



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 85 OF 2017

JUMBO NORTH (EA) LIMITED.....APPELLANT

-VERSUS-

ELIJAH NYAKUNDI ATABO.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. C. Obulutsa, CM,

delivered on 16 June 2017 in Eldoret CMCC No. 528 of 2016)

JUDGMENT

[1] This appeal was filed by **Jumbo North (EA) Limited**, the Defendant in **Eldoret Chief Magistrate's Civil Case No. 528 of 2016: Elijah Nyakundi Atambo vs. Jumbo North (EA) Limited**. It had been sued in that suit on account of an accident that took place in its factory at Eldoret where the Respondent, **Elijah Nyakundi Atambo**, was then working. The contention of the Respondent was that, at all material times, he was employed by the Appellant as a tongsman; and that, on or about the **21st of May 2015**, while he was on duty as such, he was seriously injured when the rollers of the Roll Mill Machine developed a mechanical problem and failed to pick a hot metal rod and channel it into the machine; that instead, the machine reversed the hot metal rod and threw it in his direction, thereby occasioning him serious burns on his right palm, left knee and left foot.

[2] The Respondent had further averred in his Complaint dated **19 May 2016** that, it was a term of the contract of employment between him and the Appellant that the Appellant would take all reasonable measures for his safety while he was engaged upon his work; and that he would not be exposed to risks of damage or injury of which the Appellant knew or ought to have known, but failed in the discharge of that duty. At paragraph 6 of the Complaint filed before the lower court, the Respondent supplied the particulars of negligence, breach of duty of care and/or contract by the Appellant, its servants, agents and/or employees, on the basis of which he claimed damages for his loss, pain and suffering.

[3] The Respondent's suit was resisted by the Appellant vide the Defence dated **22 June 2016** wherein it was denied that the Respondent was ever an employee of the Appellant. The Appellant further denied that an accident occurred in its premises on **21 May 2015** as alleged or on any other date; and therefore, the particulars of negligence attributed to it by the Respondent at paragraph 6 of the Complaint were denied. In the alternative, the Appellant contended that if at all the accident occurred on **21 May 2015** as alleged, then the same was due to the sole or contributory negligence of the Respondent, the particulars whereof were given by the Appellant in paragraph 5 of its Defence. The Appellant further averred that, in accepting employment, the Respondent freely accepted to run the risk of all purely accidental harm foreseeable, connected with and/or incidental to such employment.

[4] The learned trial magistrate, having heard the evidence presented by the parties and their respective submissions, found in favour of the Respondent and awarded him **Kshs. 300,000/=** in general damages and **Kshs. 7,200/=** for special damages along with interest and costs of the suit. Being aggrieved by the decision, the Appellant filed this appeal on the following grounds:

[a] That the learned trial magistrate erred in law and fact in holding that the Appellant herein 100% liable in negligence without considering the evidence tendered.

[b] That the learned trial magistrate erred in law and fact in failing to dismiss the Respondent's claim for want of proof.

[c] That the learned trial magistrate erred in law and in fact in failing to evaluate, consider and/or take into account the evidence of **DW1**, hence arrived at an erroneous judgment.

[d] That the learned trial magistrate erred in law and in fact in failing to evaluate, consider and determine all the issues raised in the pleadings and in the evidence especially as to whether the Respondent was on duty and working as a Tongsman on the alleged date

of the accident.

[e] That the learned trial magistrate erred in law and in fact in failing to find that there was duplicity of suits given that the Respondent sought compensation for similar injuries in both Eldoret CMCC No. 526 of 2016 and Eldoret CMCC No. 528 of 2016.

[f] That the learned trial magistrate erred in law and in fact in failing to consider the evidence of **PW1** who categorically stated that he examined the Respondent for similar injuries in both Eldoret CMCC No. 526 of 2016 and Eldoret CMCC No. 528 of 2016; and that at the time he was already healed from the said injuries and could not tell whether the injuries were sustained on **8 December 2014** or **21 May 2015**.

[g] That the learned trial magistrate erred in failing to consider and/or take into account the submissions filed by the Appellant.

[h] That the learned trial magistrate erred in law and in fact in applying the wrong principles of law in assessment of damages, hence an erroneous award.

[i] That the learned trial magistrate erred in law and in fact by proceeding to assess damages in the sum of **Kshs. 307,200/=** in favour of the Respondent which quantum was excessive in the circumstances and not supported by law or evidence as the Respondent had sustained minor soft tissue injuries; which injuries had completely healed.

