties filed written submissions.

3. **The appellant's** case before the trial court was that on the material date the 14th October 2010 he was working for the respondent on a crusher machine when the blade of the machine got out and the rollers pulled his hand and pressed. Three of his fingers were crushed. He was taken to hospital. It was his testimony that he had not been instructed on how to operate the machine nor was he provided with protective gloves. He further testified that he was working alone and when injured, he was alone, and that he was not to blame for the accident as it was the blade of the machine that came out and injured his three fingers.

4. The respondent testified through its Finance Director Wilfred Ndegwa as DW1. He confirmed that the appellant was indeed injured while operating a crusher machine which had a danger warning. He testified that the company issues gloves, dust mask and apron to the workers and that the same had been issued to the appellant. He produced photographs and receipts to prove that indeed the company did purchase the said items. He confirmed that two people worked on the machine and as the appellant was alone, he doubted the injury, but upon cross-examination, he stated that the supervisor told him that the appellant was injured.

5. In his judgment, the trial Magistrate made findings that there was no dispute that the appellant was injured, that the crusher machine was supposed to be operated by two people, and that on the material day the machine was operated by the appellant alone.

He further made a finding that there was no evidence that the appellant had been provided with gloves despite receipts having been produced for their purchase and further that it was negligent for the

respondent to have allowed the appellant to operate the machine alone. Upon such findings, the court apportioned liability equally.

6. I am minded that this is the first appellate court. As such, I am to reconsider the evidence tendered before the trial court and come up with my own independent findings and conclusions. See **Kenya Ports Authority -vs- Kuston (Kenya) Ltd (2009) 2 EA 212** where the court held that it is the responsibility of the court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.

7. In his submissions by counsel, the appellant's evidence was that the appellant was not given instructions on how to operate the crusher machine as he had not operated the same before, and that it ought to have been operated by two people, and that no protective gloves had been provided and thus the respondent was negligent. Citing **Section 53 of the Factories Act, Cap 514 Laws of Kenya**, he submitted that an employer is under an obligation to provide protective clothing to its employees in any factory where they are exposed to wet or injurious or offensive substances. He further submitted that the trial court erred in relying on the evidence of DW1 when he was not an eye witness and whose evidence was hearsay. He urged the court to set aside the said judgment and find the respondent wholly to blame.

8. **The Respondent** on the other hand submitted that the trial court was right by apportioning liability and that the court on appeal should be cautious to interfere with the trial courts discretion unless it is demonstrated that such discretion was not judiciously. Exercised citing **Section 13(1)(a)** of the Occupational Safety Health Act, it was submitted that an employee should ensure his own safety while at work and urged the court to uphold the trial courts judgment.

9. I have analysed the evidence tendered before the trial court and the said courts finding of facts and law. It is not in dispute that the appellant was injured while in the employment of the respondent.

In dispute is the manner and extent of the injury and which party was to blame wholly or partially in negligence. It is also not in dispute that the appellant was working alone with the crusher machine that injured his fingers, nor is there is any dispute that the respondent purchased protective gear apparently for use by the employees, among them the appellant.

10. The issues that present themselves for determination by this court are whether or not the appellant was provided with protective gear while working on the dangerous machine, and whether or not he had been instructed on how to operate the dangerous machine by the respondent.

The respondents witness DW1, the Finance Director did not help the trial court by leading any evidence to demonstrate that the purchased protective gear were issued to the appellant. He did not also demonstrate that the appellant was instructed on how to use the dangerous machine. The danger warning, whether it was indicated on the machine or not was of no assistance to the appellant.

11. **Section 6(1) of the Occupational Safety and Health Act** provides that:

> ***"every occupier (employer) shall ensure that the safety health and welfare at work of all persons working in his place."***

Likewise, the employee has a duty to take care of his own safety. **Section 13(1)** provides:

> "***Every employee shall, while at the workplace***
>
> ***(a) ensure his own safety and health and that of other persons who may be affected by his acts or omission while performing his/her duties.***

12. Under the **Factories Act,** failure of an employer to provide protective gear to an employee when he is working in a dangerous environment means that in the event such an employee is injured, then such employer shall be guilty of breach of statutory duty and shall be held liable. None compliance comply

with anyone statutory requirement is enough to find the employer liable in negligence.

See **African Highlands and Produce Co. Ltd -vs- Collins Moses Ontweka Kericho HCCC No. 38 of 2002**.

13. I have considered the trial court's findings of fact, that there was no evidence that the appellant was trained on how to operate the machine nor was he provided with protective clothing (gloves) and that it was negligent for the respondent to allow the appellant operate the machine due to the dangers it possed alone. It is therefore an error of fact that after such findings, the trial court proceeded to apportion liability equally without pointing out what the appellant failed to do that contributed to the occurrence of the accident.

14. I agree with the appellants submissions its and grounds of appeal that the trial court's judgment was based on no evidence as the evidence on recorded points to negligence on the part of the respondent only.

15. The law as stated in the **Factories Act the Employment Act** as well as **The Occupational Safety Health Act** all place a duty of care upon an employer on its workers more so where dangerous machines and came at play.

I am satisfied that the respondent failed in its statutory duties of providing a safe system and place of work and must therefore be held wholly liable in negligence and damages that arose from the breach of the statutory requirements.

To that extent, the appeal on the issue of liability is allowed. The trial court's judgment is set aside, and is substituted with a judgment that the respondent is wholly to blame for the accident and subsequent damages arising therefrom.

16. On the matter of *quantum* of damages, the trial court awarded Kshs.180,000/= for pain and suffering to the appellant. Dr. Obed Muyoma's medical report stated the injuries sustained by the appellant. The said injuries are not disputed – crush injury to the right index finger, crush injury to the middle finger and crush injury to the right ring finger. There was no permanent incapacitation.

The appellant states that the award of Kshs.180,000/= is inordinately low as it was lowered by the apportionment of liability. In itself, the appellant does not submit that the award was law as to call for interference by this court.

17. It is trite that an appeal court will not ordinarily interfere with a trial court's discretion in assessment of damages unless it is satisfied that in assessing the damages, the court took into account an irrelevant factor or left out of account a relevant one, or that the amount is so inordinately low or high that it must be a wholly erroneous estimate of the damage – **Kemfro Africa Ltd t/a Meru Express |Service -vs- AM Lubia & Another (1982-88) I KAR 727.**

I find no reason to interfere with the trial court's discretion on the assessment of damages. The upshot of the above is that the appeal as filed succeeds partially in the following manner.

1. ***That the trial court's judgment on liability is set aside and substituted with a judgment that the Respondent is wholly liable in negligence.***

2. ***That the award of general damages by the trial court is upheld at Kshs.180,000/=.***

3. ***That as the appeal succeeds partially, each party shall bear its costs of the appeal.***

Dated, signed and delivered in open court this 22nd day of September 2016

JANET MULWA

JUDGE