REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 543 OF 2016

ENDMOR STEEL MILLERS LIMITED...APPELLANT

VERSUS

EMMANUEL WAFULA WEKESA...RESPONDENT

(Being an Appeal from the Judgement and decree of the court delivered on 22nd July 2016

in the Chief Magistrate's Court Civil Case No. 902 of 2014) by Hon. E.K. Usui,

Senior Principal Magistrate

JUDGMENT

The respondent filed the suit before the Chief Magistrate's Court at Nairobi seeking damages arising from an industrial accident which occurred on the 16th of July, 2013. The trial court held the appellant 100% and awarded the respondent Kshs.290,000 as general damages for the injuries suffered. The appellant preferred this appeal on the following grounds:-

1. **THAT the Learned trial magistrate erred in Law and fact in making an award for general damages for pain and suffering that was inordinately high.**

2. **THAT the Learned trial magistrate erred in law in failing to cite and rely on relevant case law in assessing general damages for pain and suffering and thereby made on erroneous estimate thereof.**

3. **THAT the Learned trial magistrate erred in fact and in law in failing to find that the plaintiff was guilty of contributory negligence.**

4. **THAT the Learned trial magistrate erred in law and in fact in finding the Defendant 100% liable.**

5. **THAT the Learned trial magistrate erred in law in failing to find that the plaintiff had not proved the occurrence of the alleged accident.**

Counsel for the appellant submits that the appeal raises issues of liability and quantum. On liability, it is submitted that the trial court did not consider the appellant's submissions. The respondent blamed the appellant for not providing him with long gloves and for failing to provide him with a sack to tie around his legs. Counsel contend that the respondent had two years' experience and had gloves that were aimed at holding the hot metal. The metal burned the respondent because he did not hold the same properly and was therefore the author of his own misfortune. It was only the respondent's palm and fingers that were to come into contact with the hot metal and the gloves that were provided were sufficient to do the work. The respondent was engaged in manual duty that did not require specific training.

On the issue of quantum, counsel submit that the award of the trial court can be interfered with on appeal as stated in the case of **KEMFRO AFRICA LTD T/A MERU EXPRESS SERVICES 1976 & ANOTHER V LUBIA & ANOTHER (No 2) (1985) eKLR** where the court held that an appellate court can interfere with an award of damages:-

i. **Where an irrelevant factor was taken into account.**

ii. **Where a relevant factor was disregarded.**

iii. Where the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages."

According to counsel, an award of Kshs.70,000 would sufficiently compensate the respondent. Counsel referred to the case of **WEST KENYA SUGAR CO LTD –V- ZEBEDAYO KIVATI SALMBA, Kakamega HCCA 26 of 2011 (2013) eKLR** where an award of Kshs. 150,000 for 2nd degree burns was reduced to Kshs. 60,000. Counsel also relies on the case of **ELDORET STEEL MILLS LTD –V- MOENGA OBINO JOSEPHAT (2014) eKLR** where Kshs.75,000 was awarded for burns on the left forearm and injuries to the left knee and left leg.

The appeal is vehemently opposed. Counsel for the respondent submit that the respondent was assigned to work with a defective machine which produced twisted metal bars instead of straight ones. It was the duty of the employer to provide a safe working environment. The machine produced twisted metal bars which made it hard to hold safely. The respondent was expecting a straight metal but instead the machine produced a twisted one. All those who were working with the respondent on that day suffered burns due to the defective machine. Further, the appellant failed to provide the necessary protective devices. The respondent was provided with short sleeved gloves instead of long sleeved ones. The short sleeved gloves did not offer protection in situation when the machine became faulty. The respondent suffered injuries on the areas that were not covered by gloves.

On the issue of quantum, counsel for the respondent maintain that the respondent suffered 2nd degree burns to both arms and left leg below the knee. The respondent was left with scars on the left leg measuring 25cm x 5cm. The sum of Kshs. 290,000 awarded by the trial court is moderate. Counsel relies on the case of **BIDCO OIL REFINERIES –V- PIUS MACHUKI & ANOTHER, Nyahururu Civil Appeal No. 50 of 2017** where the court awarded Kshs. 350,000 to the first respondent for burns on the right hand and leg and Kshs.450,000 to the 2nd respondent for burns on the left knee and lower thigh.

This is a first appeal. The court has to evaluate the evidence and record of the trial court afresh before drawing its own conclusion. Two witnesses testified for the respondent's case while the appellant called one witness. **PW1, DR. KIMANI MWAURA** examined the respondent on 23rd January 2014. He noted that the respondent suffered 2nd degree burns on both hands and left leg. He had multiple scars on the left arm, lower medial aspect of ankle joint and left leg below the knee. He had multiple scars on the arm lower 2/3 of the elbow joint and scars on the left leg measuring 25 x 5cm. There was no permanent incapacity save for the scars.

PW2, EMMANUEL WAFULA WEKESA, is the respondent. His work was to pick hot metal and place it in another machine. He was working in a group of six (6) people who were moving in a line. He was at the front. The machine was faulty and the metal did not get straight into their hands. The hot metal came out fast. He let it go and suffered injuries. He was attended at Coptic hospital and Riders Medical Clinic. It is his evidence that he had short sleeved gloves that were only covering the wrist. He was burned above the wrist. He had no overall and a sack to protect the legs.

DW1 SIMON MARIKIO WACHIRA was the appellant's Personnel Manager on the date the accident occurred. The appellant had retained Dr. Keer to attend to its employees. It is his evidence that PW2 was not injured on 16th July, 2013. In July 2013 six (6) people were injured and the plaintiff was not one of them.

The grounds of appeal mainly deal with the issue of liability and quantum. Although DW1 was of the view that the plaintiff was not injured on the 16th of July, 2013, the trial court found that the register of injured employees that was kept by the appellant was haphazardly prepared and the records did not flow systematically. I am equally satisfied from the evidence on record that the respondent was employed by the appellant and suffered injuries while at his place of work. There were other employees who were injured in the same month of July, 2013.

It is the respondent's evidence that the hot metal which came from the machine came out so fast and he had to let it go. The machine was defective. They were assigned the duty of handling the hot metal and taking it to another machine. The defence evidence does not provide any explanation as to how the machine was working or whether it had been serviced recently. DW1 mainly dwelt on the aspect that the respondent was not injured on 16th July, 2013. DW1 did not explain how the working environment was. Counsel for the appellant maintain that the short sleeved gloves were meant to assist the respondent to hold the hot iron and place it on another machine. That could be the case but what was the working environment in the event of an unexpected eventuality. PW2 testified that all the six people who were working in one line were injured. Who was the supervisor for that Section on that day? What is the appellant's explanation on how the accident occurred? The particulars of negligence on the part of the plaintiff as stated in the defence dated 11th April, 2014 are no backed by any evidence. It is clear to me that had the appellant provided a good working environment, the plaintiff could not have suffered the injuries. Although the short sleeved gloves were ideal for holding the hot metal, the appellant ought to have provided other protective devices for other parts of the body. The appellant's position seems to be based on the fact that this was a simple task of holding hot metal coming out from one machine and placing it on another machine. That would have been the ideal situation but it did not cater for certain situations like when the machine throws out the hot metal very fast. If the plaintiff/respondent had long sleeved gloves, the injuries on the hand would not have occurred.

The trial court observed as follows in its judgment: -

"The nature of his work was to handle hot metal. It posed a very high risk of injury especially burn related. The defendant was therefore required and expected to ensure that the plaintiff was adequately insulated against any such injury. The plaintiff was however supplied with short gloves that did not cover his whole hand was therefore exposed to a risk of injury. He had inadequate protective gear. In the circumstances I do not find any reason to hold him liable and find the defendant 100% liable as pleaded."

On the issue of liability, I am entirely in agreement with the findings of the trial court. The plaintiff's evidence on how the accident occurred remains uncontroverted. The appellant did not provide a safe working environment and also failed to provide proper working tools that would have adequately protect its employees. The nature of the work was quite dangerous and this required proper supervision. I do find

that the appellant is 100% liable. Before the trial court, counsel for the appellant referred to the same authorities as stated in his current submissions. In the case of **Eldoret Steel Mills Ltd. V Moenga Obino Josephat (supra)**, the circumstances of the case were similar to the current one. A hot piece of metal rolled out of a machine at high speed and burnt the plaintiff on his forearm. The doctor stated that the injuries would heal and the pains would subside with the use of analgesics. There were no permanent scars.

In the case of **West Kenya Sugar Co. Ltd –V- Zebedeyo Kivati Salamba (supra)**, the plaintiff suffered superficial burns leaving him with a 3x4cm scar. The injuries were classified as 2nd degree burns. I do find that the injuries suffered by the wo claimants in the two cases relied upon by counsel for the appellant are quite minor and cannot be of equal comparison to those suffered by the respondent. Although the respondent was not hospitalized, he has been left with a huge permanent scar below his left knee.

In the case of **Bidco Oil Refineries –V- Pius Michuki & Another (supra),** the 1st plaintiff suffered deep superficial burns, scalding of the right leg and hand, burns to the upper lip and exterior tongue, superficial burns adjacent to the deep burns. He was admitted in hospital for twelve (12) days and the doctor classified the injuries as maim. The second plaintiff suffered multiple burns left knee joint area (deep), superficial burns lower thigh and burns on the right 3rd finger dersum side. The second plaintiff was not admitted in hospital. The High Court declined to reduce the award of Kshs. 350,000 to the 1st plaintiff and Kshs.300,000 for the 2nd plaintiff. I am convinced that the injuries suffered by the respondent in this appeal are more or less similar to those suffered by the 2nd plaintiff in the Bidco Oil Refineries case.

The underlying principles which relate to interference of assessment of damages by a superior court are well established. In the case of **KHAN V BUTT,** the court held:-

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

Counsel for the appellant referred to the Kemfro Case. I do not need to reiterate those principles. Assessment of general damages is an exercise involving the discretion of the court. The trial court did not make reference to the authorities provided by the appellant's counsel but stated that the authority referred to by the plaintiff's counsel provided comparable injuries. I do agree that the 2nd plaintiff in the Bidco Oil refineries case does provide similar injuries. I am satisfied that the award of Kshs.290,000 for the injuries suffered is not excessive.

The upshot is that the appeal on both liability and quantum is not merited and the same is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2021.

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S. CHITEMBWE

JUDGE