[j] That the learned trial magistrate erred in law and in fact in failing to consider the provisions of **Order 21 Rule 4** of the **Civil Procedure Rules**.

[k] That the learned trial magistrate erred in law and in fact in failing to consider and apply the provisions of **Sections 107, 108 and 109** of the **Evidence Act, Chapter 80** of the **Laws of Kenya**.

[l] That the learned trial magistrate erred in law and in fact in failing to hold that the Respondent had not proved his case on a balance of probability as expected by law.

[5] Consequently, the Appellant prayed the Judgment of the lower court be set aside and that the Respondent's claim be dismissed with costs.

[6] Pursuant to the directions issued herein on **24 September 2019**, the appeal was urged by way of written submissions. Accordingly, the Appellant's written submissions were filed herein on **29 August 2019**, while the Respondents written submission were filed on **21 July 2019**. Learned Counsel for the Appellant proposed two issues for consideration in this appeal, namely:

[a] Whether the Respondent proved his case on a balance of probability as against the Appellant to warrant 100% liability; and,

[b] Whether the award of **Kshs. 300,000/=** as general damages was justified.

[7] Thus, learned Counsel for the Appellant stressed the point that liability cannot attach without fault; and therefore that it was the duty of the Respondent to demonstrate, as required by **Sections 107, 108 and 109** of the **Evidence Act**, his allegations of negligence and/or breach of duty of care on the part of the Appellant. Counsel further posited that the Respondent's claim was cooked up and/or imaginary, granted that the Respondent filed two similar cases in respect of the same alleged cause of action. He took the view that the Respondent was not at all injured while on duty as alleged; and therefore that the Appellant was not at fault in any way. He relied on Karugi & Another vs. Kabiya & 3 Others [1983] eKLR; Eunice Wayua Munyao vs. Mutilu Beatrice & 3 Others [2017] eKLR and Boniface Masila vs. Richard M. Maswii & Another [2010] eKLR to support his submissions. On quantum, Counsel was of the view that an award of **Kshs. 20,000/=** would have sufficed in the circumstances.

[8] The Respondent's Counsel on the other hand, was of the view that the Respondent's evidence that he was injured on **21 May 2015** while working for the Appellant was corroborated by oral and documentary evidence given by **Dr. J.C. Sokobe (PW1)**; and that being an occupier for purposes of **Sections 2 and 6** of the **Occupational Safety and Health Act, 2007**, the Appellant ought to have ensured a safe working environment and/or premises, not only by ensuring that the machines were in good working order, but also that its employees, such as the Respondent, were supplied with safety apparels. Counsel therefore urged the Court to find that the Respondent had discharged the burden of proof on liability. Counsel relied on Nakuru HCCA No. 111 of 2005: Timsales Limited vs. Daniel Karanja Bise and Nakuru HCCA No. 38 of 1995: Sokoro Saw Mills vs. Benard Muthimbi to support the submission that the Appellant is liable for non-provision of protective gear and that the duty to provide a safe working environment is absolute.

[9] Counsel further submitted that the Appellant never raised the issue of duplicity in their Defence or cross-examination before the lower court; and therefore that it was an afterthought to raise the same in the Memorandum of Appeal. Counsel also urged the Court to note the failure by the Appellant to produce its Labour Sheet, Muster Roll, Accident Register, Protective Gear Issuance Register, Work Allocation Sheet or Pay Sheets to disprove the Respondent's claim. In his view, the Court ought to take a dim view of the Appellant's case on account of this omission, for it demonstrates a withholding of information on the part of the Appellant; and that it did this notwithstanding that a Notice to Produce was served on it by the Respondent dated **19 May 2016** which the Appellant did not respond to. Thus, the Court was urged to make the presumption that, had the said evidence been adduced, it would have been unfavourable to the Appellant, in line with the decision in Civil Appeal No. 23 of 1997: Edwards Muriga vs. Nathaniel D. Schulter and Rural Electrification Authority vs. Peter Kigen & Another [2019] eKLR.

[10] Counsel for the Respondent defended the general damages award of **Kshs. 300,000/=** and urged the Court to note that, in HCCC No. 196 of 1993: Philip Musembi vs. Coastal Tyre Retreading Company Ltd, Hon. Ringera, J. (as he then was) awarded a sum of **Kshs.**

120,000/= on 20 June 1995 for injuries that were less serious in nature. The cases of **Butt vs. Khan** [1981] KLR 349 and **Bungoma Criminal Appeal No. 144 of 2011: Peter Wafula Juma & 2 Others vs. Republic** were also referred to by the Respondent to underscore the applicable principles in the circumstances. Hence, the submission of Counsel for the Respondent was that the appeal lacks merit and should be dismissed with costs.

