



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 117 OF 2010

CHEBUT TEA FACTORY.....APPELLANT

VERSUS

NAFTALY KIPKOSGEI SUSEI.....RESPONDENT

(Being an Appeal from the Judgment and Decree of Honourable Anne Onginjo (Senior Principal Magistrate)

in Eldoret CMCC. No. 599 of 2009 delivered on 15th June 2010)

JUDGMENT

This appeal arises from the judgment of the Senior Principal Magistrate delivered on 15th June 2010 in Eldoret CMCC No. 599 of 2009 in which the Plaintiff, **NAFTALY KIPKOSGEI SUSEI** (herein, respondent), was awarded a total sum of Ksh. 1,513,260/- being damages for injuries suffered while in the course of his employment with the defendant company, **CHEBUT TEA FACTORY CO. LIMITED** (herein the appellant), on the 22nd August 2004.

By a plaint dated 31st July 2009, the plaintiff pleaded that at all material times, he was employed by the defendant as a general worker and that it was a term of the contract of employment that the defendant was to take all reasonable measures for the safety of the plaintiff while engaged upon his work, not to expose him to risks or damages or injury of which the defendant knew or ought to have known and to provide and/or maintain adequate and suitable appliances to enable the plaintiff carry out his work safely and to take all reasonable steps to ensure that the place where the plaintiff carried out his work was safe and further to provide a safe system of work. However, while the plaintiff was on duty on the 22nd August 2004 and due to the breach of contract of employment by the defendant and/or its servants/agents/employees, the plaintiff was seriously injured when his right hand was cut by a defective cross-cutter machine.

It was the plaintiff's contention that the accident was caused solely by reason of the defendant's breach of the employment contract in failing to provide protective gear and having the plaintiff work using a defective cross-cutter machine "*inter-alia*". Consequently, the plaintiff prayed for special damages, general damages for pain, suffering and loss of amenities and for loss of earning capacity. The plaintiff also prayed for costs of the suit.

At the trial, the plaintiff (PW 1) testified that on the material date he was at the defendant's tea factory where he was a casual worker. His supervisor one James Saina, assigned him the work of splitting firewood using a power saw. His normal duty was to put firewood into a boiler i.e. a boiler attendant. However, on the material date he was to split firewood using an electric cross-cutter power saw normally operated by a worker called David Mburu who was off duty. Mburu's substitute, one Mitey Francis was nowhere to be seen. After about thirty (30) minutes of operating the machine, the plaintiff's right hand fingers were cut by the machine. This occurred when the plaintiff went to check on why the machine was stuck on wood. He was taken to Kapsabet District Hospital and was referred to the Moi Teaching and Referral Hospital where he was admitted for a week. Later, he was examined by Dr. Samuel Aluda who prepared a medical report. He was also examined for a second medical report by Dr. Gaya.

The plaintiff contended that his work entailed the usage of his right hand to feed the boiler with firewood. He could no longer work without his right hand. His employment was terminated following the accident. He earned a net salary of Ksh. 5,500/- per month and had worked for the defendant from the year 1997.

The plaintiff blamed the defendant for the accident for reasons that he was assigned and forced to perform work for which he was not trained although as a general worker he could be assigned any work. He prayed for damages and costs of the suit against the defendant.

DR. PAUL KIPKORIR RONO (PW 2), confirmed that the plaintiff was admitted to the Moi Teaching and Referral Hospital on 22nd August 2004 and was discharged on 28th August 2004. He sustained severe cut on his right hand which necessitated amputation of all fingers leaving him with a stump. The use of the right hand was completely lost.

DR. SAMUEL ALUDA (PW 3), a private medical practitioner in Eldoret Town examined the plaintiff and prepared a medical report dated 28th July 2009. He agreed with the medical report compiled by Dr. Gaya and stated that it was more or less similar to his with regard to the degree of disability suffered by the plaintiff.

The evidence by Dr. Aluda marked the close of the plaintiff's case.

The defendant in its defence dated 22nd September 2009 denied that the plaintiff was its employee and also that there existed terms of the contract alluded to by the plaintiff.

