REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 254 OF 2011

KIPKEBE LIMITED…….……...APPELLANT

VERSUS

BENARD NYANDEGA NYAMBANE…….....RESPONDENT

(Being an appeal from the judgment and Decree of Hon. J.WERE(SRM), dated 15th day of November 2011 in the original Keroka SRMCC.NO. 217 OF 2009)

JUDGMENT

1. The appellant Kipkebe Limited was the Defendant before the trial court whilst the Respondent **Benard Nyandega Nyambane** was the plaintiff. The learned trial magistrate held the appellant liable for the injuries which the Respondent allegedly sustained when while throwing pieces of logs onto tractor registration No. KAJ 835H one of the logs fell from above and hit him on the forehead.

2. The trial court held the appellant 60% to blame for the incident whilst the Respondent was to shoulder 40%. General damages were assessed in the sum of Kshs.80,000/=, special damages assessed in the sum of Kshs.6,500/-. The respondent was awarded costs of the suit and interest at court rates.

3. The appellant was dissatisfied with the judgment and decree of the learned trial magistrate HON. WERE Senior Resident Magistrate dated and delivered on the 15th day of November, 2011 and filed the following grounds of appeal:-

i. ***THAT the learned trial magistrate erred both in fact and in law when he entered judgment in favour of the Respondent who failed to discharge the burden of proof to the requisite standard.***

ii. ***THAT the learned trial magistrate failed to properly evaluate evidence tendered before him.***

iii. ***THAT the learned trial magistrate erred in law and in fact by proceeding to assess and award the Respondent damages whereas the Respondent failed to prove that he sustained the purported injuries, in view of the fact that medical evidence adduced was insufficient and of no probative value.***

iv. ***THAT the learned trial magistrate erred in law and in fact by awarding the Respondent general damages in the sum of Kshs.80,000/- which damages were excessive in the circumstances and not proved at all.***

v. ***THAT the learned trial magistrate erred in law and in fact by holding the appellant liable at 60% whereas the evidence on record did not disclose any negligence or breach of any duty of care on the part of the appellant and neither was the same proved.***

vi. ***THAT the learned trial magistrate erred in law and in fact by failing to dismiss the Respondent's suit with costs to the appellant.***

The appellant therefore prays for orders that:-

i. ***The judgment and/or decree of the learned trial magistrate dated 15th day of November, 2011 be set aside and/or quashed.***

ii. ***The Honourable court be pleased to substitute an order dismissing the Respondent's suit in the subordinate court vide the original KEROKA SRMCC.NO. 217 OF 2009.***

iii. ***Costs of the appeal herein and those incurred in the subordinate court be borne by the Respondent.***

iv. ***Any such and/or further orders that the Honourable court shall deem just and expedient in the circumstance.***

4. This appeal proceeded by way of written submissions that were filed and exchanged between counsel appearing. The issues for determination raised by the appellant in his submissions are:

i. ***Whether it was proved that the Respondent sustained the alleged injuries.***

ii. ***Whether negligence and/or breach of duty was proved against the appellant.***

iii. ***Whether the award in general damages was excessive as to warrant interference by this Honourable court.***

5. On the 1st issue it is submitted by the appellant that the Respondent failed to discharge his burden of proof as stipulated under **Section 107** and **108** of the **Evidence Act**.

6. Secondly it is the appellant's submission that the Respondent did not prove negligence or breach of contract or duty against the appellant. It is argued by the appellant that the Respondent was doing manual work of packing firewood and the same did not require any specialized skills or training. That the Respondent was in control of his work and if he did it negligently then he cannot blame the appellant for the injuries he sustained. The appellant further argued that not every accident at the place of work is necessarily as a result of employers breach of duty of care particularly like the case herein where the employee is engaged in manual work that does not require exceptional skill.

7. Lastly on the issue of general damages the appellants have pointed out the principles to be considered by an appellate court when considering whether to interfere with the trial court's award on assessment on damage. These are:-

i. ***When the award is inordinately high or low as to represent an entirely erroneous estimate.***

ii. ***The trial court proceeded on wrong principles, or misapprehended evidence in some material respect.***

8. It is argued for the appellant that as a matter of principle damages must be within limits set by previous, comparable decided cases and also within limits that the Kenyan economy can afford. That

there must be uniformity in awards in cases involving similar injuries.

9. It is also argued for the appellant that the Respondent sustained soft tissue injuries which do not indicate any anticipated permanent disability. It was pointed out that the trend is that in previous cases of injuries similar in nature to those allegedly sustained by the Respondent herein an award of Kshs.20,000/- to 50,000/- would suffice. It is argued further by the appellant that there was therefore no basis whatsoever for awarding the sum of Kshs.80,000/= which was inordinately high, unjustified and not within the trend of comparable previously decided cases.

10. The Respondent on his part submitted, on the first issue, that he proved his case on a balance of probability. That he relied on LD 104/1 which was a notice by employer of an accident causing injury to a workman which confirmed that the Respondent was an employee of the appellant, he was on duty on 12th August, 2006 and he was hit by a piece of log while throwing pieces of logs onto the tractor while in the appellant's employment and lastly that he was sent to Kipkebe Health Centre by the appellant for treatment after he had been injured.

11. Secondly it is the Respondent's submission that he proved that he sustained the injuries while in the appellant's employment by producing the following documents in evidence before the trial magistrate:

i. ***LD form 104/1 PH. Exhibit.4.***

ii. ***Treatment Card PH Exhibit.8***

iii. ***Medical report PH Exhibit.8.***

12. On the issue of whether or not the appellant was negligent it is submitted for the respondent that the appellant was negligent because it did not supply a helmet to the respondent to enable him carry out the duties he was assigned by the appellant in safety.

13. Lastly on the issue as to whether general damages of Kshs.80,000/= was excessive it is submitted for the Respondent that the principles to be observed by an appellate court in deciding whether it is justified in disturbing quantum of damages are that the appellate court must be satisfied that either the trial court in assessing the damages took into account an irrelevant factor or left out of account a relevant factor or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.

14. The Respondent therefore contends that there is nothing to warrant disturbing damages as awarded and thus the appeal should fail in its entirety with costs to the Respondent and interest on the amount awarded to run from 15th November, 2011.

15. Before considering the merits and/or demerits of the appeal herein and thus being the first appellate court it is prudent to re-evaluate all the evidence on record and to draw my own conclusions. From the evidence on record the respondent testified and also called one witness.

16. PW1 **Benard Nyambane** told the trial court that on 12th August, 2006 he was on duty at the appellant's premises where he was an employee. He produced a copy of his payslip being P. Exhibit **1** as proof of his employment. He testified that he was packing firewood on a trailer. The firewood was being used to fuel boilers. That one of his colleagues threw a piece of wood and it fell and hurt him on the head as it fell from the trailer, it injured him on the head near his eye. He said that he blamed the defendant for the injury he suffered because he had no helmet which would have protected his head from such injury.

17. The Respondent stated that Nahashon Tabora was his supervisor and that he was sent to Kipkebe dispensary where he was treated and discharged. He told the trial court that the original of the treatment card was with the appellant but he only managed to bring a photocopy of the same. He added that an LD 104 form was filled for him but he only managed to bring a copy as the original also remained with the appellant (**MFI. 1- 4**). He testified further that he was seen by Dr. Ajuoga who prepared a medical report

for him and for which he paid Kshs.6500/-. He produced the report as evidence. He concluded by saying that he had not fully recovered as he still had pain on the injury site. He prayed for compensation for the injury and sought the costs of the suit and interest.

18. During cross-examination, the respondent confirmed that he was packing firewood on a trailer together with his colleagues Samuel Otandi and Richard Achinga. He blamed the appellant as he (appellant) did not provide him with a helmet and he stated that it was his first day to work there. He told the court on cross-examination that MFI.1-4 were filled by Jane a sister(nurse) at the Dispensary and he confirmed that he was treated by Dr. Ajuoga after 2 years.

19. In re-examination, he reiterated that he was injured on his first day in that section and that the wood that hit his head was thrown by a colleague. He further testified that he was later seen by Dr. Ogando Ezekiel and he paid Kshs.6,500/- which receipt he produced together with the medical report MFI. 1-8 being **P. Exhibit 9**.

20. PW2 was **Dr. Ezekiel Ogando Zoga** a medical doctor based at Kisii level 5 hospital. He told the court that he attended to the respondent on 14th January, 2011. He explained that the respondent had a deep cut on the forehead and trauma to the eye. That on examination he had a scar on the left forehead and the eye was reddish and that he had previously been treated at Kipkebe Health Centre.

21. He confirmed that the respondent suffered the injuries and that the scar was permanent. He charged the respondent Kshs.6,500/- and issued the receipt and produced the medical report in evidence which was marked as **P.Exhibit.7**.

22. On cross examination Dr. Ezekiel pW2 told the court that he saw the plaintiff on 14th January, 2011 and he learnt that the injury was occasioned on 12th August, 2006 that is approximately 4 ½ years later. He said that he did not participate in the treatment of the respondent but relied on the treatment notes and the physical examination and the history of the patient. After PW2 testified the respondent closed his case.

