REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 7 OF 2008

BETWEEN

RAIPLY WOODS (K) LIMITED.....APPELLANT

AND

PAUL AJOKO MISOLO.....RESPONDENT

(Being an appeal from the decision of the Senior Resident Magistrate Hon. G.A. M'masi dated 1st April, 2008

at Eldoret CMCC No. 219 of 2006)

JUDGMENT

Raiply Woods (K) Limited, the appellant, has appealed against the decision of **G. M'masi**, the Eldoret Senior Resident Magistrate, delivered on 20th December, 2007 whereby the Learned Senior Resident Magistrate awarded Kshs. 300,000/- general damages and Kshs. 1,500/- special damages to the Paul Ajoko Misolo the respondent, on 100% basis of liability for an industrial accident. The respondent was the plaintiff and had sued the appellant for the said damages arising from an accident which occurred on or about 1st May, 2003 at the appellant's factory. The respondent pleaded that on or about the said date, while carrying out his duties at the block board department, he sustained serious injuries to the right hand at the metacarpals of the small and middle fingers due to the negligence or carelessness of the appellant or its agents/servants/ employees.

In the particulars of negligence the respondent alleged, among other things, that the appellant had failed to provide a safe working system for him; that it had failed to provide adequate protective devices; that it had allowed the respondent to work on a defective machine and that it had failed to carry out regular checks and service of the machines upon which the respondent was working.

The appellant delivered a defence in which it, *inter alia*, denied the negligence alleged and in the alternative pleaded that the accident was caused and/or was substantially due to the respondent's negligence particulars whereof it pleaded. The appellant further pleaded, and without prejudice, that the respondent in accepting its employment, freely accepted to run the risks of accidental harm foreseeable, connected with and incidental to such employment.

At the trial, the respondent testified and called no other witness. He however produced two medical reports prepared by **Dr. Joseph Owuola and Dr. Gaya.** Also produced by consent were the treatment notes from Moi Teaching and Referral Hospital where the respondent was admitted. The respondent's case was that at the time of the accident, he was employed by the appellant. He recalled the 1st day of May, 2003 when he was on duty at the appellant's block board section of its factory in Eldoret. He changed a palate and placed it on its frame before putting on a saw. As he pressed the same a bolt came off the shaft and hit the palate which in turn hit the saw. The saw then cut the respondent on the right hand. The court saw the healed wounds. He was given first aid at the appellant's premises and later taken to Moi Teaching and Referral Hospital where he was admitted for five(5) days and continued with dressing for two(2) months after his discharge. When he returned on duty, he was given sweeping duties which he used to perform with the left hand since the right hand was then lame and weak.

The respondent blamed the appellant for the accident contending that the machine upon which he worked was not being thoroughly serviced and was old. He further stated that the gloves he had been supplied with were worn out and the bolts on the machine required replacement.

Later he was examined by **Dr. Owuola and Dr. Gaya** who prepared medical reports on his injuries. It is significant that **Dr. Gaya** examined the respondent on the recommendation of the appellant.

The appellant's case at the trial on the other hand was presented through **Richard Oseke**. DW1, and **Mucheru Karanja** DW2. The two admitted that the respondent was indeed injured on the said date but that the accident was not caused by a defective machine as the respondent had alleged. They both testified that the machine continued functioning normally even after the accident.

In her judgment, the Learned Senior Resident Magistrate made the following findings:

"the defendant contended that the machine was regularly serviced and checks done routinely but they did not avail any documentary evidence to prove the same. The court has therefore found that the defendant company is wholly to blame for the injuries sustained by the plaintiff"

On quantum, the Learned Senior Resident Magistrate, after regarding the said medical reports, awarded Kshs. 30,000/- general damages for pain and suffering. She also awarded special damages of Kshs. 1,500/-

Those findings triggered this appeal by the defendant, now appellant. It has put forward four(4) grounds of appeal which in the main challenge the trial magistrate's findings on liability and the said award of general and special damages.

During his oral submissions before me, counsel for the appellant substantiated the above grounds of appeal and urged that the appeal be allowed. On his part counsel for the respondent submitted that the trial magistrate's findings on liability and damages were based on the evidence which was adduced before her and the appeal was without merit.

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 being a first appeal, I should subject the evidence which was adduced before the trial court to a fresh scrutiny and arrive at my own independent conclusion bearing in

mind that I did not see or hear the witnesses testify and should give allowance for that. I should also be slow to disturb findings of facts of the trial court. (**See Peters -VS- Sunday Post Limited (1958) EA 424).**

I am however duty bound to examine with care whether the findings of facts of the trial court were not based on evidence or whether there was a misapprehension of the evidence or that the trial court acted on wrong principles in arriving at those findings.

I have perused the evidence which was adduced before the trial magistrate and considered whether the respondent proved the negligence he alleged against the appellant. I have sated some of the particulars of negligence alleged against the appellant herein before. In proof of those particulars, the respondent stated, in his testimony, that the machine upon which he was working was not being thoroughly serviced and further that it was old. In his own words:-

"I had worked in that place since 1997, the machine was not being serviced. The defendant company was to ensure machine was serviced. I have sued the company as the machine was very old and the bolts were not been (being) replaced that is why they could come off. We used to be given gloves and nose masks. The gloves had stayed for 1½ years. They were very old."

