REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO.16 OF 2011

KENYA TEA PACKERS LIMITED.....APPELLANT

VERSUS

MUSA MAKAI MULOCHI.....RESPONDENT

(An Appeal from the Judgment/Decree of Hon. W. N. Njage Senior Resident Magistrate, in Eldoret C.M.C.C. No.1061 of 2003 dated 22nd February, 2007)

JUDGMENT

The respondent was electrocuted whilst painting the appellant's go-down. He filed suit for damages for injuries sustained and was awarded the sum of Kshs.300,000/= as general damages.

The appellant being dissatisfied with the decision of the Hon. W. N. Njage, Principal Magistrate, Eldoret, preferred this appeal and listed six (6) grounds of appeal in its memorandum of appeal. The grounds of appeal are as listed hereunder:

1. That the learned trial magistrate erred in law and in fact in holding the appellant liable without any and/or any sufficient evidence in that regard having been adduced.
2. That the learned trial magistrate erred in law and in fact in holding the appellant liable in negligence and/or bench of statutory duty and/or breach of contract without evidence in that regard.
3. That the learned trial magistrate erred in law and in fact in failing to hold that the claim against the appellant was not proved as required under **Sections 107, 108** and **109** of the **Evidence Act Cap 80.**
4. That the learned trial magistrate erred in law and in fact in failing to consider and determine all the issues raised in the pleadings, evidence and submissions contrary to the provisions of **order XX Rule 4** of the **Civil Procedure Rules**
5. That the learned trial magistrate erred in failing to dismiss the respondent's claim.
6. That the learned trial magistrate erred in awarding damages to the respondent, which in any event were manifestly excessive as to amount to an erroneous estimate of the loss allegedly suffered by the respondent.

At the hearing of the appeal, the parties opted to rely on written submissions. Upon reading the written submissions, this court finds three (3) issues for determination:

i) was the respondent an employee of the appellant

ii) liability

iii) quantum of damages

This court being the first appellate court, it is duty bound to re-assess and re-evaluate the evidence and arrive at an independent conclusion. Refer to the case of **Gabriel Njoroge** V. **Republic** (1982 – 1988) 1KAR 1134.

It was the appellant's submissions that the trial magistrate erred in finding that the respondent was an employee of the appellant. That no evidence was adduced by the respondent that the appellant was contractually obligated to provide the respondent with protective or working apparel.

The appellant contends that the trial magistrate also misdirected himself in holding the appellant liable for negligence in the absence of evidence. He attributed the negligence to the respondent and cited the doctrine of "volenti non fiti injuria" as the respondent failed to pay due care and attention to his work and caused water paint to infiltrate into the electric cables thereby resulting in his electrocution. The appellant submits that the respondent contributed to the circumstances leading to his injuries therefore should be held 70% liable.

On the award, the appellant submitted that the sum of Kshs.300,000/= was manifestly excessive and that the trial magistrate's decision was an irregular and an erroneous estimate. The appellant urged the court to allow the appeal and that the judgment entered be set aside.

The appeal was opposed and the respondent contended that at all material times, he was employed by the appellant as a painter. That he had not been contracted by the independent contractor namely, ANKIZE GENERAL CONTRACTOR. He stated in evidence that he called in at the premises of the appellant on that material date, enquired if there was work and was referred to the appellant's manager. It was the respondent's evidence that he was a casual labourer and had been contracted on that material date by the appellant at a sum of Kshs.250/= to 300/= per day. That he did not know of any other contractor. That at all material times, it was the appellant's manager, Mr. Bii who was his supervisor and assigned him duties.

It was the respondent's case that he was injured in the course of his duty and that he had established his claim against the appellant on a balance of probabilities and that the trial magistrate properly found the appellant to be 100% liable. That in assessing the award, the respondent submits that the trial magistrate was guided by a comparable authority with comparable *in juries* and a comparable award and urged the court to uphold the trial court's decision and to dismiss the appeal with costs.

This court has re-assessed and re-evaluated the evidence on record.

On the issue of employment, this court has revisited the evidence of **PHILIP ROTICH BII (D.W.1)** who was the appellant's manager who testified and under cross-examination confirmed that there was no written agreement between the appellant and the so called Independent contractor.

