REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 90 OF 2009

ELDORET STEEL MILS LTD....................................APPELLANT

- VERSUS –

ABEL MULI..RESPONDENT

JUDGEMENT

1. The appellant was found liable for the injuries which the respondent sustained whilst he was at work.

2. At the material time, the respondent was working at the Twisting section within the appellant's premises.

3. The respondent was working alongside three (3) other colleagues. Each of them was handling hot metals, from one section to another.

4. The employer had provided each of those 4 employees with gloves to protect their hands. The said gloves were made from some sack materials.

5. It was the respondent's case that he was required to carry out his work with speed. He explained that if he had worked slowly, the company would have sacked him.

6. On the day in question, the respondent was carrying some metal bars. The place where the four employees were working was known to be a dangerous place. Therefore, each of the employees tried to be careful when working.

7. John Kiput, Wilson Ongali and Michael Onyango were the other 3 employees who were working together with the respondent on the day in issue.

8. The person who was ahead was John Kiput. The respondent was following John.

9. Whilst John was moving along, he slipped and fell down. When that happened, the metals which John was carrying separated and burnt the respondent on his left forearm.

10. Both Dr. S.I Aluda and Dr. Z. Gaya verified the said injuries.

11. Dr. Aluda examined the respondent on 10th July 2006. At that time, the respondent was still complaining of pains and scabs on his left forearm. However, the pains were continuing to subside, with the use of analgesics. Dr. Aluda also commented that the scabs would eventually fall off when the

healing was complete.

12. Dr. Z. Gaya examined the respondent on 9th March 2007. By that date, the respondent's injuries had completed healed.

13. From the two medical reports, there is no doubt that the respondent sustained injuries.

14. Secondly, there is consensus between the parties herein that the said injuries were occasioned when the respondent was at his place of work.

15. The first question that arises from the appeal herein is whether or not the respondent was to blame for the injuries. That question arises because the appellant had asserted that the accident was caused solely or substantially by the respondent's negligence.

16. Being the first appellate court, I have carefully re-evaluated all the evidence on record.

17. I note that in the defence, the appellant had asserted that the respondent failed to adhere to the set safety rules; exposed himself to a risk or danger which he knew about; failed to use the protective gear which was provided; worked recklessly, carelessly and negligently; and inflicted the injury upon himself.

18. However, when giving evidence for the appellant, RATEMO ONCHAGA (DW1) said;

> *"He was carrying metals to the twisting section when one metal which was carried by one Wanjala fell and burnt Muli on his left forearm".*

19. Later, when he was being cross-examined DW1 said;

> *"He got injuries on duty after a co-worker dropped a hot metal".*

20. From the foregoing evidence, it is clear that the injuries sustained by the respondent were attributable to the actions of a co-worker.

21. The appellant did not lead any evidence to prove any of the particulars of negligence which it had attributed to the respondent.

22. As regards the refusal to use protective bear which was provided by the appellant, both parties acknowledged that the said protective gear was a pair of gloves, which was made from sack material.

23. It is noted that the injuries were not on the respondent's hands. His hands were adequately protected from the heat emanating from the hot pieces of metal which he was carrying. That means that the respondent did put to proper use, the protective gear which was provided.

24. Notwithstanding the said protective gear, the respondent was injured because his co-worker slipped and fell, resulting in a hot metal coming into contact with the respondent's forearm.

25. According to the respondent's evidence, his forearm could only have been protected if the gloves provided by the company, had extended to the elbow joint.

26. In the light of the evidence on record, I find that the respondent was not at all responsible for the accident which gave rise to the injuries he sustained. Accordingly, I find that the learned trial did not err at all when he held that the appellant was wholly liable for the incident which gave rise to the respondent's injuries.

27. The learned trial magistrate awarded to the respondent, the sum of Kshs. 150,000/- as compensation for pain and suffering. The trial court also ordered the appellant to pay costs of the suit, together with interest.

28. The substantial portion of the appeal before me relates to the question of the quantum of the General Damages awarded to the respondent.

29. The first criticism levelled against the learned trial magistrate was the failure to give any reasons for award of Kshs. 150,000/-. As a result of that ommission, the appellant said that the trial court must therefore have simply relied on the submissions made by the respondent.

30. It was the appellant's contention that injuries like the one suffered by the respondent should attract General Damages not exceeding Kshs. 50,000/-. Therefore, the award of Kshs. 150,000/- was so high as to constitute an erroneous assessment by the trial court.

31. This court was invited to revise the sum awarded, from Kshs. 150,000/- to Kshs. 50,000/-.

32. In answer to the appellant, the respondent defended the award of Kshs. 150,000/-; submitting that the same was not manifestly excessive as was suggested by the appellant.

33. The respondent pointed out that both parties had cited the authority of **PHILIP MUSEMBI VS. COASTAL TYRE RETREADING CO. LTD (MSA) HCCC NO. 196 OF 1993.**

34. A perusal of the record of the proceedings before the trial court reveals that both parties did rely on that authority. To my mind, that was an indication that both the parties deemed the said authority to be supportive of their respective clients' cases.

35. The second point worthy of note is that during the trial, the appellant submitted that an award of Kshs. 80,000/- would be appropriate. Meanwhile, the respondent had sought an award of Kshs. 220,000/-.

36. On its part, the trial court awarded Kshs. 150,000/-. If that figure were to be looked at from a purely mathematical position, it would constitute the average of the figures cited by the two parties. But the award of General Damages is not one of mathematical calculations.

37. An award of General Damages is pegged on the judicious exercise of the court's discretion, in an endeavour to provide adequate and fair compensation to the plaintiff. An award would be deemed adequate if it is sufficient to address the nature and degree of the injuries sustained by the plaintiff. And the award is deemed to be fair if it is generally in line with other awards granted to persons who have sustained similar or comparable injuries.

38. It is for that reason that when an award is either too low or too high, compared to other awards issued for similar or comparable injuries, the appellate court would be entitled to interfere with the same. Indeed, the appellate court would be under an obligation to interfere with the award which was out of sync, so as to ensure a sense of uniformity, predictability and fairness.

39. But an appellate court should not interfere with an award of damages simply because it could have come to a decision which was different from that of the trial court. If that were permitted, it would constitute an attempt to stifle the discretion of the learned trial magistrate, by replacing the discretion of one judicial officer with that of another judicial officer.

40. In this case, both parties cited a number of authorities to back their respective submissions on quantum. However, one authority was common to both parties. To my mind, as alluded to earlier, the said authority constitutes common ground for the parties.

41. In any event, I hold the considered view that it would be wrong to allow the appellant to now advance an argument that would end up reducing from Kshs. 80,000/-, to Kshs. 50,000/-, the sum which it considers appropriate. At best, the appellant should have made efforts to justify a reduction from Kshs. 150,000/- to Kshs. 80,000/- (which is the sum suggested before the learned trial magistrate).

42. The parties cannot ask the court to be guided by an authority, and thereafter criticize the court for

doing so.

43. The case **of PHILIP MUSEMBI VS. COASTAL TYRE RETREADING CO. LTD HCCC NO. 196 OF 1993** was decided on 20th June 1995. That was some fourteen (14) years before the learned trial magistrate in this case rendered his verdict. In those circumstances, an increment of Kshs. 30,000/-, to the sum awarded 14 years before, was neither excessive nor exorbitant.

44. I say so well aware of the fact that the injuries in the case of PHILIP MUSEMBI were a bit more severe compared to those in the case before me.

45. In the result, I find no reason in law or in fact to warrant any interference with the damages awarded to the respondent. Accordingly, the appeal is without merit. It is dismissed in its entirety.

46. The appellant will pay to the respondent, the costs of the appeal.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 25th day of July 2014.

FRED A. OCHIENG

JUDGE

Judgement read in open court in the presence of

Kagunza for the Appellant.

Eshikuri for the Respondent.