REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 3 OF 2011

ELDORET STEEL MILLS LIMITED.....APPELLANT

VERSUS

MOENGA OBINO JOSEPHAT.....RESPONDENT

(Being an appeal from the original judgment of Ms. Atieno Alego, Senior Resident

Magistrate in Eldoret CMCC No. 319 of 2009 delivered on 19th February 2010)

JUDGMENT

1. The appellant prays that the judgment and decree in the Senior Resident Magistrates Court dated 19th February 2010 be set aside. The respondent (referred to variously as *the plaintiff*) had filed a suit claiming special and general damages. He pleaded that on 10th April 2009, while working for the appellant, a hot piece of metal rolled out of a machine at high speed and burnt him on his forearm. He blamed the appellant for negligence.

2. The lower court found that the appellant was 100% liable for the injuries sustained by the respondent. The respondent was awarded general damages of Kshs 150,000, special damages of Kshs 1,500 plus costs and interest. The appellant was aggrieved by that decision and has preferred this appeal. The memorandum of appeal is dated 7th January 2011. It was filed out time but with leave of the High Court dated 30th December, 2010.

3. The appellant has pleaded eight grounds of appeal. They can be condensed into three: First that the trial court erred in finding the appellant negligent; secondly, that the trial court erred in failing to find that the respondent was guilty of contributory negligence; thirdly, that the impugned decision was against the weight of evidence.

4. This a first appeal to the High Court. It is thus an appeal on both facts and the law. I am required to re-evaluate all the evidence on record and to draw independent conclusions. There is a caveat because I have neither seen nor heard the witnesses. See *Selle v Associated Motor Boat Company Ltd* [1968] EA 123, *Williamson Diamonds Ltd v Brown* [1970] EA 1. I have considered the grounds of appeal, the pleadings in the lower court, the evidence in the trial court and the submissions by learned counsels for both parties.

5. It is common ground that the respondent was employed by the appellant. When the respondent testified in the lower court, he blamed his employer for failing to provide protective gear or a safe working system. He said the following-

"I blame the company for not giving us protective gear while working. The ones we were using were old and short. The machines were not well serviced. When they are well serviced they work well. I was careful when working. I wore the so called gloves which were old and short."

6. From that evidence, the particulars pleaded by the respondent in the plaint that the appellant failed to provide protective devices or clothing were false. The true complaint is that they were old or short. Upon cross-examination (page 30 of the record) the plaintiff conceded that he was running and *"fell on the metal which was red hot."* It is doubtful that even if he had new or longer gloves, they would have prevented the injury.

7. He also conceded that the machines were serviced every morning at 8.00a.m. He however said that the accident occurred at 6.00a.m. He said there was a problem with the machine. He did not explain it. But even assuming the machines were not properly serviced, or had a problem, the respondent was conceding that the injury arose from his fall. It was an accident. The respondent stated as much when he replied in cross-examination:

"The machines are old. It was an accident. I had not been provided with a protective wears. We are usually trained (sic) how to use the machines."

8. The appellant's witness had testified that the respondent had worked in the section for four days. He was previously working in the cooling bay. He was meant to be trained by a supervisor. The plaintiff was meant to control the hot metal as it was leaving the boiler into the machine plates. He said the plaintiff failed to control the metal which "hit the channel jumped and hurt him." He had gloves but had folded them. DW1 was of the view that had the plaintiff not folded the gloves, he would not have been hurt.