And on cross-examination, the respondent stated as follows in part:-

"The machine was old and not well serviced..... I can know when the machine is not well serviced. The supervisor ordered me to work using the old machine. I..... we had complained on many occasions to the supervisor. I continued working as the supervisor neglected the warnings we gave him. I blame the company for neglecting to service the machine. The bolt came off and hit the palate ..... I blame the company as they had not serviced the machine. I had been given gloves but they were torn. I complained verbally to the supervisor."

The above testimony in my view was the foundation for the finding in favour on the respondent on liability. The respondent demonstrated some of the particulars alleged in his plaint namely, that the appellant had allowed the respondent to work on a defective machine and further that it had failed to carry out regular checks and service on the said machines.

As to whether the respondent was to blame or contributed to the accident, the testimony of **Richard Oseke (DW1)** was significant. In cross examination he acknowledged that the respondent was not to blame. In his own words:-

"An accident is normal. He did not intentionally inflict injuries on himself. He was working carefully."

With regard to the status of the machines at the time, the learned Senior Resident Magistrate did not agree with the appellant because it did not produce maintenance records at the trial. That finding was not without the support of evidence. The appellant not only failed to produce records of maintenance but did not call the relevant officers. I say so, because of what DW2 stated at the trial in cross examination:
In his own words:-

"The machine has bolts. I do not do service machine. The fitters know the (sic) how the machine operate(s) and in which condition they are."

The appellant did not call any fitter to testify on the condition of the machines.
In the premises there was basis for finding the appellant 100% liable in negligence. The appellant's appeal against liability is therefore dismissed.

With regard to quantum, the jurisdiction of an appellate court is settled. In **Butt -VS- Khan (1982 - 88) KAR,** it was held as follows:-

"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principals or that he misapprehended the evidence in some material respect and so arrived at a figure which was either, inordinately high or low."

The Learned Senior Resident Magistrate said the following on quantum:-

"..... the plaintiff from the medical reports availed in court sustained crush injury to the right hand with fractures of the metacarpals of the small, right and middle fingers. Doctor Gaya stated that the injuries sustained had healed with deformed weak right hand and he cannot flex the right hand fingers. The right hand is deformed. The permanent disability was assessed by Dr. Gaya at 10%.

The court upon considering the evidence on record and the submissions of both counsel and the authorities cited and finds that the suit has been proved on a balance of probabilities. Judgment is entered for the plaintiff as against the defendant in the sum of Kshs. 1500/- being special damages and Kshs. 300,000/- being general damages for pain and suffering."

With regard to special damages, the law is that the same have not only to be specifically pleaded but they must also be strictly proved. The respondent herein pleaded Kshs. 1000/- for treatment and Kshs. 1,500/- for the medical report. That pleading in my view was specific. At the trial however, the respondent did not produce proof of payment of any of the said sums. He therefore did not strictly prove the claim for special damages. The same should not have been awarded. The appeal against the same is therefore allowed and the award of Kshs. 1,500/- as special damages is set aside.

With regard to general damages, the Learned Senior Resident Magistrate, said she had considered the record, counsels' submissions and the authorities cited to her and found that an award of Kshs. 300,000/- would adequately compensate the respondent. She further considered the injuries sustained by the respondent as evidenced by the doctors' reports. It is clear therefore that the Learned Senior Resident Magistrate considered all the relevant factors and did not fail to consider any relevant factor.

For my part considering that the respondent had been the appellant's long serving employee and that he lost his employment very likely because of his injuries and further considering the medical reports produced at the trial by consent, I am unable to find the award of Kshs. 300,000/- as general damages for pain and suffering to be inordinately so high as to represent an entirely erroneous estimate of the damages payable.

Among the authorities considered by the Learned Senior Resident Magistrate was the case of **Saleh Suleiman Mwabagura -VS- Narshidas Company Limited HCCC NO. 911 of 1990) Mombasa (UR)** where Mbalito J. as he then was awarded Kshs. 440,000/- as general damages for pain suffering and loss of amenities for a plaintiff who was a labourer aged 29 years at the time of the accident and suffered a crush injury resulting in loss of his fingers. That was in 1993.

Also considered by the Learned Senior Resident Magistrate was the case of **Joseph William -VS- Kenya Cargo Handling Services Limited and Another (HCC NO. 843 of 1987 (UR).** There, Wambilianga J. as he then was awarded Kshs. 100,000/- general damages for pain suffering and loss of amenities to a plaintiff who had sustained injuries to the right, middle and ring fingers. The award was made way back in 1991.

The respondent herein suffered similar injuries to the injuries sustained by the plaintiffs in the above two

cases. In view of those injuries, and taking into account the lapse of time since the said comparable awards were made, I find and hold that the award of Kshs. 300,000/- made by the Learned Senior Resident Magistrate in this case was not excessive in the circumstances as submitted by the appellant. The appeal against the same is therefore without merit and is dismissed.

As the appellant has succeeded only to a very limited extend. I order that it pays 2/3 the respondent's costs of the appeal.

Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 5TH DAY OF APRIL 2011.

F. AZANGALALA

JUDGE

Read in the presence of:

Mr. Kitur hold brief for Mr. Okoth for the appellant and Mr. Chepkwony hold brief for Mr. Onyando for the Respondent.

F. AZANGALALA

JUDGE

5TH APRIL 2011