[11] This being a first appeal, it is the duty of this Court to re-evaluate the evidence presented before the lower court and make its own conclusions thereon; a principle that was aptly expressed in **Selle & Another vs. Associated Motor Boat Co. Ltd & Others** [1968] EA 123, thus:

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

[12] Accordingly, I have carefully perused and considered the record of the lower court and note that the Respondent testified before the lower court as **PW3**. He adopted his witness statement dated 19 May 2016 and testified that he was employed by the Appellant in the year 2014 as a tongsman; and that on 21 May 2015, he reported for work at 8.00 a.m. and was under the charge of his supervisor, one **Mr. Lawrence Omas**. He added that his shift, which included **Joel Otwane** and **Geoffrey Wanjala** among others, was to end at around 7.00 p.m.; and that his work basically entailed the feeding/inserting of metal rods into the Roll Mill Machine.

[13] It was further the testimony of **PW3** that, at about 9.00 a.m. on the 21 May 2015, as he was feeding a metal rod into the rollers of the Roll Mill Machine, the rollers reversed suddenly and caused the metal rod to be thrown towards his direction; thereby burning him on the right palm, left knee and left foot. He stated that the supervisor was immediately notified of the accident and first aid was promptly administered to him before he was released to go for treatment. That he then visited **Wareng Medical Clinic**, where he was treated and discharged. He later saw **Dr. J.C. Sokobe** for purposes of examination and the preparation of a Medical Report; after which he instructed **M/s Z.K. Yego Law Offices** to file a suit on his behalf.

[14] The Respondent testified that the Appellant exposed him to the said injuries by instructing him to work in an obviously unsafe environment in addition to failing to provide him with safety apparel which would have prevented or mitigated the injuries he sustained. He also blamed the Appellant for the defect in the Roll Mill Machine, contending that it had not been serviced as regularly as was required. In the Respondent's view, it was this neglect by the Appellant's servants or employees that led to the accident. He therefore pleaded vicarious liability on the part of the Appellant.

[15] The Respondent also called **Dr. Sokobe (PW1)** who confirmed that he examined the Respondent and prepared a Medical Report in respect of that examination dated 6 May 2016. He produced the said report as the **Plaintiff's Exhibit 1a** along with a receipt for **Kshs. 6,000/=** for his services. The receipt was marked as **the Plaintiff's Exhibit 1b** in the lower court. The Respondent also called **Patrick Kipkomen (PW2)**, a clinical officer based at **Wareng Medical Services** in Eldoret Town. His evidence was that he treated the Respondent and that the treatment notes marked **the Plaintiff's Exhibit 4** were written by him.

[16] On the Appellant's side, one of its supervisors, **Gabriel Ocharo Omas (DW1)**, testified on 10 May 2017. His evidence was that the Respondent was not on duty on the date in question; and that in any case, he was deployed to work at the Cooling Bed Section (see handwritten version of the proceedings). He produced the Allocation Register as **the Defence's Exhibit 1** to demonstrate that the Respondent was not working as a tongsman as alleged.

[17] From the evidence adduced before the lower court, it is manifest that, the Respondent was indeed an employee of the Appellant. **DW1** conceded as much, although his evidence was that the Respondent was then attached to the Cooling Bed Section and was therefore not deployed as a tongsman as alleged by him. While it was the contention of the Respondent that he was on duty on 21 May 2015, the Appellant's denied this and took the posturing that the Respondent was not on duty on that particular day, and therefore that the issue of liability did not arise. In the premises, the two broad issues that emerge in this appeal for consideration are:

[a] Whether the Respondent proved his allegations of negligence/breach of duty on the part of the Appellant on a balance of probabilities; and if so,

[b] Whether the sum awarded by the lower court as general damages was a fair award in the circumstances.

[18] As was observed in **Statpack Industries vs. James Mbithi Munyao** [2005] eKLR, the burden was on the Respondent to prove his allegations on a balance of probabilities. In this respect, here is what the Court had to say in the **Statpack Industries Case**:

"It is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone's negligence. An injury per se is not sufficient to hold someone liable."

