REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 2 OF 2008

(Being an appeal against the judgment of the Hon. Mr. B. O. Ochieng (Principal Magistrate) delivered in Makindu PMCC No. 132 of 2006 on 13th December, 2007)

DWA ESTATE LIMITED……..…….……..APPELLANT

VERSUS

NIKO MULAKI KATAMBUKA…….……..…...….RESPONDENT

JUDGMENT

1. The Appellant, DWA SISAL ESTATE LIMITED was sued by the Respondent NIKO MULAKI KATAMBUKA for damages for injuries allegedly sustained when the Respondent was working for the Appellant.

2. The claim was denied. According to the statement of defence filed, it was denied that the Respondent was an employee of the Appellant. That the Appellant maintained a safe working environment and if the Respondent was injured, he was to blame for it.

3. During the trial, the Respondent gave evidence (PW2). It was the Respondent's evidence that he was an employee of the Appellant and was injured while on duty cutting sisal when he was pricked by a sisal thorn on his big toe, right leg. He blamed the Appellant for failure to provide him with gumboots. The Respondent denied suggestions during cross-examination that he was injured while carrying out his own work.

4. PW1 Dr. Diro Aaron Kyalo who examined the Respondent produced a medical report. His evidence was that the Respondent sustained injuries on the right toe but had sufficiently recovered. The doctor charged Ksh 2,000/= for preparing the medical report. The receipt was produced as an exhibit.

5. The Appellant company called its field supervisor, DW1 Jackson Mwatee and a clerk, DW2 Adam Mutavi as its witnesses. Both the field supervisor (DW1) and the clerk (DW2) testified that the Respondent was an employee of the company but denied that the Respondent was on duty on the 30th November 2001 *(i.e. the material date)*. According to PW1, if the Respondent was injured at work, a report should have been made to the Respondent's immediate boss who would then have reported to him. The Respondent would then be referred to the Appellant's clinic for treatment. DW1's view was that the Respondent must have been injured elsewhere. According to the clerk, the cheque roll for the material date did not reflect the Respondent's name but reflected that the Respondent had worked the previous day for half a day.

6. The trial magistrate entered judgment in favour of the Respondent on a 100% liability basis, Ksh

90,000/= General Damages, Ksh 2,000/= special damages, costs and interests.

7. The Appellant was dissatisfied with the said judgment and appealed to this court on grounds that can be summarized as follows:

a) *The judgment was against the weight of the evidence.*

b) That the award of quantum of damages was manifestly excessive.

c) That the submissions and authorities of the Appellant's counsel were not taken into account.

8. The appeal was canvassed by way of written submissions which I have duly considered alongside the cited authorities.

9. This being the first appellate court, the court is duty bound to re-evaluate the evidence on record and come to its own findings – *See* **Selle –vs- Associated Boat Co. Ltd (1968) EA 123.**

10. It is not in dispute that the Respondent was an employee of the Appellant. DW1 and DW2 in their evidence conceded that the Respondent was an employee of the Appellant.

11. The Respondent's evidence was that he was cutting sisal when his big toe was pricked by a thorn. Although the Respondent blamed the Appellant for not providing him with a pair of gum boots, he has not shown what precautions he took to avoid being injured taking into account that sisal plants are thorny plants. There is no evidence of any effort made to request for gum boots. As held in the case of **STATPACK INDUSTRIES VS JAMES MBITHI NBI HCCA 152 OF 2003:**

> ***"An employer's duty at common law is to take all reasonable steps to ensure employees' safety. But he cannot baby-sit an employee. He is not expected to watch over the employee constantly."***

12. On the other hand, the Appellants evidence as given by DW1 and DW2 is that the Respondent was not on duty on the material day but had worked the previous day. Although DW1's evidence was that the Respondent was not on duty on the material day, the treatment notes produced by the Respondent were issued at the Appellant's clinic. Although DW1's evidence was that the Respondent's immediate boss was the headman, the said headman was not called as a witness.The headman could have shed light on whether the Respondent was on duty on the material day or not. I say so because the Respondent was not reporting to DW1 or DW2 as his immediate supervisors.

13. The registers for workers attendance produced in court were prepared by DW1 or DW2. Although the cheque roll produced by DW2 reflects the Respondent was not on duty on the material date, the same was based on the information extracted from the attendance register. It is also noteworthy that none of the registers in question was signed by the Respondent. It is noteworthy that the evidence of DW1 is that any worker who absents himself from duty without permission would receive a warning letter yet no such letter was written to the Respondent. DW1's evidence is that the Appellant's employees are supplied with safety gear. Once again, there is no document to reflect the issuance of any safety gear. Both the evidence of DW1 and Dw2 failed to state what safety gear, if any, was supplied.

14. With the foregoing, on a balance of probability, I find that the Respondent was injured while on duty and that he had not been provided with any safety gear. If the Respondent had been issued with gum boots, probably this case would not have arisen in the first place. However, as held above, the Respondent also contributed to the injury. I would apportion liability on 50:50 basis.

15. On whether to interfere with the award of general damages, the Court of Appeal in **Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini vs. A. M. Lubia and Olive Lubia [1982-1988] 1 KAR 727** at p. 730 Kneller J. A. said:-

"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

16. The award of general damages of Ksh 90,000/= was in my view inordinately high taking into account the injuries herein. The Respondent recovered. The award of general damages in similar cases ranges between 20,000/= to 50,000/=. (*See* for example **SOCFINAF COMPANY LIMITED VS. JOSHUA NGUGI MWAURA (2005) eKLR**, **Eldoret Steel Mills Limited VS. Jotham Wekesa Wanami [2012] eKLR)**.

17. Taking into account the passage of time, an award of Ksh 50,000/= is reasonable.

18. For the reasons stated above, the appeal has merits and is fully allowed. I enter judgment as follows:

a) General damages Ksh 50,000/=

b) Special damages Ksh 2,000/=

52,000/=

Less 50% liability Total 26,000/=

c) The Respondent shall have the costs in the lower court and interest.

d) The appeal having been partially successful, each party to bear own costs of the appeal.

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B. THURANIRA JADEN

Dated and **delivered** at Machakos this 29th day of April, **2015**

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B. THURANIRA JADEN

JUDGE