REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL 95 OF 2010

EASTERN PRODUCE KENYA LTD…….....…….APPELLANT

VERSUS

JAMES MUSALE……RESPONDENT

JUDGMENT

This is an appeal arising from the Judgment and Decree of Hon. J Njoroge (SRN) KAPSABET PMCC NO. 272 OF 2005 on the 18th May, 2010.

MR. TERIGIN holding brief for MR. KIBICHY appeared for the Appellant.

MR. OKANGI appeared for the Respondent. Both Counsels opted to put in written submissions.

FACTS.

The facts of this case are that on the 12th November, 2004 the Respondent was lawfully on duty working in the Appellant's premises when a log of wood hit him as a result of which he sustained severe injuries and suffered loss and damage and claimed damages for the following injuries.

(i) The right thigh was swollen and tender.

(ii) Blunt trauma to both tecticles which were tender.

The learned trial magistrate entered judgment for the Respondent and awarded the sum of Kshs 100,000/= as general damages and Kshs 1,500/= as special damages.

The Appellant being aggrieved filed the appeal here and listed the Grounds of Appeal as set out hereunder:

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 balance of probability as is required by law.

4) The Respondent's injuries on the basis of which assessment was made were not proved or verified as per onus on the part of the Plaintiff.

5) The Respondent's employment status with the Appellant was contested and was not proved during the trial.

6) The Learned trial magistrate's award of damages was inordinately too high and manifestly excessive for the injuries allegedly suffered by the Plaintiff.

7) The Learned trial magistrate erred on all points of fact and law in as far as both liability and award of damages is concerned.

The duty of this appellate court, this being a first appeal, is to re-evaluate and re-examine the evidence on record and come up with an independent conclusion. Refer to the case of **ARROW CAR LTD –VS- BIMOMO & 2 OTHERS C.A 344 OF 2004.**

This same authority lays down the principles as to when an appellate court may interfere with an award for damages as enunciated hereunder;

"…….it must be satisfied that either that the Judge, in assessing the damages took into account an irrelevant factor or left out of account a relevant one or that short of this the amount was so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages……"

After reading the written submissions of Counsel for the Appellant and after perusing he Record of Appeal, the court finds that the issues for determination relate to:

(a) Liability

(b) Quantum

Liability

The Appellant argues that the trial magistrate erred in law and fact in attributing liability to the Appellant whereas it was the actions or the mistake of the Respondents fellow employees that caused the Respondents injuries.

That it was not upon the Appellant to baby sit its employees or to be held responsible for the employees mistakes.

The Appellant contends that if the employees had been intent on what they were doing the accident would not have happened.

It was therefore wrong for the trial magistrate to hold the Appellant as 100% Liable.

The Respondent did not put in any written submissions in response to the Appellants appeal.

On this issue the court refers to the common law statutory duty of care that is expounded in the case of **CLIFFORD –VS- CHARLES & SONS LTD (1951) ALL E.R** where Lord Demming as he then was stated that;

"…….an employer is not merely required to provide a safe system of work but must ensure that the employees complied with that system of work……."

At the trial the Respondent gave evidence that was not rebutted by the Appellant as the Appellant did not call any defence witnesses.

The evidence of the Respondent was that the employees were not given any instructions on how to work.

The evidence also alludes for there being a supervisor in the vicinity as a report of the injury was made to the said supervisor.

This court finds that the nature of the work involved off loading logs from a trailer, and that the risk like the one that occurred was foreseeable.

It was the duty of the employer to provide a safe system of work. This was not discharged by the employer as the supervisor did not provide or instruct the employees on a system as to how the work was to be carried out thereby endangering the said employees in particular the Respondent.

True, protective clothing and gear would not have minimized the injuries but had a system of work been established by the supervisor, then maybe the accident would not have occurred.

For the reasons stated above I find that the trial magistrate did not err in finding the Appellant wholly to blame. I find no reasons to interfere with the trial magistrates finding on liability and apportionment, hereof.

Quantum:

The Appellant submits that the Respondent exaggerated his injuries. That the award made by the trial magistrate of Kshs 100,000/= for general damages was inordinately high and that the trial magistrate had not been guided by previous wards for similar injuries.

The Appellant proposed a sum of Kshs 20,000/= as being an adequate award and cited there (3) authorities in support of their proposal.

This court finds that it is not in dispute that the Respondent had soft tissue injuries.

I am satisfied that the trial magistrate made an award based on the injuries sustained and the evidence produced by the Respondent. This court is also satisfied that the award was not unreasonable and inordinately high and finds that the trial magistrate based the award on comparable awards made for soft tissue injuries.

The court therefore sees no need to interfere with the trial magistrates award as it was not misguided.

CONCLUSION:

The appeal is hereby disallowed. As the Respondent did not put in any written submissions to oppose the appeal, each party shall bear its/their own costs.

Dated and Delivered at Eldoret this 20th day of April 2012.

A.MSHILA
JUDGE

Coram: Before A. Mshila J

CC: Collins

Counsel for Appellant - Koech

Counsel for Respondent – Nyambegera

A.MSHILA
JUDGE