The defendant further denied the occurrence of the accident and contended that, if the accident occurred, then it was wholly occasioned and/or substantially caused by the negligence of the plaintiff in that he "*inter-alia*" failed to take any reasonable steps to ensure his own safety and exposed himself to the risk of injury which he knew or ought to have known.

On behalf of the defendant, **JOHN KIGEN (DW 1)** testified that he was on duty at the defendant's factory on the material date when the plaintiff was deployed to assist him and another in splitting firewood using a cross-cutter machine. The plaintiff operated the machine while a worker called Sila Kipsum placed wood on the machine. He (DW 1) removed split wood from the machine. In the process, the plaintiff held the machine with his left hand and used his right hand to remove split wood. As a result, the machine cut his hand before he could remove the split firewood. He (plaintiff) appeared not to have held the machine as he was required to do. Kigen (DW 1) contended that the machine was not defective and that if the plaintiff had followed instructions he would not have been injured by the machine as it was not his first time to assist in splitting firewood. **SILAS KIPSUM (DW2)**, more or less repeated what was stated by Kigen (DW 1). He also contended that the machine was not defective. After the testimonies by Kigen (DW 1) and Kipsum (DW2), the defendant closed its case.

The learned trial Magistrate considered the evidence in its totality alongside the submissions made by both sides and arrived at the conclusion that the plaintiff was injured while in the course of his

employment with the defendant company and that the defendant company was in breach of the duty of care towards the plaintiff in that it assigned an unskilled person to perform the dangerous work of operating an electric power saw. The learned trial Magistrate also concluded that the plaintiff was partly to blame as he should have known that a machine that cuts wood would be harmful to him if it came into contact with his body.

The learned trial Magistrate therefore apportioned liability at 80% against the defendant and 20% against the plaintiff.

On quantum of damages, the learned trial Magistrate awarded the plaintiff a sum of Ksh. 750,000/- being general damages for pain and suffering and Ksh. 761,760/- for loss of future earnings. For future earnings, the learned trial Magistrate applied a multiplicand of Ksh. 6,348/- and a multiplier of ten (10) years.

Special damages were awarded at Ksh. 1,500/-. The decree dated 19th November 2010 took into account the plaintiff's 20% contributory negligence on the sum of Ksh. 750,000/- for pain and suffering.

Being dissatisfied with the whole judgment of the learned trial Magistrate, the defendant preferred twelve (12) grounds of appeal. These are contained in the memorandum of appeal dated 30th June 2010 and include the following:-

- (1) That the learned trial Magistrate erred in law and fact in holding the appellant 80% liable for the alleged accident when there was no sufficient evidence to that effect.**
- (2) That the learned trial Magistrate erred in law and fact in failing to hold the plaintiff wholly and/or substantially liable for the alleged accident.**
- (3) That the learned trial Magistrate erred in law and fact in failing to consider the appellant's evidence tendered in Court by the defence two witnesses.**
- (4) That the learned trial Magistrate erred in law and fact by overly relying upon the evidence of the respondent which was not proved when awarding damages.**
- (5) That the learned trial Magistrate erred in law and fact in awarding the respondent special damages of Ksh. 1,500/- when there was no sufficient evidence to support that finding/award.**
- (6) That the learned trial Magistrate erred in law and fact by failing to evaluate the injuries sustained on the medical chits and/or reports.**
- (7) That the learned trial Magistrate erred in law and fact in making an award in general damages of Ksh.750,000/- that was so excessive as to amount to an erroneous estimate of loss or damage suffered by the respondent.**
- (8) That the learned trial Magistrate erred in law and fact in awarding the respondent a sum of Ksh.761,760/- as loss of earnings when there was no evidence to support that finding and/or award.**
- (9) That the learned trial Magistrate erred in law and fact in making an award in general damages of Ksh.761,760/- that was so excessive as to amount to an erroneous estimate of loss or damage suffered by the respondent.**
- (10) That the learned trial Magistrate erred in law and fact in failing to subject the special damages and an award on loss of earnings to contribution on liability.**
- (11) That the learned trial Magistrate erred in law and fact in failing to consider the appellant's**

submissions and legal authorities relied upon in support thereof.

