REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CORAM: F. AZANGALALA J.

CIVIL APPEAL NO. 31 OF 2009

BETWEEN

ELDORET STEEL LMILLS LIMITED …… APPELLANT

AND

PARMENAS OKEMWA OBIRI …….. RESPONDENT

(Being an appeal from the Judgment of the Principal Magistrate – W.N. Njage, dated 13th March, 2009 at Eldoret Chief Magistrate's Court in Civil Case No. 1291 of 2004

JUDGMENT

Eldoret Steel Mills Limited, (hereinafter, **"the appellant"**) was sued by **Parmenas Okemwa Obiri**, (hereinafter, **"the respondent"**) for damages for injuries he sustained on 11th September, 2003 while working for the appellant. He pleaded that on the said date, in the course of his employment, a hot iron came off a channel conveyor belt and hit him causing him severe bodily injuries. In the particulars of negligence, the respondent alleged, among other things, that the appellant failed to provide him with gloves, apparel, gum boots, masks, goggles or a proper system of working. He further pleaded that as a result of the appellant's negligence, he sustained deep burns to his right foot and right ankle joint.

The appellant filed a defence in which it, *inter alia*, denied employing the respondent and the occurrence of the said accident. In the alternative, it pleaded that if any injuries were suffered by the respondent in the alleged accident, then the same was solely and or substantially contributed to by the negligence of the respondent. The appellant further specifically pleaded that any injuries suffered by the respondent were self inflicted and were sustained outside the scope of his duty.

At the trial, the respondent testified and called one witness, **Patrick Kiprono**, a Clinical Officer at Uasin Gishu District Hospital. The respondent's case was that while on duty at the cooling bed for steel bars, he was hit on the right foot and right ankle which suffered burn injuries. He testified that the appellant was negligent as it never controlled its machine to ensure that the steel bars landed safely on the cooling bed. He was also not given any protective clothing. He reported to his supervisor called **Jack** and received treatment at Eldoret District Hospital. Later, **Dr. S.I. Aluda** examined him and prepared a medical report of his injuries. In those premises, he prayed for general and special damages.

The appellant's case on the other hand was that on the date of the alleged incident, no report of the alleged accident was made even though the respondent was indeed on duty on the material date.

The learned Principal Magistrate, (**W.N. Njage**), analyzed the evidence adduced before him and concluded that the appellant was 80% liable in negligence and assessed general damages for the respondent at Kshs 144,000/= after taking into account his own contribution of 20% negligence. That decision triggered this appeal by the defendant in the Lower Court. Four main grounds are raised, namely; that the learned trial Magistrate erred in arriving at a finding on liability which was not supported by evidence; that the learned trial Magistrate erred in law and fact in basing his finding on irrelevant matters; that the respondent's case was not proved on a balance of probability and that the learned trial Magistrate's award of damages was not supported by evidence.

When the appeal came up for hearing before me on 5th July, 2011, counsel for the appellant submitted that the respondent never proved that he was employed by the appellant at the material time and that the appellant was in any event negligent. Responding to those submissions, counsel for the respondent contended that the appellant's witness admitted that the respondent was indeed the appellant's employee and was on duty on the material date. In his view, the appeal has no merit and should be dismissed.

I have considered the record, the grounds of appeal and the submissions of counsel. Having done so, I take the following view of this matter. This is a first appeal. That being the case, the court is mandated to 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 witness testify and hence due allowance should be made for that – (**See Selle –vrs- Associated Motor Boal Company Limited [1968] E.A. 123 and Williamson Diamonds Limited –vrs- Brown [1970] E.A.1.**

It is also trite that the Court should be slow to disturb findings of facts by a trial court particularly if such findings are based on the demeanor of witnesses as observed by the trial Court and its general appreciation of the evidence in the case. (See **Peter –vrs- Sunday Post Limited [1958] E.A.423**). The court is also bound to examine with care whether the findings of facts were not based on evidence adduced before the trial court or whether there was a misapprehension of the evidence adduced or that the trial court acted on wrong principles in arriving at those findings.

The respondent, in this case, testified at the trial that, he had been employed by the appellant from 1997 upto 2002 July when he was sacked. He was re-employed in September of the same year and sacked on 11th September 2003. The appellant's witness **Samwel Aburo Owino** supported the respondent's testimony in that regard. The said witness was categorical that the respondent was on duty on 11th September, 2003 at the appellant's cooling bed. The evidence on record therefore demonstrated that the respondent was in the appellant's employment at the time of the incident.

The respondent testified that while on duty on the material date and as he removed hot steel bars, one of the steel bars hit him on the right ankle and right foot thereby causing burns on those body parts. He blamed the appellant for the negligence. In his own words:-

"I was not careless. I was not given any protective clothing.
They are not bothered about the safety of the employees
…."

That testimony clearly laid blame upon the appellant for the incident. The cross-examination did not discredit the same. The testimony in my view demonstrated one of the particulars of negligence alleged by the respondent against the appellant. This case is therefore distinguishable from the case of **Muthuku - vrs- Kenya Cargo Services Limited [1991] KLR 464** upon which the appellant sought to rely. In that case, the appellant had not proved upon a balance of probability, any one of the forms of negligence alleged against the respondent. In the premises, I have no difficulty in finding that the respondent herein demonstrated that the appellant had been negligent. There was therefore basis for finding that the appellant was 80% liable in negligence.

The statement in the learned trial Magistrate's judgment that the respondent had failed to prove his case against the appellant on a balance of probabilities can only have been a slip of the tongue. I say so because immediately after the statement, the learned trial Magistrate held the appellant 80% liable.

With regard to damages, the challenge made against the same is that the learned trial Magistrate's award was not supported by evidence. The appellant does not suggest that the award is too high. Its challenge seems to be that the award was based on no evidence. In **Kemfro Africa Limited t/a Meru Express Service, Gathogo Kanini –vrs- A.M. Lubia & Olive Lubia [1982 – 88] 1 KAR 727 at page 730, Kneller J.A.** said as follows:-

" The principles to be observed by an appellate Court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either 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 is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages. See Ilango –vrs- Manyoka [1961] E.A. 705; 709; 713; Lukenya Ranching & Farming Co-operative Society Ltd –vrs- Karokoto [1970] E.A.; 414, 418,419."

What is the position herein? I have already found that there was basis for finding the appellant 80% liable. The respondent also produced Exhibit 2 (a), which was a Medical Report on his injuries. **Dr. S.I. Aluda,** who prepared the Medical Report, found that the respondent had sustained severe burns on the right ankle and foot which were swollen and tender. He concluded that the respondent sustained severe injuries leaving scars and skin pigmentation which would remain a permanent feature on his body.

With regard to general damages, the learned trial Magistrate rendered himself as follows:-

"I have addressed myself to the evidence, the medical reports, and the submissions by counsel and to the authorities referred to. Doing the best I can in the circumstances and having in mind the evidence of inflation, I do assess and award the Plaintiff general damages of Kshs 180,000/=. I will discount this by 20% liability to be borne by the plaintiff to have a net balance of Kshs 144,000/=."

To my mind, the learned trial Magistrate took into account all relevant factors and did not take into account any irrelevant factors. I also do not find his award so inordinately high as to suggest an erroneous estimate of the damages suffered by the respondent.
In the end, I do not find any merit in this appeal which I accordingly dismiss with costs.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS

25TH DAY OF JULY 2011.

F. AZANGALALA
JUDGE

Read in the presence of:-

1. **Mr. Omboto** for the Respondent

F. AZANGALALA
JUDGE.
25/07/2011