REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 14 OF 2013

EASTERN PRODUCE (K) LIMITED……..…..……..….APPELLANT

VERSUS

ALLAN OKISAI WASIKE……..…..…….……RESPONDENT

(Being an appeal from the original judgment of B. Mosiria, Principal Magistrate in Kapsabet CMCC No. 220 of 2011 delivered on 18th January 2013)

JUDGMENT

1. The appellant is aggrieved by the judgment and decree in the Principal Magistrates Court dated 18th January 2013. The appellant was the defendant in the lower court. The plaintiff had filed a suit claiming special and general damages. The plaintiff was employed by the defendant to pick tea. He had been so employed for ten years. He testified that on 5th September 2011, his supervisor allocated him duties to cut some trees. He was given a *panga* for that purpose. It was the very first time he was undertaking the task. He testified that while cutting a tree, the handle of the *panga* came off. The *panga* cut his left index finger. He blamed the appellant for negligence. The appellant denied the claim.

2. The lower court found that the appellant was 80% liable for the injuries while the respondent was liable at 20%. The learned trial Magistrate assessed general damages at Kshs 200,000 and special damages at Kshs 1,500. The net award was thus Kshs 161,200 or thereabouts. The learned trial Magistrate also awarded the appellant costs and interest.

3. The appellant was dissatisfied with the entire decision. He has lodged a memorandum of appeal dated 12th February 2013. He has pleaded eight grounds. They can be condensed into six: First, that the respondent did not prove his case on a balance of probabilities; secondly, that the learned trial Magistrate exaggerated the degree of injuries; thirdly, that the trial court erred by finding the respondent guilty of contributory negligence; fourthly, that the award of damages was too high; fifthly, that the trial court failed to consider that the defence of the respondent was uncontroverted; and, lastly that the impugned decision was founded on wrong principles.

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 written submissions by learned

counsel for both parties.

5. It is common ground that the respondent was employed by the appellant. On the material day he was assigned new duties of cutting trees using a *panga*. The *panga* was supplied by the respondent. The respondent testified that the handle came off; he was hit by the *panga* which cut his left index finger. There is no dispute that the finger was amputated. The respondent was first treated at the appellant's dispensary.

6. I have studied the *particulars* of negligence pleaded in the plaint. It was claimed that the employer failed to provide a safe working system or environment. The plaintiff blamed the employer for failing to provide "gloves, apparel, gumboots, masks, or goggles". He pleaded that he was given a "defective" *panga*; and that he was neither warned of the dangers nor were any measures taken by the employer to prevent the injuries. He also blamed his employer for assigning him new duties or failing to supervise him.

7. The learned trial Magistrate after considering the evidence held as follows-

> *"I do find the defendant having given its worker a tool which they did not verify to be in good condition in view of claim by plaintiff, was in breach of their statutory duty of care, the defendant had a duty of care to ensure facilities used by its workers do not pose any threat to them……further the plaintiff said he was not provided with protective apparel like gloves. The supervisor (DW1) said……he never provided such to the plaintiff. It was the first time the plaintiff did that work its [sic] possible they hadn't supplied him with gloves which would have helped prevent and/ or minimize injuries"*

8. Regarding contributory negligence, the trial court found as follows-

> *"the evidence adduced is overwhelming that the defendant is liable to a great extent, without prejudice to the foregoing, I do find that since the panga that was used by the plaintiff was in his control, it may have been faulty, but he had to be more cautious and careful in using the panga knowing it was a dangerous tool. I will also hold the plaintiff liable….the plaintiff will shoulder 20% [liability]"*

9. From the evidence, the appellant had been employed to pick tea for nearly ten years. Although he was assigned duties to cut trees for the very first time on the fateful day, the instrument of a *panga* was a simple tool that did not call for any specialized training or supervision. As the learned trial Magistrate found, since the *panga* was being used by the plaintiff and entirely in in his control, he knew it was a dangerous tool.

10. The only fault one can assign to the employer is that the handle of the *panga* was defective. It is that fault that partially led to the injury. In *Wilson Musingi v Sasini Tea & Coffee Limited*, Kericho, High Court Civil Appeal 15 of 2003 [2006] eKLR, the employer had supplied the employee with a slasher in good condition. The court found that the company was not liable for the injuries to the employee who was using the implement. See also *Mumias Sugar Company Ltd v Samson Muyinda*, High Court, Kakamega Civil Appeal 58 of 2000 (unreported). But in the present case, the faulty *panga* alone was not to blame; the plaintiff knew about the inherent dangers; and, he was in full control of the implement. I find that the learned trial Magistrate erred in apportioning *greater* liability to the employer.