(12) That the learned trial Magistrate's decisions albeit, a discretionary one was plainly wrong.

Learned Counsel, **M/S. TUTEI**, argued the appeal on behalf of the appellant while learned Counsel, **MR. CHANZU**, opposed the same on behalf of the respondent.

On the issue of liability, the appellant's Counsel contended that the respondent ought to have been blamed wholly and substantially for the accident. Learned Counsel submitted that the evidence by the respondent, DW 1 and DW2 showed that the respondent was a general worker and was expected to undertake work assigned to him by his supervisor. He could be assigned duty in a section other than that belonging to him. He was in the boiler section but performed the work of splitting firewood with a power saw yet he had no training or instructions on how to operate the machine. It was contended by the appellant's learned Counsel that the evidence of DW 1 and DW 2 showed that the role of the respondent was to hold the machine as an assistant. He was not skilled in the operation or usage of the machine and could not therefore have attempted to remove wood stuck in the machine as that was the role of DW 1.

The appellant contended that the respondent was highly negligent by inserting his hand into a machine operated by electric power. He thus exposed himself to danger and ought to have been found wholly culpable for the accident. It was not his first time to handle the power saw.

On quantum, the appellant contended that the award made by the trial Court was excessive as the loss of five fingers attracted an award of about Ksh. 300,000/- on the basis of the authorities cited by itself (appellant). The appellant further contended that the award for loss of earnings was not merited for want of proof of specific earnings given that there was contradiction regarding the salary earned by the respondent. Further, even after the liability was apportioned, loss of earning was not taken into consideration by the learned trial Magistrate.

On his part, the respondent through his learned Counsel, submitted that he was removed from his normal duty and given the duty of operating rather than holding the power saw. This was necessitated by the fact that the actual machine operators were not on duty.

The respondent submitted that he was an unskilled labourer and was not expected to operate a machine but his supervisor assigned him that role. The supervisor was therefore negligent and this caused him (respondent) to suffer injury when a firewood got stuck on the machine.

The respondent contended that if the machine was in good condition, the wood would not have stuck. On quantum, the respondent contended that the award was not excessive as the fingers of his right hand were completely chopped off. He was left with a stump. The authorities relied upon by the appellant involved four fingers and were decided in the year 2004.

On loss of earnings, the respondent relied on the authority contained on page 44 of the record of appeal. He contended that the issue of contradiction in the earning does not arise as the sum of Ksh. 5,500/- referred to by the appellant related to net salary.

The respondent further contended that he suffered permanent incapacity. The award given was moderate

and should in fact be enhanced. The failure to apply the apportionment of liability to the loss of earnings was at the discretion of the Court. The respondent therefore prayed for the appeal to be disallowed.

Having considered the foregoing submissions for and against the appeal, the duty of this Court is to reconsider the evidence adduced at the trial, as has been done hereinabove, and arrive at its own conclusions bearing in mind that the trial Court had the advantage of seeing and hearing the witnesses.

From the evidence, it is apparent that the occurrence of the accident and the respondent's employment with the appellant company were factors which were not at all or substantially disputed. Indeed, the respondent's evidence coupled with that of the appellant's witnesses (DW 1 and DW2) established that the respondent was on the material date in the course of his duty when he was injured by a power-saw he had been assigned to operate in the splitting of firewood.

Although, the appellant denied liability and sought to rely on the evidence of DW 1 and DW 2 to show that it was the respondent who was to blame for his own injuries by exposing himself to danger in operating rather than holding the machine while in his knowledge he did not have the necessary skill or training or instructions, the same witnesses confirmed that the respondent was assigned a task which was ordinarily not his. The said witnesses further confirmed that the unusual task of operating a machine was assigned to the respondent by a supervisor. Therefore, it was the appellant through its servants who exposed the respondent to danger by giving him a task without firstly giving him the necessary skill, training and instructions to operate a machine which uses electric power. The respondent was exposed to danger and not that he exposed himself to danger. He was owed a duty of care by his employer, the appellant. However, that duty of care was breached when the respondent was exposed to danger and to the risk of injury by the appellant.

