REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 78 OF 2018

TECHPACK INDUSTRIES LIMITED.....APPELLANT

VERSUS

IDAH GAKII MEME.....RESPONDENT

***(Being an appeal from the judgement of Hon. Senior Resident Magistrate Orenge K. I delivered on 7/2/2018 in CMCC No. 28 of 2016 at Nairobi*)**

JUDGEMENT

1. A brief background of this matter is that the respondent on 5/2/2016 filed a plaint claiming special and general damages for pain and suffering. She alleged that on or about 29/7/2015 while working for the appellant, a sealing machine that had been wrongly connected shocked her and as a consequence, she sustained severe bodily injuries, loss and damage.

2. She further alleged that the appellant had an implied duty to take reasonable precautions for the safety of the respondent while she was engaged in her work environment.

3. The appellant in his defence dated 28/4/2016 denied that the respondent was its employee and that she got injured in the course of fulfilling her duties when she was injured. The appellant further denied having breached its contractual obligations.

4. The matter proceeded to trial where only two witnesses testified. PW1 the respondent told the trial court that she had worked in the packing department for the appellant since 2008 on a casual basis. PW1 stated that on 28/7/2015 as she was operating a sealing machine, she got an electric shock and regained consciousness three days later while admitted at Nairobi South Hospital.

5. During Cross examination she said that she was paid on a monthly basis but could not produce a pay slip because she had not carried it with her. However, she produced a dos form 1 which was issued by the appellant at the time of the accident. She added that there was no protective gear that were provided to her but nylon gloves meant to protect the food from infection.

6. PW2 DR Kimani Mwaura told the court that he treated the respondent on 3/12/2015 at his place of work. He stated that the respondent had suffered an electric shock that caused pain on her left hand and caused weakness on her left side. It was his opinion that the respondent had suffered grievous harm.

7. The trial magistrate considered the said testimonies and it was his determination that the respondent was working for the appellant at the time of the accident and that the appellant was wholly to blame for the accident. On quantum he awarded Ksh. 350,000 as general damages and Ksh. 2,000 as special damages.

8. The appellant was aggrieved by the aforementioned determination hence lodged this appeal proffering the following grounds of appeal;

a) **That the learned magistrate erred in law and in fact in entering judgement against the defendant and finding that the defendant was 100% liable when considering the evidence on record and at trial the same had not been proven.**

b) **That the learned magistrate erred in law and in fact as the evidence adduced did not support any negligence on the part of the appellant.**

c) **That the learned magistrate erred in law and in shifting the burden of proof to the appellant when the same was never discharged by the plaintiff.**

d) **That the learned magistrate erred in law and in fact in reaching a conclusion that was contrary to the evidence placed before him and therefore finding the appellant liable.**

e) **That the learned magistrate award of general damages in particular considering the injuries sustained by the respondent was inordinately high in that it was erroneous estimate of damages without due, regard being made to the injuries sustained**

f) **That the learned magistrate erred in law and in fact by failing to take into account and fully consider the various authorities submitted by the appellant before arriving at the sum of Ksh. 350,000 which awards was not founded on any outlined legal principles or precedent and was inordinately high.**

g) **That the learned magistrate erred in law and in fact by basing the award on erroneous considerations and factors.**

9. On 25/10/19 this court ordered that the appeal be disposed by way of written submissions. Both parties have since filed their submissions

10. The appellant in their submissions argued that the respondent did not prove negligence. It was their claim that the respondent admitted to being issued with plastic gloves to prevent infecting the food but never indicated whether an alternative was offered nor whether she had complained about the use and protection of the said gloves while using the packing machine.

11. It is further asserted by the respondent that the appellant was assigned her duties with due care and attention and that she was not exposed to risk and that the respondent never produced any evidence as to whether the plastic gloves issued by the appellant were inappropriate for the job.

12. The appellants added that it had employed machine technicians who were not blamed by the respondent for the incident and additionally that during trial it is admitted that the machine was properly working earlier on.

13. The appellant also stated that the respondent having worked for the appellant for around eight years, was knowledgeable of the implements for the job and the workings of the packing machine.

14. The appellants in their submission argued further that the respondents pleaded particulars of injuries that were not supported by the contents of the discharge summary where the diagnosis was included and that it was the doctor's explanation that the soft injuries sustained had healed.

15. It was also their submission that in the case of **Eunice Adonyo Onyango v. East African Growers Limited [2017] eKLR** that the learned magistrate relied on, the plaintiff sustained severe injuries which is contrary to this instant suit as the respondent did not suffer any incapacity as the injuries had already healed.

16. On the other hand, the respondent in her submissions argued that the main cause of the accident was wrong electric connection that caused short circuiting that led to he being injured.

17. The respondent further stated that she was a general worker and not an electrician and therefore it was the responsibility of the appellant to hire electricians to ensure a safe working environment and in failing to do so they were liable for the negligent acts of their agent and/or servants.

18. It was the respondent's argument that the sealing machine had exposed wires and it was quite obvious that an incident such as this one was likely to happen and therefore the trial court's finding on liability cannot be faulted.

