REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
[CORAM: AZANGALALA J.]
HCA NO. 64 OF 2007
BETWEEN
ELDORET STEEL MILLS LIMITED.....APPELLANT

AND

JEREMIAH NJUGUNA KARANJA.....RESPONDENT

[An appeal from the Judgment and decree of G.A. Mmasi SRM dated 5/6/2007 in Eldoret CMCC No. 808 of 2001]

JUDGMENT

The defendant, **Eldoret Steel Mills (K) Ltd** (hereinafter **"the appellant")** was sued by the plaintiff **Jeremiah Njuguna Karanja** (hereinafter **"the respondent")** for damages for injuries he sustained on or about 23rd November 2000 while engaged as a general worker by the appellant. He pleaded that on or about the said date in the course of or within the scope of his employment with the appellant, he was seriously injured when he was burnt on both feet due to the negligence of the appellant, it's servants and or agents.

In the particulars of negligence, the respondent alleged, among other things, that the appellant failed to take reasonable precautions for his safety and further failed to maintain its plant adequately. The respondent also pleaded that as a result of the appellant's said negligence, he sustained grade 4 burns to his left and right knee joints, bilateral burns to both legs and to the elbow joint.

The appellant filed a defence in which it denied liability alleging, *inter alia,* that the respondent was not it's employee and that no accident occurred on the said date. In the alternative, the appellant averred that if an accident did occur, then it was caused by the respondent's negligence particulars whereof it supplied. In the further alternative the appellant pleaded that in accepting employment, the respondent freely accepted to run the risk of foreseeable accident, harm connected with and incidental to such employment.

At the trial, the respondent testified and called one witness, **Dr. Solomon K. Sirma (P.W.2)** who treated the respondent and prepared a medical report of his injuries. His case was that on the material date, he was working for the appellant. The work involved getting iron bars from a roll mill to a cooling bans. On the said date, a hot metal bar came off the roll mill and hit him on the right leg and left hand. He reported the incident to a **Mr. Timona,** the appellant's Personnel Officer. He went to Moi Teaching and Referral Hospital where he was treated and discharged. He then had a medical report prepared for which he paid Kshs 1,500/=. He produced a receipt for Kshs 1,500/=.

He blamed the appellant for exposing him to a defective machine and for failing to provide him with gloves, boots, overalls and protective gear.

At the time of his testimony, he had healed but still experienced pain in the injured leg.

In Cross-examination, the respondent stated that the aforesaid metal came off from its channel and hit him. He then limped to the office of Timona who gave him first aid before he went to Moi Teaching and Referral Hospital where he was treated and discharged.

The appellant's case at the trial was presented through **Rafael Wanyonyi,** the Director/Manager of health records and information system at Moi Teaching and Referral Hospital and **Lolyd Timona Nganda**, the appellant's Personnel Officer. The latter acknowledged that the respondent was, at the material time, an employee of the appellant. He however denied that any accident occurred on 23rd November 2000 at the appellant's premises. He testified that whenever an accident occurred, the victim would go to him accompanied with his supervisor or his immediate colleague to report and treatment would be arranged. He produced copies of the appellant's register which did not record any accident involving the respondent on the said date. He further testified that on 9/5/2003, the appellant by letter of even date enquired from Moi Teaching and Referral Hospital whether the respondent had been treated there and the latter, in their letter dated 19th May 2003 replied that the name of the respondent did not appear in their records.

In the judgment delivered after the trial, the learned Senior Resident Magistrate concluded that the respondent was indeed injured in the course of his employment with the appellant on the material date and awarded him Kshs 1,500/= as special damages and Kshs 100,000/= as general damages for pain and suffering.

That decision has triggered this appeal by the defendant (now appellant). It has put forward three (3) grounds of appeal expressed as follows:-

1). That the learned trial magistrate erred in law and in fact in holding the defendant 100% liable and yet the defendant called witnesses and produced evidence in that regard.

2). That the learned trial Magistrate erred in law and in fact in ignoring the evidence on record and submissions of the appellant in his judgment without proper reason for so doing.

3). That the learned trial Magistrate erred in law and in fact in awarding damages to the respondent which were in any event not specifically proved and were excessive in the circumstances.

The appeal was canvassed before me on 18th January, 2011, by **Mr. Okoth,** learned counsel for the appellant and **Mr. Korir,** learned counsel for the respondent. **Mr. Okoth** submitted that the trial court's finding on liability was not supported by the evidence. In learned counsel's view, there was no basis in finding in favour of the respondent who relied on a forged document. He further contended that the precedents relied upon by the trial Magistrate in awarding general damages involved more serious injuries than those sustained by the respondent. Counsel further contended that the special damages awarded were not strictly proved.

In response, counsel for the respondent submitted that there was indeed adequate material placed before the trial Magistrate to enable her determine the issue of liability. With regard to quantum, counsel contended that the award made by the trial court was not excessive in view of the injuries sustained by the respondent.

I have considered the record, the grounds of appeal and the submissions of counsel. Having done so, I take the following view of the matter. This is a first appeal. The court should therefore subject the evidence which was adduced before the trial court to a fresh scrutiny and arrive at its own conclusion bearing in mind that it did not see or hear the witnesses testify. The court should also be slow to disturb findings of fact of the trial court. (See **Peter –vrs- Sunday Post Limited [1958] E.A 424).**

The court is duty bound to examine with care whether the findings on facts were not based on evidence adduced before the trial court or whether there was a misapprehension of the evidence or that the trial court acted on wrong principles in arriving at those findings of fact. In this case the learned trial

Magistrate said the following on liability:-

"The court upon considering the evidence adduced by the plaintiff and his witnesses [and] has found that the plaintiff was indeed working with the defendant company and on 23rd November 2000, he was on duty and he received injuries on duty"

Was that finding based on no evidence or on a misapprehension of the evidence? The respondent had, at the trial, testified that he was indeed on duty at the appellant's mills on the material date when he was hit by a hot metal bar on his right leg and left hand. The hot metal bar had come off its channel. The respondent had further told the court that the appellant's machine was defective. He further blamed the appellant for failing to furnish him with gloves, boots, overalls and protective gear. He further testified that after being injured, he reported to the appellant's personnel officer, **Timona,** who administered first aid before he went to Moi Teaching and Referral Hospital where he was treated and discharged.

The respondent's testimony on liability conflicted with that of **Lolyd Timona Nganda** who testified for the appellant as D.W.2. It should be recalled that the respondent had testified that he had reported to a **Timona** when he was injured and that he had received first aid from him. DW. 2 denied receiving the respondent's report. He infact produced copies of records which indicated that the respondent was not injured as he alleged.

The learned trial Magistrate preferred the version of the events of the material date as given by the respondent. Although she did not assign any reasons why she did so, her right to elect who to believe, cannot be faulted. She is the one who saw and heard them testify. She had an advantage which I do not have. In the premises, I cannot say that the learned trial Magistrate's finding on liability was not based on evidence or that she misapprehended the evidence which was adduced before her.

The learned trial Magistrate further believed that the respondent had been injured as he alleged. In her own words:-

"P.W.2, the doctor has confirmed the injuries were soft tissue injuries and the doctor found that the plaintiff suffered 4th degree burns."

The appellant's case, on the other hand, was that the medical evidence be rejected because the records of Moi Teaching and Referral Hospital did not show that the respondent had been treated at the facility as he had alleged. The appellant infact treated the medical documents relied upon by the respondent as forgeries. The learned trial Magistrate did not believe the appellant's witnesses. Once more she did not assign any reasons for so doing. But was her conclusion not based on evidence or was it based on a misapprehension of the evidence? The learned trial magistrate saw and heard **Dr. Solomon K. Sirma** (P.W.2) testify. The said doctor, *inter alia,* stated as follows:-

"In the year 2000, I was based at Moi Referral Hospital. I recall having treated Jeremiah Karanja on 23/11/2000. He came after sustaining burns on the left elbow joint, left knee, the left tibia and tibular (sic) .

On examination, the burns were grade four …. I prepared this treatment chit which I produce as exhibit 1. I then prepared this medical report on 11/7/2001 when I examined the patient and gave my opinion."

The learned trial Magistrate may not have analysed the evidence as she ought to have done but she was faced with the direct evidence of the doctor who testified before her that he had treated the respondent on the material date and made notes of that treatment. He had also subsequently prepared a medical report of the injuries sustained by the respondent. As against this direct evidence, the appellant argues that the letter denying that the respondent was treated be preferred. Yet in cross-examination of **Dr. Solomon K. Sigma,** it was never put to him that he indeed did not examine and treat the respondent as he had testified.

In the premises, I cannot say that the learned trial Magistrate believed the respondent without basis or that she misapprehended the evidence which was adduced before her.

With regard to quantum, the learned trial Magistrate considered the cases sited to her before making her award. She specifically mentioned the case of **Mary Muhoya –vrs- The Board of Governors – Erasui Girls Secondary School** which she found involved more severe burns.

The Principles upon which a court on appeal can interfere with the quantum of damages awarded by a trial court are well settled. The award must be manifestly excessive or so low as to suggest an erroneous estimate of the damages. The court on appeal may also disturb such an award if the trial court took into account an irrelevant factor or left out of account a relevant one as to do so would be to err in principle (see **Henry H. Ilanga –vrs- M. Manyoka [1961] E.A 705**. In this case, the learned trial Magistrate awarded, as general damages, for pain and suffering Kshs 100,000/= for 4th grade burns to the knee joint, left elbow and right lower leg. **Dr. Sirma** observed on examination, on 5th March, 2002, that the respondent still had pain in the right leg after standing for a long time. He was also unable to do hard work. That was nearly 1½ years after the accident. In view of those injuries and the resultant pain which persisted even after 1½ years, I do not find the award made by the learned trial Magistrate as so excessive as to suggest an erroneous estimate of the damages. I also do not detect consideration of an irrelevant factor or failure to consider a relevant fact. There was therefore no error of principle. I therefore find no basis to interfere with the said award.

With regard to special damages, the record shows that the respondent specifically pleaded Kshs 1,500/= being amount he paid for the said medical report**. Dr. Sirma** indeed testified that he charged the amount for the report prepared on the injuries sustained by the respondent. The respondent produced the receipt for Kshs 1,500/= as exhibit 3. In those premises, I find that the special damages were not only specifically pleaded but were also strictly proved.

In the end, I find that the learned trial Magistrate came to the correct decision on all issues laid before her and there are no grounds to fault her. This appeal is without merit and is dismissed in its entirety.

The respondent shall have the costs of the appeal. It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 15TH DAY OF FEBRUARY 2011.

F. AZANGALALA
JUDGE

Read in the absence of the parties as the date was taken in court.

F. AZANGALALA

JUDGE