REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 43 OF 2008

JOSEPH KIPTOO KOGO …….....…… APPELLANT

VERSUS

EASTERN PRODUCE (K) LIMITED ….....…….. RESPONDENT

(Being an Appeal from the Judgment and Decree of Honourable S. Atonga (Principal Magistrate) in Kapsabet PMCC. No. 188'A' of 2006 delivered on 27th March 2008)

JUDGMENT

This suit was filed by the plaintiff, **JOSEPH KIPTOO KOGO** (herein, the appellant) against the defendant, **EASTERN PRODUCE (K) LTD** (herein, the respondent) vide a Plaint dated 25th April 2006 in which the appellant claimed damages and costs of the suit arising from injuries suffered by himself while in the course of his employment at the respondents premises on the 19th March 2002.

It was averred that at all material times, the appellant was an employee of the respondent and that on the material date while in the course of his employment he suffered injuries occasioned by the respondent's negligence, carelessness and/or breach of its statutory duty and/or breach of statutory duty and/or breach of the employment contract.

The appellant contended that as a result of the said accident he suffered loss and damages. He therefore claimed both general and special damages against the respondent.

In a statement of defence dated 28th June 2006, the respondent denied the allegations made against itself by the appellant and more particularly that the appellant was its employee and that it was negligent and/or in breach of its statutory duty and/or breach of contract. The respondent contended that if indeed, the appellant suffered injures, then it was due to his own negligence and/or contribution thereto. The respondent therefore prayed for the dismissal of the appellant's case with costs.

At the trial, the appellant (PW 2) testified that he had been employed by the respondent for a period of ten (10) years from 1999 to 2006. He produced necessary pay slips to establish the fact and went on to testify that his employment was terminated in March 2006 due to the injuries suffered by him on the material date. He had been employed as a tractor turnboy and said that on the material date while loading tea, he slipped and knocked his right leg against a building and trailer. He suffered injury on his right knee and was taken for treatment at the respondent's dispensary from where he was referred to Nandi Hills District Hospital and continued the treatment.

The appellant contended that the injury resulted in deformity of his leg thereby causing him to walk with a limp. He attributed the accident to the slippery environment at the respondent's premises and the failure by the respondent to provide him with gumboots.

DR. SAMUEL ALUDA (PW 1) examined the appellant on the 21st April 2006 and thereafter prepared a medical report showing that the appellant suffered dislocation of the right knee and fracture of the right femur and tibia at the knee joint.

The doctor said that the injuries healed with limited movement of the right knee joint thereby causing permanent disability.

The respondent through its supervisor **JOHN KOGO (DW1)** confirmed that the appellant was its employee but was not on duty on the material date. However, the appellant was on duty on the previous night when he was injured.

A nurse at the respondent's clinic, **MILLICENT OTIENO (DW 2)**, testified that the appellant was treated at the clinic on the 20th March 2002 as a follow up of treatment given at the Nandi Hills District Hospital. He was given pain killers and treatment chits which indicated that he suffered soft tissue injuries but not fractures. A medical report by Dr. V. V. Lodhia dated 27th September 2005 produced by the respondent with the consent of the appellant showed that the appellant suffered soft tissue injury on the material date but which did not result in permanent disability.

The report also showed that there was no evidence of any bone injury on the material date and that the X-rays showed a bone injury which had occurred in September 2001 and which led to the deformity of the appellant's right knee joint.

The learned trial Magistrate considered all the evidence placed before him and concluded that the respondent was liable for exposing the appellant to an unsafe working environment and to danger at his place of work.

The learned trial Magistrate found as a fact that the respondent failed to provide the appellant any safety gear like gum boots which could have prevented him from skidding on a watery surface. On quantum of damages, the learned trial Magistrate awarded a sum of Ksh. 85,000/- general damages after finding that the appellant had suffered only soft tissue injuries.

It was the finding of the learned trial Magistrate that the medical report produced by Dr. Aluda (PW 1) was exaggerated as it did not reflect the correct injuries suffered by the appellant.

Being dissatisfied with the finding and decision of the learned trial Magistrate on the assessment of the general damages, the appellant preferred the present appeal on the following grounds:-

(1) That, the learned trial Magistrate erred in law and fact in the exercise of his judicial discretion as to amount to abuse and wrong application of principles on award/assessment damages.

(2) That, the learned trial Magistrate erred in fact and law in awarding damages that were inordinately low as to amount to gross underestimation of the injuries sustained by the appellant.

(3) That the learned trial Magistrate erred in fact and law in failing to appreciate the medical evidence adduced before him by the appellant.

In arguing the appeal on behalf of the appellant, learned Counsel, **MR. OMONDI**, submitted that the learned trial Magistrate misapprehended the evidence and awarded an amount which was inordinately low.

Learned Counsel submitted that the medical notes and X-rays were considered by the doctor (PW 1)

who then arrived at the conclusion that the appellant had suffered the injuries set out in the plaint. Further, the appellant confirmed that it was his first time to be injured while employed by the respondent and that he was retired on medical grounds as his movement was restricted. He denied the allegation that he had previously suffered injuries.

Learned Counsel contended that the medical report by Dr. Lodhia was evasive and inconclusive and even though it showed that the appellant suffered a shortening of his leg, the report without any basis indicated that the appellant was injured in the year 2001 contrary to what was stated by DW 1 and DW 2.

Learned Counsel further contended that it was an error for the learned trial Magistrate to have relied on and accepted the respondent's medical report showing that the appellant suffered soft tissues injuries on the material date whereas the report was vague and did not reflect the actual injuries suffered by the appellant.

For those reasons, the appellant urged this Court to allow the appeal by enhancing the award of Ksh. 85,000/- to at least Ksh. 600,000/-.

