No. 129
REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 243 OF 2006

PRINSAL ENTERPRISES LTD.....APPELANT

-VERSUS-

BENEDICT OKOTH ONGANGO.....RESPONDENT

JUDGMENT

On 30th March, 2005 the respondent then as plaintiff filed a suit in the Chief Magistrate's Court at Kisii against the appellant then as defendant seeking special and general damages, costs and interest. The suit was informed by the fact that the respondent had been employed by the appellant as fish bladder remover. It was the statutory duty according to the respondent for the appellant to keep and maintain a safe and proper system of work for all its employees and not to expose any of them to any risk of damage or injury which it knew or ought to have known, to provide and maintain adequate and suitable measures to enable the plaintiff to carry out his work in safety.

However on or about 22nd December, 2004, the respondent in the course of his work aforesaid cut his left finger with a knife he was using to remove the fish bladder. As a result he suffered pain, loss and damage. The accident afore said was as a result of the appellant's breach of statutory duty of care towards the respondent in that it failed to make or keep safe the respondent's place of work, employing the respondent without instructing him to the dangers likely to arise in connection with his work or without providing him with any or any sufficient training, without providing any or any adequate supervision and failing to provide or maintain safe means of access to his place of work. The respondent also pleaded common law negligence against the appellant to wit; that the appellant failed to take any adequate precaution for the safety of the respondent while he was engaged upon the said work, exposing him to a risk of damage or injury, failing to provide the respondent with appropriate protective apparatus such as gloves.

On being served with the suit papers, the appellant through **Messrs L. G Menezes & Advocates** filed a memorandum of appearance and later a defence. In the defence, the appellant denied having employed the respondent, and therefore owed him no duty of care, statutory or otherwise, denied the occurrence of the accident, the injuries sustained and special damages claimed by the respondent. In the alternative the appellant pleaded that if the accident occurred then the same was outside the scope and control of the appellant, the respondent cutting himself with a knife was an act solely within his control and as such he was the author of his own misfortune. Finally it pleaded that if an accident occurred the same was due to the sole or contributory negligence of the respondent. The appellant thereafter proceeded to give the particulars of negligence it attributed to the respondent.

This defence was followed by a reply and thereafter the suit proceeded to hearing before **A. A Ingutya**

SRM. In brief, the case for the respondent was that the respondent on the material day was on duty at the appellant's Company removing fish bladder using a knife when he cut himself with the same. He blamed the appellant for the accident because it did not provide him with gloves. He had asked for the same earlier from one **Bernard Onyango**, the supervisor who did not give them to him but instead asked him to work faster. Following the accident he went to St. Akivida Memorial Hospital where he was treated. He left the treatment chit there though. He also produced a photocopy of filed LD 104 forms but stated that the original was left with the company. He later saw **Dr. Ajuoga** who prepared a medical report for which he paid Kshs. 3,500/=.

In cross-examination, the respondent stated that he had worked for the appellant for 4 years. He also stated that he had asked the supervisor for gloves but was not issued with any and that they were only given a knife and gumboots which they always signed for. He in the same breath stated that he is the one who normally sharpens the knife. He went on to state that at the dispensary, their names are entered in the accident register but that he does not know whether his name was so entered. He testified further that he knew the importance of gloves after he had worked for one month. However, although he stated that he had asked for gloves he had nothing to prove that he had done so.

The respondent's other witness was **Dr. Ajuoga.** He testified that he saw the respondent on 19th February, 2005. He had a history of industrial accident on 22nd December, 2004. He had a cut wound on left thumb. He concluded that the respondent had sustained soft tissue injuries. He prepared a medical report to that effect and charged the respondent Kshs. 3,500/=.

The appellant called one **Diana Alkuo Ocharo** as a witness. She worked for the appellant as the first aid in charge and her duties included taking care of those injured while on duty. She also added that she had worked for 5 years and knew the respondent when he used to work for the appellant.

In her evidence, she stated that the respondent was never injured on 22nd December, 2004 since if one is injured, he reports to the supervisor who in turn brings the injured to her, does first aid and later records a statement. She added that she normally takes the matter to the Production Manager who refers the injured to St. Akidiva Memorial Hospital in Migori for further treatment. She produced the accident register book and while referring to it stated that the respondent was not injured on that material day. The only people injured in that month were **Joshua Muluna**, **Edward Masee**, **Michael Mutura** and **Davison Ochieng**.

