REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 49 OF 2008

BETWEEN

CHEBUT TEA FACTORY::::::::::::::::::::::::::::::::::::APPLICANT

AND

AMOS N. MUKOKHA::::::::::::::::::::::::::::::::1ST RESPONDENT

(Being an appeal from the decision of the Senior Resident Magistrate Hon. J.M. Njoroge dated 8th April, 2008 in Kapsabet Senior Resident Magistrate's Court Civil Case No. 310 of 2004)

RULING

The appeal before me arises from a decision of **J. M. Njoroge**, (SRM) dated 8th April, 2008 in Kapsabet Principal Magistrate's Court Civil Suit No. 310 of 2004. The respondent, who was the plaintiff before the Senior Resident Magistrate, was working at the chimney area of the appellant's factory where he was employed as a boiler technician on 19th July, 1999, when part of the roof collapsed and the respondent fell down with it. He particularised his injuries as follows:-

(a) Blunt trauma to the pelvis which was tender especially the left hip joint.
(b) A fracture of the left superior pubic ramus.
(c) A fracture of the left inferior pubic ramus.

The respondent was admitted to Kapsabet District Hospital for 12days. Later **Dr. Aluda** examined him and prepared a medical report of his injuries.

In his plaint lodged in October, 2004, the respondent blamed the appellant for the accident. He averred that the appellant exposed him to risk of injury or harm; that it failed to provide him with protective garments; that it allowed him to carry out duties in a risky environment; and that it instructed him to use a defective ladder.

In the written statement of defence delivered by the appellant, it denied the respondent's claim and averred, *inter alia*, that no accident ever took place and in the alternative that if it did then the same was wholly occasioned and/it substantially contributed to by the negligence of the respondent whose particulars were stated.

After hearing the testimony of the respondent, the Learned Senior Resident Magistrate awarded Kshs. 350,000/- to him as general damages and Kshs. 1,500/- as special damages. He determined that the

appellant was 100% liable in negligence and thus provoked this appeal. Four grounds of appeal have been raised. In a nutshell however, the appellant challenges the Learned Magistrate's findings on liability and the award of damages which the appellant considers as excessive given the injuries sustained by the respondent.

Only the respondent testified at the trial. The testimony in brief was as follows: On the material date at 1:00p.m., he was working at the chimney area of the appellant's factory when he fell down with part of the roof and the ladder he was using. He woke up at Kapsabet District Hospital in the evening of that day and was admitted there for twelve (12) days. He was injured on the left pelvis where he sustained a double fracture. He was later examined by **Dr. Aluda** who prepared a medical report of his injuries which report was produced as P EX 2. He also produced, as P EX 3, Form 10 completed, by the appellant under the workmen's compensation Act (Cap 236 Laws of Kenya.) He was accordingly paid Kshs. 50,000/- under that Act. He blamed the appellant for the accident because it had failed to check the old building whose roof was leaking and further that it had failed to provide him with proper protective tools such as safety belts.

The appellant called no witness, but produced a medical report prepared by **Dr. Gaya**.

The Learned Senior Resident Magistrate found that the respondent had indeed been injured while on duty and that the appellant had failed in its duty to provide a safe working environment for its employees thereby exposing them to danger. The appellant, according to the learned Senior Resident Magistrate failed to call evidence in rebuttal and was therefore 100% liable. On quantum, the Learned Senior Resident Magistrate found, on the basis of the medical evidence, that the respondent had suffered very severe injuries and awarded him Kshs. 350,000/- as general damages and Kshs. 1500/- as special damages.

When the appeal came up before me for hearing on 5th July, 2001 counsel agreed to file written submissions which they duly filed by 18th October, 2011. Having considered the pleadings, the record of the Learned Senior Resident Magistrate, the grounds of appeal and the submissions of counsel, I take the following view of this matter.