11. There was an implied term of the contract that the respondent took the risks *incidental* to his duties. He was aware of the dangers of using a sharp *panga*. It was then the respondent's primary duty to keep a safe look out. I have taken into consideration that this was *not* his ordinary work. But like I said, a *panga* is an ordinary farm implement that called for no special training or supervision by the employer. True, the employer had not supplied him with gloves, gumboots, goggles and such like apparel. But I am at a loss how they would have mitigated the impact of a sharp *panga* on a finger. Considering the handle of the *panga* came off, the gloves may perhaps have afforded a better grip.

But that is a theory not borne out clearly by the evidence. I thus say so *obiter*.

12. The duty of the employer to ensure the safety of an employee is not *absolute*; it is one of *reasonable care* against a foreseeable risk or one that can be avoided by taking reasonable measures or precautions. It would be unreasonable to expect an employer to be his employee's insurer round the clock. See *Halsbury's Laws of England* 4th edition volume 16 paragraph 562, *Mwanyule v Said* [2004] KLR 1, *Arkay Industries Ltd v Amani* [1990] KLR 309, *Eldoret Steel Mills Limited v Moenga Obino*, High Court, Eldoret Civil Appeal 3 of 2011 [2014] eKLR.

13. From the evidence, there was no basis for blaming the employer *more* than the employee. I would apportion liability equally in the circumstances. 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, *Statpack Industries v James Mbithi Munyao*, High Court Nairobi, Civil Appeal 152 of 2003 [2005] eKLR, *Eldoret Steel Mills Limited v Moenga Obino*, High Court, Eldoret Civil Appeal 3 of 2011 [2014] eKLR. I will thus set aside the judgment on liability and order that both parties shall share liability at 50% each. That ground of appeal succeeds to that extent.

14. I will now turn to quantum of damages. The appellant contends that the award of Kshs 200,000 as general damages was too high. It proposes a sum of Kshs 30,000 as being more appropriate for the injuries. As a general rule, an appellate court will not interfere with quantum of damages unless the award is so high or inordinately low or founded on wrong principles. See *Butt v Khan* [1982-88] KAR 1, *Arkay Industries Ltd v Amani* [1990] KLR 309, *Karanja v Malele* [1983] KLR 42, *Kemfro Africa Limited & another v Lubia & another* [1987] KLR 30, *Akamba Public Road Services Ltd v Omambia* Court of appeal, Kisumu, Civil Appeal 89 of 2010 [2013] eKLR.

15. From the medical report of Dr. Aluda dated 9th September 2011, the plaintiff suffered a traumatic amputation of the left index finger and severe pains from the injury. He opined that the loss of the distal phalanx will "remain a permanent feature and disability''. The injuries were thus severe. Considering the nature of employment of the appellant as a general or manual worker, they have obvious corollaries.

16. Granted the evidence, I cannot say that the award of general damages was too high or inordinately low in the circumstances. I would also not say the award was arbitrary. The authorities cited by the appellant before me relate to soft tissue injuries or less severe injuries. For example, in the case of *Peter Kahugu & another v Ongaro*, High Court, Nairobi, Civil Appeal 676 of 2000 [2004] eKLR, the plaintiff suffered soft tissue injuries. An award of Kshs 80,000 was granted. In *Sokoro Saw Mills Limited v Grace Nduta Ndungu* High Court, Nakuru, Civil Appeal 99 of 2000 [2004] eKLR the court reduced the general damages for soft tissue injuries to Kshs 30,000. That is clearly not the case here.

17. The award of damages is at the discretion of the trial court. Like I have stated, I can only interfere with it if the lower court applied the *wrong principles* and arrived at an unjust decision; or the award is manifestly high or inordinately low. See *Butt v Khan* [1982-88] KAR 1, *Arkay Industries Ltd v Amani* [1990] KLR 309, *Kemfro Africa Limited & another v Lubia & another* [1987] KLR 30 *Beauty Line Ltd v David Njuguna*, High Court, Nakuru, Civil Appeal 48 of 2005 [2012] eKLR. I am satisfied that the respondent incurred special damages of Kshs. 1,500 for the medical report. They were pleaded in the plaint and strictly proved. I accordingly uphold the findings on quantum of general and special damages.

18. In the result, this appeal succeeds only on the ground of apportionment of liability. The award of general and special damages in the total sum of Kshs 201,500 is upheld. As the respondent was 50% liable for the accident, the appellant shall only pay Kshs. 100,750 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 18th day of November 2014.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:-

Mr. Bett for the appellant instructed by Kibichiy & Company Advocates.

Mr. Aseso for Mr. Chanzu for the respondent instructed by Z.K. Yego & Company Advocates.

Mr. J. Kemboi, Court clerk.

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