In cross-examination, she stated that she graduated from St. John ambulance. She stated further that she had a sample of a statement written when one is injured which she tendered in evidence. She added that she is the one who fills the accidents register.

The appellant also called one, **Moses Oreno** as a witness. He was a supervisor with the appellant. His duties mainly concerned taking care of the health of workers and confirming that they have protective gear. He admitted knowing the respondent as he was his supervisor. On that material day however, the respondent worked until evening, he was never injured. He also said that the respondent did not need to use a knife in the section he was working in and that it was not true that he had used it.

In cross-examination, he stated that he was the respondent's supervisor on the date of the alleged injury but he was never injured at all and further that his name was not even in the accident register. The defence then closed their case.

The learned magistrate having evaluated the evidence tendered as aforesaid by both the respondent and appellant found for the respondent holding this;-

"….I have carefully considered the evidence herein. The records produced by DW1 bear no stamp or other mark of the defendant. They cannot ex-facie be associated with the defendant. My findings (sic) is that the plaintiff must take some blame for the accident. He is the one who was in control of the knife. He would not have cut himself if he was careful. He averred (sic) it to himself to be extra careful because he did not have gloves. However, the longer (sic) proportion of blame must lie squarely on the defendant for failing to ensure that the plaintiff was supplied with gloves. Having said so, I apportion liability at 10%:90%.

Considering the injury sustained by the plaintiff. I assess general damages at Kshs. 60,000/= and enter judgment for the plaintiff for Kshs. 54,000/= together with proved specials of Kshs. 6500/=, costs and interest…"

The appellant was aggrieved by the judgment and ensuing decree. Accordingly it filed the instant appeal. In all it advanced 9 grounds upon which it felt that the judgment of the learned magistrate could be faulted. These were:-

"1. The learned trial magistrate grossly misdirected himself by treating the evidence and submissions before him on quantum and liability superficially and consequently arrived at wrong decision without any basis in law or fact.

2. The learned trial magistrate erred in assessing the appellant's evidence and submission on quantum and liability perfunctorily and consequently arrived at a decision without any basis in law.

3. The learned trial magistrate's decision on quantum and liability was based on a wrong evaluation and assessment of the facts and relevant principles of law.

4. The learned trial magistrate erred by weighing the respondent's case in isolation from the appellant's case and thus precluded himself from assessing the magnitude of quantum and the apportionment of liability impartially.

5. The learned trial magistrate erred in failing to give any sufficient weight to the appellant's case and thereby arrived at a decision without any basis in law.

6. The learned trial magistrate erred by accepting the respondent's case at face value without critically appreciating the same and without considering the ramifications thereof and the consequences to the appellants.

7. The learned trial magistrate erred by failing to apply relevant and pertinent judicial principles precedents and trends regarding the award on quantum and liability.

8. The learned trial magistrate erred by awarding the respondent damages that were so inordinately high and excessive so as to be unreasonable and punitive on the appellant in view of the nature of injuries purportedly suffered by the respondent.

9. The learned trial magistrate wholly erred in law by failing to evaluate judicially the evidence adduced and to judicially determine the same…"

When the appeal came up for directions, it was agreed amongst other directions that the same be canvassed by way of written submissions. Parties later filed and exchanged written submissions which I have carefully read and considered together with the authorities which they cited.

This being a first appeal it is my duty to re-evaluate the evidence, assess it and make my own conclusions, remembering that I have not seen nor heard the witnesses and making allowance for this (**See Selle V Associated Motor Boat Company Ltd (1968) E. A 123 and Williamson Diamonds Ltd V Brown (1970) E.A.1**.

The twin issues before the learned magistrate and which called for her determination was liability and quantum. On both she found for the respondent. Was she justified in doing so? Let me see!

In its defence, the appellant had categorically denied having employed the respondent. However, the appellant's own witnesses did in their testimony concede that the respondent had in fact been an employee of the appellant although at the time of their testimony, he no longer worked for the appellant. It was also conceded that the respondent used to work in the production section. According to the respondent his job description entailed removal of bladder from fish. I do not see how the respondent could remove fish bladder without using a knife or other implements or machine to slit and open the fish so as to access its bladder. There is no evidence from the appellant that it had other implements or machines for doing such work. In my view therefore, the respondent was an employee of the appellant doing manual work of removing fish bladder using a knife. It is also common ground that the respondent was not provided with gloves on that day. His evidence on this aspect of the matter was not seriously challenged. Though the appellant's witnesses seem to suggest that the respondent was not injured on that day as per their records, it is important to note that none of them was able to tender any evidence to show that they were at work on the material day. I have no doubt in my mind that had the respondent been provided with gloves as required in this sort of trade, the injuries sustained could as well have been minimized. Further the evidence of the respondent was that he was forced to work fast. He had asked for