D.W.1 further testified that on the date of the accident, he authorized a company vehicle to take the respondent to hospital and gave Kshs.5000/= towards payments of the bill.

The appellant's witness SAMMY CHERUIYOT RUTO (D.W.2) produced receipts in court that were payments to the independent contractor which receipts were dated 6/3/2003 and 30/4/2003 being payment for work done. Under cross-examination D.W.2 stated as follows:

> **".....I have produced no letter of contract between Ketepa and Ankize....."**

From the above evidence, the court notes that the receipts show that payments were made before the date of the accident. This court notes that the appellant took no steps to enjoin the independent contractor

to the suit nor did the appellant call the so called independent contractor to give evidence touching on the issue of employment, to clarify who was the employer of the respondent.

It is trite law that in evidence the onus of proof is upon the person who avers. Therefore, it was incumbent upon the appellant to adduce and produce evidence to support the existence of this independent contractor. The evidence produced by the appellant shows that the independent contractor had completed its work and had been paid on a date prior to the accident.

This court is satisfied that the respondent proved on a balance of probabilities that he was contracted by the appellant on that material date and assigned the duty of painting and was injured in the course of his duties. It was the respondent's evidence that the appellant failed to provide him with protective apparel in the form of gloves.

Having found that the respondent was an employee of the appellant, this court states that the appellant had a common law statutory duty of care and ought to have provided a safe working environment and a safe system of work. Refer to the case of **Clifford** V. **Charles & Sons Limited,** (1951) All E.R. 72.

The appellant did not offer any evidence to controvert the evidence of the respondent that it had failed to provide any protective gear in the form of gloves to the respondent. It is not disputed that there were electric conduit pipes on the appellants gate and that the respondent was given water paint to carry out the paint job.

This court opines that the risk was foreseeable and had the appellant provided the protective gear, the injuries would have been minimised or not occurred at all. This court also notes that the respondent proceeded to work at the appellant's premises notwithstanding the fact that he did not have the protective gear and finds that the doctrine "v*olenti non fiti injuria"* relied upon by the appellant to be applicable.

For the reasons stated above, this court finds reasons to interfere with the trial magistrate's finding on liability. The appeal on liability is allowed as it is found to have merit and this court hereby apportions liability on a ratio on 80% to 20%, with the appellant bearing the larger portion.

On the issue of quantum of damages, this court is guided by the case of **Bhutt** V. **Khan**, KLR 349 and 356 where the principles are laid down to be taken into consideration by an appellant court as to whether or not to disturb award.

The court must be satisfied that the trial court took into account irrelevant factors or omitted a relevant factor or that the amount awarded was inordinately high or inordinately low to render it an erroneous estimate.

The respondent pleaded in his plaint that he sustained the following injuries:

i) dislocation of the left elbow resulting into permanent deformity;

ii) cut wound on the left eye – supra orbital region;

iii) swollen and tender left elbow.

In his evidence, the respondent testified to having sustained the above injuries after he fell off the ladder and was electrocuted.

The respondent was examined by Dr. Aluda and the medical report was tendered into evidence [Pexb. 2 (B)] corroborates the evidence of the respondent on his injuries. This court finds that the respondent proved the injuries sustained.

In awarding the sum of Kshs.300,000/=, the trial court was guided by the authority cited by the

respondent's counsel **Joseph Ndinguri Mwita** V. **Justus M. Ngigi,** HCCC No.1450 of 1991, where the claimant was awarded Kshs.300,000/=.

After perusal of the above authority, this court finds that the injuries sustained by the respondent are comparable and finds that the award made by the trial court was not manifestly excessive nor was it an erroneous estimate. The court finds no merit on this ground of appeal and dismisses the appeal on quantum of damages.

In conclusion, this court finds the appeal partially successful and makes the following orders:

1. Judgment on liability is hereby set aside and liability is apportioned on a ratio of 80%:20%. the appellant to bear the larger portion.
2. The appeal on quantum is hereby disallowed.
3. Interest shall be applied thereon at court rates from the date of judgment for the general damages and from the date of filing suit for special damages.
4. The appellant shall have half the costs of the appeal.

It is so ordered.

Dated and Signed this ..... day of....., 2013.

A. MSHILA

JUDGE

Dated, Signed and Delivered at Eldoret this 18th day of June, 2013.

JUDGE