23. DW1 **George Morara Ombonyo** was the first to testify on behalf of the appellant herein. He told the court that he was a check roll clerk whose duties were to make entries of daily attendances and keep the record, the check roll book and payment files. He told the court that he did enter the days worked and also indicated those absent.

24. He testified further that when employees got sick or got injured they were treated at the company dispensary and that nobody could go for treatment without his knowledge. He also told the trial court that before treatment at the dispensary one reports to the supervisor and then goes to his office where he is issued with a sick sheet before proceeding for medication.

25. That on the 12th August, 2006, the respondent's name appears in the register for that day that his check roll No. 3533 and that he was on duty that day. He told the court that the respondent was a collecting worker, he was collecting tea from the trough for processing and that he worked full day.

26. DW1 also testified that he did not receive a report of any injuries of the respondent that day and the plaintiff could not have been treated of injuries at the company dispensary without his knowledge. He produced a copy of the check roll register in evidence. On cross-examination DW1 confirmed that the plaintiff was an employee of the defendant company and he was on duty on that material day. He testified that his supervisor that day was Dickson Ndarira. He told the court that he did not have a list of injured workers in court but the same was in his office and that he is the one who kept the Rochell which is not accessible to other employees.

27. DW2 **Daudi Kipchirchir Koech** told the court that he was a clinical officer at Kipkebe Limited where he treated employees and kept the O.P.D. register and treatment cards. He testified that in the O.P.D. register he entered the records of patients seen on that day and it was not possible to treat patients

and fail to record their details in the register. He produced his register for 12th February, 2006 which he says showed that the respondent was not treated at the clinic that day but he treated 7 patients. He produced a copy of the O.P.D. register DEB 2.

28. On cross-examination he testified that he was not on duty on 12th August, 2006 but there was a nurse who attended to the patients that day. The defence closed its case and parties thereafter filed written submission and judgment was read on the 15th November, 2011.

29. On the issue on liability the learned trial magistrate addressed himself as follows **"that it was not clear in what circumstances the wood failed to be thrown on the trailer but at the plaintiff"**. He (trial magistrate) asked himself whether the respondent was on the path of the wood as it was being thrown, which was not clear and whether the respondent could have done something to avoid the injury. He deemed that a little thoughtfulness and care on the part of the respondent would have resulted in the injury being avoided. He stated in his judgment that a helmet would have avoided the injury but much more the respondent's vigilance would have avoided the incident that led to the injury. After making the above considerations he apportioned liability at 60:40 in favour of the plaintiff.

30. I do appreciate the reasoning by the trial magistrate. I believe the respondent should have been a little bit more vigilant but it would have even been more appropriate if the respondent and others were given helmets to wear. I believe the helmet could either have stopped the wood from hitting the Respondent or if it hit him, the helmet would have protected his head and eye. I am not saying that the helmet is 100% safe but it could have protected the plaintiff to some considerable extent.

31. In my considered opinion and from all the above, the Respondent did prove that his injury was caused by an event which was reasonably foreseeable and which could have been prevented by taking reasonable precaution. In **Mumias Sugar Co. Ltd –vs- George Mulunda Maende (Kakamega) Civil Appeal No. 20 Of 2001** the High court expressed itself in the following manner:-

> **"The Respondent was cutting cane with a panga. He had the skill to do so and had cut cane for four(4) years without gloves and without any accident. It is patent that the absence of gloves did not cause the accident. The absence of gloves may have exacerbated the injury as the panga hit the hand directly".**

32. I am in full agreement with the above reasoning but do hold that in the circumstances herein the respondent was working for the first time in that section therefore he may not have had that expertise. Having said that I find no good reason in law or in fact to interfere with the issue on liability.

33. Finally on the issue of quantum I find no reason in law or in fact for interfering with the award of Kshs.80,000/= as the same is not inordinately high or low. It has been proved that the Respondent was an employee of the appellant company. He was on duty on that fateful day and it was his first time to work in that particular section.

34. The company appellant had a duty to him considering that the was working in a new section. This duty was breached thus the injuries sustained by him which have been proved by Dr. Zoga (PW2). The clinical officer (DW2) did not have a chance to examine the respondent on that fateful day as admittedly he was not on duty.

35. I find that the appeal herein lacks merit and the same is dismissed with costs to the respondent.

Dated and delivered at Kisii this 23rd day of October, 2014

R.N. SITATI

JUDGE.

In the presence of:-

Mr. Soire h/b for O.M. Otieno for Appellant.

Mr. Nyangosi (present) for Respondent

Mr. Bibu - Court Assistant