In response, the respondent argued through the learned Counsel, **MR. MARITIM** that the appellant did not prove that he suffered the injuries pleaded in the plaint as the two medical reports were contradictory.

The respondent argued that the doctor (PW 1) examined the appellant four years after the accident. His evidence clearly contradicted the medical notes he relied upon to compile his medical report. The respondent further argued that the doctor (PW 1) also relied on two X-rays images and although he confirmed that one image was taken on the material date of the accident, he could not confirm when the other image was taken.

The respondent went on to argue that the report by Dr. Lodhia was based on the same x-rays images and showed that one image was taken in September 2001 while another was taken on the material date and whereas the earlier image showed that the appellant had suffered fractures of both lower and upper libia, the second image showed that there were no fractures.

The respondent contended that the medical report by Dr. Lodhia was consistent with the treatment notes used by both doctors in preparing their respective medical reports. Further, the injuries proved by the appellant were soft tissues injuries. Therefore, the award of Ksh. 85,000/- made by the learned trial Magistrate was proper as it was neither inordinately low nor high.

For all these reasons, the respondent urged this Court to dismiss the appeal and uphold the decision of the learned trial Magistrate.

The foregoing rival submissions have been considered in the light of the grounds of appeal. The duty of this Court to re-consider the evidence and draw its own conclusion bearing in mind that the trial Court had the advantage of seeing and hearing the witnesses.

In that regard, the evidence adduced at the trial has already been considered hereinabove. With regard to liability, which is not contested herein, this Court finds no reason to interfere or disagree with the findings of the learned trial Magistrate.

With regard to the contested assessment of general damages by the learned trial Magistrate, this Court has only to be guided by the decision of the Court of Appeal in the case of **KEMFRO AFRICA LIMITED T/A MERU EXPRESS SERVICE VS. A.M. LUBIA & ANOTHER [1982-88] 1 KAR 777**, where it was 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 theJudge 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 ……"

The same principles have generally been accepted as the guiding factors in deciding whether or not an appellate Court would interfere with exercise of discretion by the trial Court. (See also, **ARROW CO. LTD VS. BIMOMO & 2 OTHERS [2004] 2 KLR 101, ZIPHORAH WAMBUI WAMBAIRA & 17 OTHERS VS. GACHURU KIONGORA & OTHERS (2004) e KLR)**.

From the decisions in the Arrow Case (supra) and that of Ziphorah W. Wambaira (supra), it is clear that in assessment of damages the general method of approach should be that comparable injuries should as far as possible, be compensated by comparable awards.

The question herein is whether the learned trial Magistrate departed from the general method of approach such that the award he made of Ksh. 85,000/- was inordinately low. The appellant's contention is that the award was too low vis-à-vis the injuries suffered. It was pleaded in the plaint that the appellant suffered the following injuries:-

(a) A swollen and tender right knee.
(b) A dislocation of the right knee joint.
(c) A fracture of the right femur at the knee joint.
(d) A fracture of the right tibia and the knee joint.

To prove the said injuries, the appellant relied on the medical report and evidence of Dr. Aluda (PW 1) and to disprove the same, the respondent relied on the medical report by Dr. Lodhia.

The learned trial Magistrate was persuaded by the medical report by Dr. Lodhia and found that the appellant had only suffered soft tissue injures.

The view of this Court is that since none of the two doctors had the opportunity of examining the appellant no sooner had he been injured, they had to rely on the initial treatment notes and documents to re-examine the appellant and form their own opinions.

The treatment notes were therefore the most crucial evidence in establishing the injuries actually suffered by the appellant as a result of the material accident on the material date. The award of general damages had to be based on the nature of the injuries.

The treatment notes produced by the appellant (P.Ex.3) showed that the appellant was treated at the Nandi Hills hospital on the material 19th March 2002 after being diagnosed with a dislocation of the right knee. In the process, he was referred to an Orthopaedic Clinic for X-ray examination. The X-ray showed an old deformed knee with severe Osteophytes formation.

The treatment notes thus indicated that the appellant must have suffered a previous injury to his right knee leading to a deformed knee. The treatment notes also indicated that the injuries suffered by the appellant on the material date were soft tissue injuries to the right knee.

Indeed, the medical report by Dr. Lodhia was consistent with the treatment notes. It pointed out that two X-rays images were presented by the appellant. One appeared to have been taken in September 2001. It showed that there were fractures. The other one appeared to have been taken on the material date. It showed osteophytes on both lower femur and tibia without fractures. It was thus concluded by Dr. Lodhia that the injury leading to the deformity of the appellant's right knee joint could have occurred in September 2001 and that the injuries suffered by the appellant on the material date were only soft tissue injuries.

In his evidence, Dr. Aluda, conceded that the treatment notes (P.Ex 3) did not show that the appellant suffered any fractures on the material date.

Just like the trial Court, this Court is persuaded by the medical report compiled by Dr. Lodhia rather

than Dr. Aluda.

The report by Dr. Aluda is inconsistent with the treatment notes. It did not give a true and accurate reflection of the injuries suffered by the appellant on the material date.

Consequently, this Court must uphold and agree with the finding of the learned trial Magistrate that the medical report by Dr. Aluda was exaggerated. What the appellant established was that he suffered soft tissues injury on the material date. Therefore, the award of Ksh. 85,000/- made by the learned trial Magistrate was reasonable and adequate. It was neither inordinately low nor inordinately high as to be a wholly erroneous estimate of the general damages.

In the end result, this appeal lacks merit. It is hereby dismissed with costs to the respondent.

J.R. KARANJA
JUDGE

[Delivered and signed this 6th day of December, 2011]