On liability, I note that the respondent pleaded that the appellant was to blame for the accident. He particularised the appellant's negligence, *inter alia*, as exposing him to the risk of injury or harm and failing to provide him with protective garments. In his testimony in court he stated that the appellant failed to check on the old building which building's roof was leaking and was weak. He further testified that the appellant failed to provide proper protective tools such as safety belts. In cross-examination, he explained how the safety belt would have prevented the accident. The respondent in my view therefore not only pleaded the negligence against the appellant, he also proved the same as required in law. The appellant offered no evidence at the trial to rebut the respondent's testimony on liability. With all due respect o the appellant submissions cannot substitute evidence. In the premises the Learned Senior Resident Magistrate was entitled to find the appellant 100% liable.

On quantum, the Learned Senior Resident Magistrate observed as follows:-

"Both doctors conclude that the injuries sustained were very severe and have healed. Dr. Gaya concludes that the plaintiff may develop early Post Traumatic Osteoarthritis because of the injuries.

I have further considered the submissions by both Learned counsel on record. I find that the plaintiff has proved his case on a balance of probability and shall enter judgment for the plaintiff as against the defendant……."

The appellant contends that the award of Kshs. 350,000/- as general damages was excessively high. It has invoked the decision of **Patrick Muchangi Ngorori -Vs- David K. Gitau & Another [HCCC No. 950 of 2002] (UR)**. There, the plaintiff sustained a cut wound in the forehead and a fracture to the left pelvis and was awarded Kshs. 200,000/- by **Ang'awa J**. The appellant also invoked the decision of **Mbugholi Msaga J.** in **Nzau Kivutha -Vs- Spinners & Spinners Company Limited**

[HCCC NO. 4883 of 1998.] There, the plaintiff, who suffered a fracture of the pelvis of the right superior ramus and had right shoulder injuries, was awarded Kshs. 165,000/- as general damages.

The respondent at the trial relied on cases which were really not relevant and where the injuries sustained were of different parts of the body.

There are clear principles which have been established overtime and which guide an appellate court when a lower court's award is challenged. In **Butt -Vs- Khan [1981] KLR 349** the following passage is found at page 356.

"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 principles or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

And in **Kitavi -Vs- Coastal Bottlers Ltd[1985] KLR 470, Kneller J** A. rendered himself as follows: -

"the Court of Appeal of Kenya, then should as its fore-runners did, only disturb an award of damages when the trial judge has taken into account a factor he ought not to have taken into account or failed to take into account something he ought to have taken into account or the award is so high or so low that it amounts to an erroneous estimate.
Chenan Singh -Vs- Chanan Singh & Handa [1955] EACA 125, 129(CAK). Butt -Vs- Khan CA Civil Appeal 40 of 1997."

With regard to findings of fact by the trial court the court of appeal held as follows in **Peters - Vs- Sunday Post [1958] EA 424**:

"it is a strong thing for an appellate court to differ from the finding, on a question of fact of a judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. But the jurisdiction (to review the evidence) should be exercised with caution: It is not enough that the appellate court might itself have come to a different conclusion."

Having re-examined and reconsidered the findings of fact of the Learned Senior Resident Magistrate on which he assessed damages, I am unable to detect any misapprehension of the evidence by him. I cannot also say that his findings on damages were not based on evidence. The respondent testified of his injuries. He produced medical evidence of the injuries. This evidence was not challenged by rebuttal testimony.

The award of Kshs. 350,000/- for the injuries sustained by the respondent cannot also be said to be inordinately so high as to represent an entirely erroneous estimate. I have further not detected failure to take into account any factor which ought to have been taken into account or consideration of a factor which ought not to have been considered.

In the end the entire appeal is without merit and is dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT ELDORET
THIS 29TH DAY OF NOVEMBER, 2011

F. AZANGALALA
JUDGE
Read in the presence of:
Mr. Barasa H/B for Mr. Esikuri for the Respondent

F. AZANGALALA
JUDGE
29TH NOVEMBER, 2011