9. DW2 testified that the plaintiff had been provided with gloves, overalls and army boots on 27th January 2009. The learned trial magistrate in her judgment found as follows: -

"however since the the defendant firm is within Eldoret, this court would have appreciated a physical exhibit of the said 'leather gloves, army boots and overalls' as averred by the defence. Further DW1 has testified that PW1 had only worked in this section for four days when he was asked to hold fort for a colleague….he had not been trained to work herein and when the machine had a problem and the metal ejected, PW1 had no otherwise but to save his life from the red hot metal.……this court having analysed the evidence finds that the defendant is 100% liable"

10. That finding was erroneous in a number of respects. It is true that the appellant had not trained the respondent properly on use of the machine or at all. He had only been there for four days. The respondent had been working in a cooling bay before. To that extent the appellant had contributed to the accident. But the plaintiff was not free of blame either. He had not reported any fault with the machines in the last four days. The machines were serviced daily. He had been supplied with boots, gloves and overalls. He had folded the gloves exposing him to injury. When he failed to control the hot metal rolling out of the machine, he ran, fell and got injured. He thus contributed to the injury.

11. Granted all that evidence, I would blame both parties equally. I would apportion liability at 50% against the appellant and 50% against the respondent. See *Woods v Durable Suites Ltd* [1953] 2 All ER 391. In *Devki Steel Mills Limited v joseph Mulwa* Nairobi, High Court Civil Appeal 658 of 2002 [2004] eKLR a near similar situation arose. The court in the material part held-

"The evidence before the lower court was clear: that both parties were to blame equally for this accident; the employer for allowing the same to come into contact with the electric wires; and the employee for not wearing protective gear, which he freely admitted he was given, but simply did not bother to put it on. In the circumstances, he must take an equal blame for causing this accident. The employer is expected to take all reasonable steps to ensure the employee's safety. He is not expected to watch over the employee constantly"

12. I will now turn to quantum of damages. As a general rule, an appellate court will not interfere with quantum of damages unless the award is so high or inordinately low or based on wrong principles. See *Karanja v Malele* [1983] KLR 42. The respondent suffered burns on the left forearm. He experienced severe pains. From the report of Dr. Aluda (page 22 of the record) the following opinion is given:

> *"The injuries sustained were severe and are continuing to heal but for the pains in the above named regions which subside with use of analgesics. The scabs will eventually drop off when healing will be complete."*

13. The report was made on 21st April, 2009, eleven days of the accident. In a synopsis, the injuries, through severe and painful were not permanent. The award of Kshs 150,000 for general damages was too high in the circumstances. In *Eastern Produce Kakuzi Ltd v Edwin Wasike*, Eldoret High Court Civil Appeal 51 of 2002 [2012] eKLR, the court awarded general damages of Kshs 100,000 for chemical burns to both legs and toes. In *Devki Steel Mills Limited v joseph Mulwa* Nairobi, High Court Civil Appeal 658 of 2002 [2004] eKLR the plaintiff was electrocuted and suffered burns on the head, right hand, thumb, elbow, right foot and stomach. He was awarded 150,000. In *Kanyenyaini Tea Factory Company Limited v Stanley Muhia Gichure* High Court, Nyeri, Civil Appeal 37 of 2006 [2008] eKLR, the plaintiff slid and fell into a pit that had a fire and got extensive superficial burns. He was awarded Kshs 100,000 in general damages.

14. The respondent in this case suffered burns on the left forearm. They were not permanent. The examining doctor stated that they would heal and the pains would subside with use of analgesics. The scabs would eventually drop off when healing is complete. There is no doubt the respondent suffered severe pain. Considering the nature of those injuries I would assess general damages at Kshs. 75,000. I am satisfied the respondent incurred special damages of Kshs. 1,500 for the medical report. They were pleaded in the plaint and were strictly proved.

15. In the result, this appeal succeeds in part. The judgment and decree dated 19th February 2010 is hereby set aside. Judgment is entered for the respondent against the appellant in the total sum of Kshs. 76,500. As the respondent was 50% liable for the accident, the appellant shall only pay Kshs. 38,250 to the respondent. Interest shall apply from the date of this decree until full payment. Each party shall bear its own costs at the High Court and in the lower court.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 4th day of August 2014.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:-

Ms. R. Tum for Mrs. Khayo for the appellant instructed by Nyairo & Company Advocates.

Mr. M. Rop for Mr. Onkangi for the respondent instructed by Nyambegera & Company Advocates.

Mr. Kemboi, Court Clerk.