REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Appeal 133 of 2002

PLY & PANELS LIMITED…….. APPELLANT

VERSUS

WELLINGTON W. LUTTA……..……...RESPONDENT

(An Appeal from the Judgment of Hon. H. S. Wasilwa , Senior Resident Magistrate, in Nakuru C.M.C.C.No.1592/1998 dated 12th July, 2002)

JUDGMENT

The court below found the appellant 100% liable for the injuries sustained by the respondent while working for the former and awarded him (the respondent) Kshs.100,000/= in general damages and Kshs.1,500/= in special damages.

The appellant being aggrieved, has preferred this appeal on 8 grounds challenging both the finding on liability and the quantum.

On liability, the only question raised was with respect to the date of the alleged accident. In paragraph 4 of the plaint, the respondent deposed that:

> **"4. On or about the 29th of March, 1998, the plaintiff while performing his lawful duty**

> **under the defendant's instructions got seriously injured by the machine due to the negligence of the defendant, his (sic) servant and/or agent."**

In his testimony, however, the plaintiff repeatedly asserted that the accident was on 26th and not 29th March, 1998. Learned counsel for the appellant has asked this court to find that the respondent was bound by his pleadings and that no accident occurred on the date pleaded – i.e 29th March, 1998, hence the learned trial magistrate erred in finding that the accident was on 26th March, 1998. I need only to mention that the appellant at paragraph 4 of its statement of defence denied the occurrence of any accident at or about the 29th March, 1998. Despite this and the testimony of the respondent, learned counsel for the respondent failed to seek to amend the plaint. What is the effect of the date as pleaded *vis a' vis* the respondent's evidence? There is no doubt that the respondent gave a vague/rough period when the accident occurred. *"On or about 29th"* is not specific but suggests an approximate period.

The use of that phrase has been explained in the **Black's Law Dictionary 7th Ed**. at page 1117 as follows:

> **"This language is used in pleading to prevent a variance between the pleading and the proof, usually when there is any uncertainty about**

> **the exact date of a pivotal event."**
> (emphasis nine)

Ordinarily, the phrase is only used when the actual date is not certain. That cannot be said about the accident in which the respondent was involved.

I find nonetheless that it only constitutes poor drafting of pleadings and does not prejudice the appellant in any way. After all, all the medical reports produced by consent left no doubt as to the date of the accident. The respondent was first treated at the Provincial General Hospital on the same day as the date of the accident.

When he was examined on 30th April, 1998 by Dr. Wellington K. Kiamba the date of his injury is given as 26th March, 1998. I came to the conclusion on this point that the learned magistrate did not err in finding that the accident was on 26th March, 1998.

On liability and quantum, the fact that the respondent was employed by the appellant as a machine operator and that he was injured in the course of that employment was not rebutted.

In his evidence the respondent explained that after fixing the log on the machine, he switched it on and as he walked away, the log trapped his shirt while the machine was in motion. As a result, he injured his 2nd finger, elbow and chest. He blamed the appellant for failing to provide him with protective device and exposing the him to dangers of unprotected engine/machine. These claims, once again

were not challenged and I find no fault on the part of the learned magistrate in her conclusion as to the appellant's liability.

Relying on the case of **Joel Edward Odhiambo** Vs. **Wilson Mbaya Opee & Another**, HCCC No.3295 of 1989, the learned magistrate gave judgment in favour of the respondent against the appellant in the sum of Khs.100,000/= in general damages and Kshs.1,500/= in special damages.

It is trite law that assessment of damages is an exercise of discretion and an appellate court should be slow to reverse a lower court on the question of the amount of damages unless it is satisfied that the trial court acted on a wrong principle of law, or misapprehended the facts or for these or other reasons made a wholly erroneous estimate of the damage suffered. See **Mariga** Vs. **Musila** (1984) KLR 251.

It is also settled that awards must reflect the trend of previous, recent and comparable awards. See **Mbaka Nguru & KWS** Vs. **James George Rakwar**, Civil Appeal No.133 of 1998. The respondent suffered:

a) laceration and swelling of the left forearm
b) deep cut wound on the left index finger, and
c) soft tissue injuries to the chest

The respondent had sought an award in the sum of

Khs.120,000/= on the strength of **Joel Edward Odhiambo** case (supra) where Kshs.70,000/= was awarded for more or less similar injuries and **Charles Maingi Muriithi** Vs. **John Muthee Kamau Another**, HCCC No.4191 of 1989 where Githinji, J (as he then was) awarded Kshs.80,000/=. But the injuries in that case were more serious than those suffered

by the respondent.

The two cases relied on by the respondent were decided in 1992 and 1993 respectively. The appellant, on their part suggest an award of Kshs.25,000/= or Kshs.30,000/= relying on the case of **Meshak Ingusi** Vs. **Synthetic Fibres (K) Limited**, HCCC No.4691/1987 decided in 1989 where Kshs.15,000/= was awarded.

That case was decided 13 years before the judgment in this case and twenty-one (21) years today. Bearing in mind these factors, I find no reason to interfere with the award of damages by the court below. I also find no merit in the argument that the judgment of the court below does not confirm to **order 20 rules 4** of the **Civil Procedure Rules**. There is no doubt the judgment is extremely brief – 1¼ pages. But it must be born in mind that the appellant did no call any evidence during the trial. But more fundamentally, in its brief form, the judgment contains a concise statement of the case, points for determination, the decision thereon and the reason for

such decision complete with supporting authority.

For these reasons, this appeal fails and is dismissed with costs. The appellant also to pay costs in the court below. The decretal sum of Kshs.101,500/= deposited in joint account of counsel for the parties by consent may be released to the respondent.

Dated, Signed and Delivered at Nakuru this 15th day of July, 2010.

W. OUKO

JUDGE