The appellant bore the greatest responsibility for the accident even though there was also some responsibility of a lesser magnitude on the part of the respondent. He risked injury when he attempted to remove a piece of wood stuck on his machine. He was negligent to the extent that he failed to exercise reasonable care by simply switching off the power supply prior to attempting to remove the firewood.

In the circumstances, the apportionment of liability by the learned trial Magistrate at 80% against the appellant and 20% against the respondent was in the opinion of this Court proper and justified. A reason to alter or interfere with the finding does not arise.

With regard to the quantum of damages, this was mostly based on discretion. It is generally accepted that an appellate Court cannot interfere with the exercise of discretion by a Court unless it is satisfied that the trial Court misdirected itself in some matter and as a result arrived at a wrong decision or unless it is manifest that the trial Court was clearly wrong in exercise of its discretion and as a result there has been miscarriage of justice (See, **MBOGO VS. SHAH [1968' EA 93]**).

In **KEMFRO AFRICA LIMITED T/A MERU EXPRESS SERVICE & ANOTHER VS. A. M. LUBIA & ANOTHER [1982-88] 1 KAR 777**, the Court of Appeal stated that:-

“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 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 is so inordinately low or so inordinately high that it must be a wholly erroneous

estimate of the damage.”

Herein, the respondent was awarded general damages, for pain and suffering in the sum of Ksh. 750,000/-. The appellant contends that this amount was excessive since the injury suffered by the respondent was not serious. However, the medical report by Dr. Aluda (PW 3) indicated otherwise. The respondent lost all the five fingers of his right hand. This occasioned permanent disability assessed at 50% by the good doctor. The report by Mr. Z. Gaya (Surgeon) dated 12th October 2009 placed the degree of permanent disability at 43%.

The appellant relied on the decision of the High Court in **DAVID M. NYAMBANE VS. NATONAL UNGA INDUSTRIES (K) LTD NBI HCCC. NO. 892 OF 2001** and proposed that the respondent be awarded general damages for pain and suffering in the sum of Ksh. 300,000/-. The learned trial Magistrate considered the said decision together with those cited by the respondent as well as the trends of inflation and awarded Ksh. 750,000/- general damages for pain and suffering.

In this Court’s opinion, the amount was reasonable and adequate compensation for the loss of five fingers, of the right hand with the resultant 43 to 50% disability of the hand. The respondent was a right handed person. The respondent was also awarded general damages for loss of future earnings in the sum of Ksh. 761,760/- made up as follows:- Ksh. 6,348 x 12 x 10 = Ksh. 761,760/-. The method used to quantify the loss was proper. However, the multiplicand of Ksh. 6,348/- was on a higher side given that the figure was not the net salary but gross salary included in the Workmen’s Compensation Form (LD 104/1) produced herein by the plaintiff.

In his evidence, the plaintiff said that he earned a net salary of Ksh. 5,500/- per month. This figure was not disputed and ought to have been applied by the learned trial Magistrate as the multiplicand thereby resulting in an award for loss of future earnings as follows:-

Ksh. 5,500/- x 12 x 10 = Ksh. 660,000/-

The respondent was thus entitled to Ksh. 660,000/- instead of Ksh. 761,760/- for loss of future earnings.

The special damages in the sum of Ksh. 1,500/- were proved by the production of the relevant payment receipt (PEX.6 (b)).

In total, the respondent was entitled to a sum of Ksh. 1,411,500/- less 20% contributory negligence i.e. Ksh. 1,129,200/-.

In the end result, this appeal succeeds in part on the issue of quantum but fails in totality on the issue of liability.

The Judgment of the trial Court is altered to the extent that judgment be and is hereby entered for the respondent against the appellant in the sum of Kshs. 1,129,200/- together with costs and interest. The costs of the appeal shall be borne by each party.

Ordered accordingly.

J.R. KARANJA
JUDGE

[Delivered and signed this 17th day of November, 2011]

[In the presence of Mr. Maingi for Appellant and Mr. Yego for respondent)