



IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 92 OF 2013

HARON KIPCHUMBA CHERON.....APPELLANT

VERSUS

EASTERN PRODUCE (K) LIMITED.....RESPONDENT

(Being an appeal from the original judgment of R. Koech, Senior Resident Magistrate in Kapsabet CMCC No. 220 of 2011 delivered on 18th June 2013)

JUDGMENT

1. The appellant is aggrieved by the judgment and decree in the Senior Resident Magistrates Court dated 18th June 2013. The appellant was the plaintiff in the lower court. He had filed a suit claiming special and general damages. He testified that on 11th May 2010, while working for the respondent, his overalls were caught by the rollers of a cutting, tearing and culling machine known generally as a *CTC machine*; his right hand was trapped by the rollers; and, that as a result he suffered severe injuries to the limb. He blamed the appellant for negligence.
2. The lower court found that the appellant was 30% liable for the injuries while the respondent was liable at 70%. The learned trial Magistrate then assessed general damages at Kshs 350,000, special damages at Kshs 1,500. He awarded the appellant costs and interest.
3. The appellant was dissatisfied with the findings on liability and quantum of damages. He has lodged a memorandum of appeal dated 15th July 2013. He has pleaded three grounds: First, that the trial court erred by finding him guilty of contributory negligence; secondly, that the award of damages was inordinately low; 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 appellant was employed by the respondent. He was assigned duties of *sweeping* tea leaves falling off from the *CTC machine*. He was provided with an overall, ear plugs, gumboots, gloves and a broom. On the material day, the appellant was sweeping tea leaves from beneath the machine. The machine was of course running. His overalls were caught up by the conveyor belt which pulled his right hand into the machine causing the injuries. He blamed his employer for failing to install protective guard rails around the machine or providing any *training* to the appellant. In a synopsis, he was pleading that the employer had failed to provide a safe working system or environment.
6. From that evidence, the appellant was a general worker. He was not employed to operate or handle

- the machine. That was *not* his work. His duties were limited to sweeping tea leaves spilling over from the machine onto the floor. He had done that work for a long period of time. In cross examination he conceded that he had done those tasks for well over a year. It was not the kind of work that required special training from the employer. From the evidence, the appellant admitted he had gone through an induction course on the *CTC machine* pointing out the dangers of working near the unit. He had executed a document and a manual confirming that.
7. As the work of the plaintiff entailed sweeping around and beneath the machine, there were inherent dangers from its moving parts. There is a sense then in which the employer could have secured the rotating parts with some guard railing. There was an implied term of the contract that the appellant took the risks *incidental* to his contract. He was aware of the dangers of working in close proximity to the rotating parts. It was then the appellant's primary duty to keep a safe look out.
 8. 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 (unreported).
 9. The appellant had been supplied with an overall, gloves and a broom. He had undergone an induction course on the machine. Granted those circumstances, the employer had taken *reasonable* precautions to provide a safe working environment. True, he could have done a little more. An obvious intervention would have been to secure the rotating parts with some protective guard rails. There was no evidence that that could not be done on the machine or that such additions would compromise its operations. The learned trial magistrate correctly concluded as follows-

"I do find that both the plaintiff and defendant are to blame for the accident..the defendant failed to install guard rails to prevent contact between the CTC machine and those using it. The plaintiff also failed to take caution while sweeping beneath the CTC machine. I will apportion liability at the ratio of 70:30 in favour of the plaintiff"

10. From the evidence, there was no basis for blaming the employer *more* than the employee. I would have apportioned 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. But there is no cross- appeal on *liability*. The appellant only contends that he should not have been blamed *at all* for the accident. I will thus not substitute my discretion with that of the learned trial Magistrate. In the end, the findings of liability by the trial Magistrate, and the apportionment thereof are upheld. That ground of appeal collapses.
11. I will now turn to quantum of damages. The appellant contends that the award of Kshs 350,000 as general damages was too low. He proposes a sum of Kshs 600,000 as 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, *Akamba Public Road Services Ltd v Omambia* Court of appeal, Kisumu, Civil Appeal 89 of 2010 [2013] eKLR.
12. From the medical report of Dr. Aluda dated 13th May 2011, the plaintiff suffered a fracture on the right radius distal third; double fractures of the right ulna; and, a fracture of the right olecranon of the right ulna at the elbow joint. There were also soft tissue injuries. Initially, some plates were fixed to deal with the fractures. They were later replaced with pins and screws after an open reduction. That evidence is uncontroverted. The injuries were thus severe. Considering the nature of employment of the appellant as a general or manual worker, they had obvious corollaries. The learned trial magistrate however considered that there was no permanent disability. After considering a number of authorities, he awarded a sum of Kshs 350,000.
13. 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 more severe injuries. For example, in the case

of *Kiminza v Baggies Ltd and another*, High Court, Machakos, Civil case 129 of 2000 [2004] eKLR, the plaintiff was disabled by the accident. It was also telling from the costs of his treatment of running to over Kshs 140,000. The same can be said of the circumstances in *Anthony Maina v Samuel Njenga* [2006] eKLR.

14. The award of damages is at the discretion of the trial court. 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 *Beauty Line Ltd v David Njuguna*, High Court, Nakuru, Civil Appeal 48 of 2005 [2012] eKLR. I am satisfied the respondent incurred special damages of Kshs. 1,500 for the medical report. They were pleaded in the plaint and strictly proved.
15. In the result, this appeal fails in its entirety. It is dismissed. Granted my views on liability in this matter; the circumstances in which the appellant finds himself in; and, in the interests of justice, each party shall bear its own costs of this appeal.

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:-