gloves from the supervisor one, **Bernard Onyango**. He was not given. Instead the supervisor ordered him to work fast. Had he refused to work without gloves, he would have been sacked. This evidence was again not seriously challenged by the appellant. All that the appellant maintained was that there was no accident on that day involving the respondent. In support of that contention it tendered in evidence an alleged register of accidents. However the authenticity of the said register was questionable bearing in mind that it was self-generated by the appellant and as correctly observed by the learned magistrate, ***"… The records produced by DW1 bear no stamp or other marks of the defendant. They cannot ex-facie be associated with the defendant …"*** I entirely agree with this observations. The respondent also tendered in evidence a photocopy of the LD 104 form. He stated that the original was left with the appellant. Again this testimony was not seriously challenged. I doubt whether the respondent could have obtained the workmen compensation forms and caused them to be filled unless he was surely and truly injured and was infact an employee of the appellant.

The evidence of the respondent was that, he was using a knife and he cut himself in the process. He blamed the appellant because the supervisor allegedly did not give him gloves though he had asked for them. Instead the supervisor asked him to work fast. Going by the testimony, there is no doubt at all that the respondent was also to blame for the accident. I do not agree with the appellant however that the respondent exposed himself to a risk of injury which he knew and or that he was the sole author of his misfortune. The learned magistrate apportioned the blame at 10% and 90% respectively in favour of the respondent. I do not discern any error in that apportionment.

The up shot of all the foregoing is that the learned magistrate was right in finding the appellant liable to the respondent for the accident and the subsequent apportionment. It cannot be that cutting of oneself while removing fish bladder is a remote event that could not be foreseen by the appellant so that it could take steps to ensure that such injury is minimized or avoided. At the very least the appellant should have provided the respondent with the gloves.

On quantum it has been stated now and again 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 keeping in mind the correct levels of awards in similar cases. Further an appellate court can only disturb the quantum of damages awarded by the trial court if it is satisfied that either the trial court 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 high that it must be a wholly erroneous estimate of damages.

See **Kenfro Africa Limited T/A Meru Express Service Gathogo Kanini V.A. M Lubia and Olive Lubia (1982 – 88) 1 KAR 727.** The respondent basically sustained soft tissue injuries I do not think that an award of Kshs. 60,000/= for such injuries was inordinately high as to warrant my interference. Taking into account other decided cases on soft tissue injuries which range from as low as Kshs. 20,000/= to as high as Kshs. 250,000/=, I think that an award of Kshs. 60,000/=was reasonable in the circumstances.

The appellant is however of the view that the respondent did not produce any credible evidence to support the injuries. That though he attended Akidiva Memorial Hospital for treatment after the accident, he neither produced any documentary evidence from the said hospital nor from any other health facility. Incidentally, this is the same hospital that injured employees of the appellant are taken for treatment. A simple answer to this submission is that the respondent called PW1, **Dr. P. M Ajuoga** who testified and produced a medical report. Further the respondent produced an LD 104 form. In any event as correctly observed by **Ringera J in the case of NBI HCCC No. 4089 of 1988 Stephen Kagoovid V Joseph Waithaka Kabai and other (UR)** ***"…..The defendants counsel submitted that in the absence of admissible medical evidence, there is no basis on which the court could assess damages. I cannot agree. If a court believes the plaintiff as I do, it must assess damages on the basis of his evidence. Lack of medical evidence is not fatal to a plaintiff's claim in Civil Proceeding where the proof is of a balance of probability. Needless to state, the presence of medical evidence cannot but fortify and clarify the plaintiff's evidence on the existence, nature and effects of the injuries suffered …"*** I could not agree more **Dr. Ajuoga** and the respondent having testified on the nature and effects of the respondent's injuries, the court was correct in assessing damages, which as I have already stated are not so inordinately high or based on erroneous understanding or appreciation of the law.

This appeal lacks merit and is accordingly dismissed with costs to the respondent.

Judgment dated, signed and **delivered** at Kisii this 16th July 2010.

ASIKE-MAKHANDIA

JUDGE