REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 129 OF 2013

KAPCHORUA TEA FACTORY.....APPELLANT

VS

DAVID KIRWA LAGA.....RESPONDENT

(An Appeal from the Judgment and Decree of the Senior Resident Magistrate Honourable A. LOROT (SPM), in Kapsabet PMCC No. 236 of 2010 dated 7. 2. 2012).

JUDGMENT

1. The respondent in this appeal *David Kirwa Lagat* was the plaintiff in Kapsabet Civil Suit No. 236 of 2010 in which he had sued the appellant, then the defendant for special and general damages as a result of injuries sustained on or about 8th December 2009 in the course of his employment.

2. The learned trial magistrate *Hon. A. Lorot (SRM)* found the appellant 100% liable for the respondent's injuries. He was awarded a total sum of Kshs.81,000 in both general and special damages. He was also granted costs of the suit and interests.

3. Aggrieved by the trial court's decision, the appellant preferred the instant appeal. In its memorandum of appeal, the appellant raised seven grounds in which it challenged the trial court's decision on both liability and quantum. The gravamen of the appellant's grievance is that the learned trial magistrate erred in law and fact in failing to apply the law applicable to the respondent's action against it to the evidence on record; that he failed to properly analyse the said evidence in its entirety and thereby arrived at an erroneous finding on liability; and, that the learned trial magistrate erred in his assessment of damages and awarded damages that were manifestly excessive considering the injuries sustained by the respondent.

4. The appeal was prosecuted by way of both oral and written submissions. The appellant filed its written submissions on 10th November, 2015 through its advocates *Ms Mukite Musangi and Company advocates*. Those of the respondents were filed on 5th April 2016 through the firm of *Ms D.L Were and Were company advocates*. The written submissions were highlighted before me on 27th September, 2016.

5. This is a first appeal to the High Court. As such, it is an appeal on both facts and the law. I am well aware of the duty of the 1st appellate court which is to re-evaluate the evidence adduced before the trial court in order to reach its own independent conclusion giving due allowance to the fact that unlike the trial court, it did not hear or see the witnesses. See ***Selle V Associated Motor Boat Company Ltd& others (1968) EA 123; Williamson Diamond Ltd V Brown (1979) EA I.***

6. It is important to point out that though an appellate court is mandated to review and even reverse the

findings of the lower court, it is trite that that jurisdiction must be exercised with caution. An appellate court should be slow to interfere with the findings or decision of the trial court and should only interfere if it was satisfied that the decision was not based on any evidence or was based on a misrepresentation of the evidence or that in arriving at its decision, the trial court either considered extraneous factors or applied the wrong legal principles. **See:** ***Jabane V Olienja (1986) KLR 661***; ***Ephantus Mwangi and Geoffrey Nguyo Ngatia V Duncan Mwangi Wambugu (1982 – 88) 1 KAR***

7. I have carefully considered the grounds of appeal, the evidence adduced before the trial court, the rival submissions made by the parties and the authorities cited. Having done so, I find that only two issues arise for my determination namely whether the trial court erred in its finding on liability given the evidence on record and secondly, if the finding on liability is upheld, whether the damages awarded to the respondent were manifestly excessive in the circumstances of the case.

8. On liability, I find that from the evidence on record, it is not disputed that the respondent was the appellant's employee and that he was on duty in its factory on the material date. What is disputed is his claim that he sustained injuries on the said date (8th December, 2009) in the course of his employment owing to the appellant's and or it's servant's negligence or breach of statutory duty.

9. In a bid to prove his case, the respondent testified as PW2 and called three other witnesses. He testified that on 8th December, 2009 he was assigned the duty of lifting bags of tea together with *Justin Ombasa* and pouring its contents into a conveyor belt for processing; that as they lifted one of the bags which was quite heavy, Justin (PW3) who was already tired and inexperienced was unable to steady his step. He slightly lost balance and this pushed him in front with the result that he hit the metal frame of the conveyor belt. He fell down in pain. PW3 called their supervisor who went to the scene and gave PW2 a referral note to attend the appellant's dispensary for treatment. The note was exhibited as Pexhibit 3.

10. According to PW2, he went to the dispensary and received treatment. He then went home. The pain persisted and on 28th December, 2009 he went back to the same dispensary. He was referred to Nandi Hills Hospital where he was treated by PW4. He blamed the appellant for his injuries for assigning an inexperienced and untrained worker to work with him; for assigning only him and Justin the work of lifting heavy bags, a task which in his view was supposed to be undertaken by three people and for failure to provide him with protective gear.

11. In countering the respondent's claim, the appellant called two witnesses who were DW1, *Shem Kibet* a field operations supervisor and DW2 *Naomi Jepkogei* who was then a clinical officer in charge of the appellant's dispensary. DW1 denied that the respondent was injured in the course of his employment on 8th December, 2009 as no report was received by him to that effect. He also claimed that the accident could not have occurred as luggage in the factory was being lifted by forklifts and not by employees. But in cross examination, he admitted that the respondent's work involved lifting of bags weighing 25 kgs, a task he claimed could be done by two people. And though he claimed that employees lifting heavy luggage were provided with rubber shoes, mouth masks, overalls and gloves, he did not produce any evidence to substantiate that claim.