19. On the issue of quantum, the respondents opined that she produced a discharge summary and a dosh form 1 which contained the extent of her injuries and therefore their extent is not contradictory at all. The respondent maintained that the lower court took into account all the injuries and its award of general damages of Ksh. 350,000 was therefore not inordinately high to cause interference by this court.

20. This being the first appellate court, it is therefore this court's duty to re-evaluate all the evidence on record and to draw independent conclusions. There is a caveat, however that this court neither saw nor hears the witnesses. **Selle v. Associated Motor Boat Company Ltd [1968] EA 123, Williamson Diamonds Ltd v. Brown [1970] EA 1**

21. The grounds of appeal herein may be collapsed into two main grounds, namely;

a) That the learned magistrate erred in fact and in law in finding that the respondent had proved negligence on a balance of probability

b) That the learned magistrate erred in fact and in law in his apportionment of liability and in his award of damages.

22. On the first element of negligence, it is common ground that the appellant was employed by the appellant at the material day. The accident occurred in the course of her employment. The key question therefore, is whether the employer was negligent by failing to provide a safe working environment? Whether the accident was as a result of either failing to provide her with proper gloves or exposing her to the risk of electric shock?

23. The duty of the employer to ensure the safety of an employee is not absolute; it is one of reasonable care against a foreseeable risk or one that can be avoided by taking reasonable measures or precautions. It would be unreasonable to expect an employer to be his employee's insurer round the clock.

24. In Halsbury's Laws of England 4th edition volume 16 paragraph 562 it is stated inter alia as follows;

> **"It is an implied term of contract of employment at common law that an employee takes upon himself risks necessarily incidental to his employment. Apart from the employer's duty to take reasonable care; an employee cannot call upon his employer, merely upon the ground of their relation of the employer and employee to compensate him for any injury, which he may sustain in the course of his employment in consequence of the dangerous character of the work upon which he is engaged. The employer is not liable to the employee for damages suffered in the course of his employment in consequence of the dangerous character if the work upon which he is engaged. The employer is not liable to the employee for damage suffered outside the course of his employment. The employer does not warrant the safety of the employee 's working conditions, nor is he an insurer of his employee's safety; the exercise of due care and skill suffices. The employer does not owe any general duty to the employee to take reasonable care of the employee's goods; the duty only extends to his person."**

25. It was the respondent's testimony that on 2/7/2015 that in the course of her duties she suffered an electric shock by the packing machine. She asserted that she entered into a coma and was admitted ay Nairobi South Hospital which was confirmed by the discharge form.

26. It was her testimony that the appellants only provided nylon gloves but failed to provide any other protective gear

27. On examination of the record the appellants did not call any witnesses to rebut the claims of the respondent. The appellant failed to provide evidence showing that reasonable measures were put in place to ensure the safety of the employees and ensure that the packing machine was in proper working condition

28. In consideration of this I agree with the court below on its findings on liability.

29. On quantum, the principles upon which an appellate court would interfere with the quantum of damages awarded are well settled.

In **Butt vs Khan [1981] eKLR 349** it was stated;

> **"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 on a figure which was either inordinately high or low."**

30. The respondent sought special damages of Ksh 2,000 and general damages. The magistrate in his decision relied on the case of **Eunice Adonyo Onyango v East African Growers Limited [2017] eKLR** where the plaintiff suffered an electric shock while sealing damaged paper boxes. She suffered pain on the right side of her body, headaches, lost hearing ability in her right ear and was unable to lift her leg and arm. The plaintiff was awarded Ksh.500,000. In consideration of the above the magistrate in this case awarded the respondent ksh.350,000/=

31. In **Joshua Shitawa v. Kishan Builders Limited [2015] eKLR** where the plaintiff suffered electric shock the court held inter alia as follows;

> **"I concur with the learned trial magistrate that the injuries to the appellants thumb were serious. The general damages proposed at Ksh 120,000 would have been reasonable. These were soft tissue injuries that would eventually heal. The appellant specifically pleaded for special damages of Ksh. 4,700. He was only able to prove Ksh. 1,500 as costs of the medical report as per exhibit 2B"**

32. It was PW2 testimony that he treated the respondent on 3/12/2015. He stated that her injury was severe causing pain on her left hand and weakness on her left side. He however included in his medical report that the pain and weakness on the left side would gradually subside.

33. In light of the above I find that the award of ksh.350,000 awarded by trial magistrate is inordinately high and not commensurate with the injuries sustained. The authorities cited suggest a reasonable award should be lower than what was given by the trial court.

34. In the case of **Joshua Shitawa =vs= Kishan Builders Ltd (2015) eKLR**, an award of kshs.120,000/= was made about six years ago. Due to the falling value of the shilling, I think an award of ksh.150,000/= should suffice. Consequently, the appeal as against quantum is allowed. The award of ksh.350,000 for general damages is set aside and is substituted with an award of kshs.150,000/=.

35. In the circumstances of this appeal a fair order on costs is that each party shall bear its own costs. However, costs of the suit is awarded to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 13TH DAY OF MAY, 2021.

……

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent