REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 198 OF 2009

EASTERN PRODUCE (K) LTD ..... APPELLANT

VERSUS

STANLEY KIPRONO TARUS …..... RESPONDENT

(Being an appeal from the Judgment of the Hon. Resident Magistrate G. O. Mutiso in Kapsabet Principal Magistrate's Civil Case No. 111 of 2009 delivered on 12th November, 2009)

JUDGMENT

The Respondent was the Plaintiff in the suit before the trial court. He sued the Appellant for recovery of damages for injuries sustained in the course of his employment to the Defendant Company. On the material date of the accident, that is, on 2nd September, 2008 he was loading truck Registration number KRC 581/ZB 1119. He then made a U-turn to unload the truck, but the truck drove back, the rear wheels stepping on his right foot tearing two middle toes.

The Respondent blamed the accident on the sole negligent breach of duty and/or contract of the Appellant. In particular he averred that the Appellant failed to provide him with protective gear that would have prevented the injury, failed to provide a proper system of working so as to prevent the accident, failed to warn the Respondent of the impeding danger or take any measures so as to prevent the Respondent from sustaining the injuries and for instructing and compelling the Respondent to continue working with a faulty machine.

The Respondent averred that as a result of such negligence he sustained the following injuries:-

(a) Cut wound on the right second toe which was tender.

(b) A cut wound on the right middle toe which was tender.

He sought the following reliefs:-

(a) Special damages of Ksh. 1,500/=.

(b) General damages to be assessed by this Honourable Court.

(c) Cost of the suit.

(d) Any other relief the court may deem fit and just to grant.

In its Judgment the trial court apportioned liability at the ratio of 20:80% in favour of the Respondent. He noted that the Appellant had to shoulder the highest liability because DW1, the Supervisor at work allocated the work to the Respondent to load the truck which work he knew could only be done by a minimum of three persons. He ordered that the Plaintiff shoulder the 20% liability because he ought to have declined to do work which he knew was too heavy for him.

General damages of Ksh. 160,000/- were awarded less the 20% contributory negligence. A further sum of Ksh. 1,500/- as special damages was also awarded to the Respondent.

It is this Judgment that the Appellant was dissatisfied with. Vide a Memorandum of Appeal filed on 14th June, 2012, it has listed five (5) grounds of appeal namely:-

1. The learned trial Magistrate erred by arriving at a finding on liability, which was not supported by evidence.

2. The learned trial Magistrate erred in law and fact in basing his finding on irrelevant matters.

3. The Respondent's case was not proved on a balance of probability as is required by law.

4. The learned trial Magistrate's award of damages was inordinately too high and manifestly excessive for the injuries allegedly suffered by the Plaintiff.

5. The learned trial Magistrate erred on all points of fact and law in as far as both liability and award of damages is concerned.

In view of the grounds of appeal listed above, I narrow down the issues of determination to the following:-

- Whether the trial court apportioned liability appropriately.

- Whether the Plaintiff's case was proved on a balance of probabilities.

- Whether the damages awarded were excessive in the circumstances.

It is now settled principle that the duty of the first appellate court is to reconsider the evidence adduced before the trial court, re-evaluate it and come up with its own findings. Further an appellate court would not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on misapprehension of the evidence or on ground that the trial court acted on wrong principles in reaching at its findings.

See the case of **SUMARIA AND ANOTHER -VS- ALLIED INDUSTRIAL LIMITED (2007) 2 KLR**:-

"This being a first appeal we are obliged to consider the evidence, revaluate it and make our own conclusions, but as we do so it must be remembered that we have neither seen nor heard the witnesses-see Peters vs Sunday Post Ltd[1958]EA 424, Seller & Another vs Associated Motor Board Co Ltd & Others [1968]EA 123 and Ephantus Mwangi & Another vs Duncan Mwangi Wambugu [1982] 1 KAR 278. In the last case Hancox JA (as he then was) put it thus at pg 292 of the Report:- 'A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principle in reaching the finding he did'. The first holding in that case is also relevant namely that:- 'The Court of Appeal would hesitate before reversing the decision of a trial judge on his findings of fact and would only do so if (a) it appears that he failed to take account of particular circumstances or probabilities material to an estimate of the evidence or (b) that his impression based on the demeanour of

material witness was inconsistent with evidence in the case generally"

In ***Seller & Another vs. Associated Motor Boat Company Limited & Others [1968]EA, 123 at pg 126,*** Sir Clement De Lestang VP, opined as follows;

"An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound to follow the trial judge's finding of fact if it appears either that he clearly failed on some point to take account of particulars circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally. (Abdul Hameed Saif vs. Ali Mohamed Sholani (1955) 22 EACA 270)".

In **JABANE VS. OLIENJA [1986]KLR 661, AT PG 664,** Hancox JA noted as follows;

"I accept this proposition, so far as it goes, and this court does have the power to examine and re-evaluate the evidence and the findings of facts of the trial court in order to determine whether the conclusion reached on the evidence should stand – see Peters vs. Sunday Post [1958]EA 424. More recently, this court has held that it will not likely differ from the findings of facts of a trial judge who had the benefits of seeing and hearing all the witnesses, and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did- see in particular Ephantus Mwangi vs. Duncan Mwangi Wambugu (1982-88) 1KAR 278 and Mwana Sokoni vs. Kenya Bus Services (1982-88) 1 KAR 870."