12. In his judgment, the learned trial magistrate briefly evaluated the evidence adduced by both parties. He concluded that the respondent had proved through the treatment notes exhibited in evidence that he had been injured on his chest and back as alleged and that the injuries had been occasioned by the inappropriate working conditions he was exposed to by the appellant.

13. On my own reappraisal of the evidence, I find that the respondent was able to prove on a balance of probabilities that he was indeed injured in the course of his employment with the appellant as alleged. His workmate Justin confirmed that he was pushed to the metal frame of the conveyor belt when he (PW3) was unable to balance the heavy weight of the sack they were lifting since his hands were sweating and the sack was too heavy for only two people to carry. He supported PW2's claim that they had not been provided with protective gear like gloves and that the bags they were assigned to lift were too heavy to be safely lifted by two people.

14. I accept the respondent's claim that he was indeed injured on the material date since besides the evidence of PW3, he also produced as exhibit 3 the referral note allegedly issued by his supervisor authorizing him to attend the appellant's dispensary for treatment. The note bears the date of the accident and the dispensary's rubber stamp. In addition, PW4, a clinical officer from Nandi Hills Hospital produced as exhibit 4 treatment notes proving that the respondent was treated in that hospital for the same injuries on 28th January, 2010. I disagree with the appellant's submissions that the trial magistrate erred in allowing the production of the treatment notes as exhibits in support of the respondent's case. I find that PW4 laid a proper foundation for their production and they were admissible in evidence under *Section 33* of the *Evidence Act* .

15. The fact that the said treatment notes did not bear an outpatient number does not mean that they were not authentic. PW4 authenticated the said notes when he confirmed that they were authored by a fellow clinical officer and that the giving of outpatient numbers was an administrative function unrelated to the treatment of patients.

16. It is the duty of employers to ensure that they provide a safe system of work for their employees and a safe working environment. This includes the duty of providing them with protective gear and apparel to either prevent the risk of injury in the course of their duties or to mitigate the impact of injury should any accident occur. Though the task the respondent and PW3 had been assigned on the material day was purely manual and may not have required any special training, the evidence of DW1 that luggage in the factory was usually lifted with forklifts seems to lend credence to PW2 and PW3's claims that the sacks they were lifting were very heavy and the appellant through its supervisors ought to have foreseen the danger of not availing adequate hands for the task and taken appropriate action.

17. The appellant did not also adduce any evidence to prove that indeed the respondent and his workmate had been provided with any protective gear including gloves. PW3 maintained that part of the reason he was unable to balance the weight of the bag was because one, it was too heavy for two people and secondly, he did not have a good grip of the same since his hands were wet with sweat as he had not been provided with gloves. These evidence was not seriously contested by the appellant. In light of the above evidence, I find that the respondent proved to the required standard of proof that his injuries were a direct result of the appellants failure to exercise due care in ensuring that its employees were provided with protective gear and that they worked in conditions that ensured their safety. I have therefore come to the same conclusion as did the learned trial magistrate that the appellant was liable for the respondent's injuries at 100%. The trial court's finding on liability is consequently upheld.

18. Turning now to the appeal on quantum of damages, it is settled law that an appellate court will only interfere with an award of damages by the trial court if it is satisfied that the award was either too low or inordinately high as to lead to an inference that it represented an erroneous estimate of the damage suffered or if it was satisfied that in arriving at the award, the court applied wrong legal principles.

See: Kemfro Africa Ltd & Another V Liobia & Another (NO.2)1987 KLR 30.

19. In this case, the record shows that in awarding the respondent general damages in the sum of Kshs.80,000, the learned trial magistrate considered the proposals made by each party in their written submissions. The respondent had proposed a sum of Kshs. 150,000 while the appellant proposed Kshs. 50,000. The trial magistrate settled for an amount of Kshs. 80,000 which was reasonable considering that it was not too far from the amount proposed by the appellant and also considering that according to the medical report dated 1st February, 2010 (exhibit 1), the respondent was still undergoing treatment and complaining of pain three months after the injuries were sustained. I am thus unable to fault the learned trial magistrate on the said award. It was not so high as to lead to an inference that it was a totally erroneous estimate of the compensation that the respondent was entitled to for his injuries. The special damages of Kshs. 1,000 awarded were specifically pleaded and proved. Consequently, I find no reason to interfere with the award of Kshs. 81,000 and the award is accordingly affirmed.

20. In the result, I am satisfied that this appeal is devoid of merit and it is hereby dismissed with costs to the respondent.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 16th day of November, 2016.

In the presence of:-

Ms Kiplagat holding brief for Ms Nasimiyu for the Appellant

No appearance for the Respondents

Naomi Chonde court clerk