Although the Appellant's counsel has submitted on both liability and quantum, the Respondent's counsel has only submitted on quantum, stating that parties had agreed that appeal be as against the quantum alone. My attention has been drawn to the proceedings of 6th November, 2012. It is on this date that Mr. Kibichiy, counsel for the Appellant informed court that appeal would only be on quantum. I therefore agree with the Respondent's counsel that submissions should have been filed on quantum alone. I will therefore address myself only on the issue of quantum.

In this respect, damages awardable must be within the limits set out in precedents and must not be inordinately high or low. An appellate would interfere with an award of damages based on the following grounds:-

(a) When the award (of general damages) is inordinately so high.

(b) When the award (of general damages) is inordinately so low.

(c) When the estimate is erroneous.

(d) When the award (of general damages) is based on wrong factor.

(e) When the award (of general damages) is founded on wrong principles of law.

See case of **OSSUMAN DHAHIR MOHAMED & ANOTHER -VS- SALURO BUNDIT MUHUMED,** the learned Judges Omollo, Shah & Pall, JJA while relying on **KIGA RAGARI -VS- AYA (1982 - 88) 1 KAR 768** and **CHEGE -VS- VESTERS (1982 - 88) 1 KAR, 1021**:-

"**..... damages must be within limits set out by decided cases and also within limits that the Kenyan economy can afford. Large awards are inevitably passed on to the members**

of the public, the vast majority of whom cannot afford the burden, in the form of increased costs for insurance cover or increased fees ....."

The case of **KIVATI -VS- COASTAL BOTTLERS LTD CIVIL APPEAL NO. 69 OF 1984,** the Court of Appeal laid down the principles which an appellate court would consider in interfering with an award of general damages as follows:-

"The Court of Appeal should only disturb an award of damages when the trial Judge has taken into account a factor he ought not to have or failed to take into account something he ought to have or if the award is so high or so low that it amounts to an erroneous estimate."

In the instant case, the Respondent sustained the following injuries:-

(a) A cut wound on the right second toe which was tender.

(b) A cut wound on the right middle toe which was tender.

PW1, the Respondent herein produced an outpatient treatment card from Nandi Hills District Hospital as P. Exhibit 4. A medical report dated 4th July, 2009 prepared by Doctor S. I. Aluda was produced by the doctor (PW2) as P. Exh. 6 (a). The latter shows that at the time of examination the Respondent complained of occasional pains in the injured regions and had scars around the same area. He noted that the injuries had healed although the scars would remain permanent.

I would wish to point out that I was not able to locate the exhibits in the compiled Record of Appeal but in original lower court record.

Only the Respondent's submissions are contained in the Record of Appeal. The same were filed before the trial court on 22nd October, 2009. Counsel for the Respondent submitted on an award of Ksh. 350,000/=. He relied on the case of **NYERI HCCC. NO. 320 OF 1998 CATHERINE WANJIRU KINGORI & 3 OTHERS -VS- GIBSON THEURI GICHUBI**. Judgment in this case was delivered on 1st July, 2005 and the Plaintiffs were awarded Ksh. 300,000/=, Ksh. 100,000/=, Ksh. 350,000/= and Ksh. 100,000/= respectively. The first Plaintiff had suffered injuries to the left ankle, legs and chest, the 2nd Plaintiff injury to the back, the third Plaintiff soft tissue injuries on the left elbow joint and both ankles while the fourth plaintiff suffered injury on the neck and had headache.

From the lower court record, the Appellant had submitted on an award of Ksh. 20,000/= and its counsel had cited the following case law:-

1. **SOCFINAF COMPANY -VS- JOSHUA NGUGI MWAURA NAIROBI HCCA. NO. 742 OF 2003** in which the Plaintiff was awarded Ksh. 20,000/= for soft tissue injuries, being blunt injury to the right forearm.

2. **HANNAH NJERU WANJAU -VS- THE DRIVER OF KWR 893 & ANOTHER NAIROBI HCCC. NO. 1273 OF 1989**

The Plaintiff suffered a cut across her forehead and was admitted to hospital for 4-5 days. Unfortunately in this case, the suit was dismissed as the Plaintiff did not plead particulars of injuries. It is not therefore true that the Plaintiff was awarded Ksh. 20,000/= as general damages.

None of the above authorities is quite comparable with injuries the Respondent suffered. They were soft tissue in nature. He was not admitted in hospital but instead was treated and discharged. He suffered no permanent disability. It must however be noted that as at 4th July, 2009 when he went on an examination, he was still experiencing some pain. To this extent, the

learned Magistrate in his Judgment noted:-

"**Though the injuries were soft tissue in nature, the Plaintiff must have endured a lot of pain and suffering over a prolonged period. For these reasons I assess the general damages for pain suffering at Ksh. 160,000/=."**

It is my view in the circumstances that the award of general damages made was not excessive or inordinately too high. It was not based on the wrong principles of law but on evidence on record. I would have no reason to disturb it in effect. Documentary evidence was also produced in prove of the special damages awarded.

In the result this appeal is dismissed with costs. Damages remain as awarded less 20% contributory negligence.

DATED and **DELIVERED** at **ELDORET** this 8th day of August, 2013.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:-

Mr. Langat for the Appellant

Mr. Kipnyekwei for the Respondent