[19] As has been pointed out herein above, the evidence of the Respondent before the lower court was that the accident occurred at about 9.00 a.m. on the 21 May 2015; and that, as a tongsman, he was in the process of feeding a metal rod into the rollers of the Roll Mill Machine when the rollers reversed suddenly and caused the metal rod to be thrown towards him; thereby burning him on the right palm, left knee and left foot. While it is true that the Appellant failed to produce as exhibits, critical documents that had been filed along with the Plaintiff's witness statement for purposes of **Order 3 Rule 2 of the Civil Procedure Rules**, he did produce and extract of the Attendance Register as **the Defendant's Exhibit 1** and it does show that there were six people assigned as tongsmen on 21 May 2015; and that the Respondent was not one of them. It further shows that the Respondent was one of the seven people assigned to the Cooling Bed Section on that day.

[20] It is noteworthy that an extract of the Attendance Register was filed way back on **3 August 2016** along with the Defendant's List and Bundle of Documents; and that the line of defence taken by the Defendant was made explicit in the Defendant's witness statement filed on the same date. This was the essence of the evidence of **DW1**. Thus, there was sufficient rebuttal on the part of the Appellant that had the effect of disproving the Respondent's allegations of negligence/breach of duty. He was under obligation to show, at the outset that he was indeed instructed to work as a tongsman on **21 May 2015** and by whom. He needed to show that he was seen that day working as a tongsman by calling the two colleagues he mentioned in his evidence, namely, **Joel Otwane** and **Geoffrey Wanjala**, for the burden of proof was on him to prove his assertions.

[21] Section 107(1) of the *Evidence Act, Chapter 80 of the Laws of Kenya*, is explicit that:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

[22] It is for the foregoing reason that I take the view that the lower court misdirected itself in dismissing the Attendance Register and holding that it was not authentic simply because it had no letterhead or logo of the Appellant. The Appellant having raised the issue of whether or not the Respondent had been employed as a tongsman and deployed to work as such on **21 May 2015** was a pertinent issue and the burden was on the Respondent to discharge that burden, which upon a reconsideration of the evidence, was not discharged in my view.

[23] Secondly, and more importantly, is the question whether an accident happened at the factory on **21 May 2015**. Again, the Appellant denied this and therefore sufficient proof was called for on the part of the Respondent. Other than his narration of the events of that morning, the Respondent relied on the treatment notes prepared and produced by **PW2**, a clinical officer then working at **Wareng Medical Services**. His evidence, as captured on page 52 of the Record of Appeal is thus:

"I am called Patrick Kipkomen a clinical officer based at Highway Medical Services. I treated Elijah Nyakundi who had bruises. The notes (Pexh.3) the report (Pexh.4)." (underlining supplied)

[24] Having perused the original record of the lower court, the underlined words may be attributable to typographical errors. This is supported by the evidence of the Respondent and the two documents produced by **PW2**, namely the treatment card and the receipt for **Kshs. 1,200/=** issued by **Wareng Medical Services** dated **21 May 2015**. It is noteworthy, however, that in the treatment card, the indication given is that the injuries were two days old and that the burns had become septic. This discrepancy ought to have been resolved by the trial court in favour of the Appellant whose contention it was that no accident occurred at its premises on **21 May 2015**, and that if indeed the Respondent had been injured as claimed, then the injury was not attributable to its negligence.

[25] Whereas the general rule is that the employer is liable for any injury or loss that occurs to his employees while at the work place as a result of the employer's failure to ensure their safety, that connection must be sufficiently made. The Court of Appeal reiterated this principle in **Purity Wambui Muriithi vs. Highlands Mineral Water Co. Limited [2015] eKLR** thus:

"...as a general rule the employer is liable for any injury or loss that occurs to his employees while at the workplace as a result of the employer's failure to ensure their safety. Does this mean that the employer would always be liable in all circumstances regardless of what caused the accident in question? We do not think so. We say so because where an accident happens due to the employees own negligence it would be unfair to hold the employer liable..."

[26] It is for the two reasons aforementioned that I take the view that the Respondent had failed to prove his allegations of negligence/breach of statutory duty on the part of the Appellant on a balance of probabilities. On quantum, it is trite that assessment of damages is at the discretion of the trial court and that an appellate court can only interfere if it is shown that the lower court acted on wrong principles, or that it awarded so excessive or so little damages that no reasonable court would allow it; or that the court took into consideration matters that it ought not to have taken into consideration or failed to consider matters that it ought to have considered, and as a result arrived at the wrong decision. In **Butt vs. Khan [1981 KLR 349]** the court expressed this principle thus:

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

[27] A similar position was taken by the Court of Appeal in **Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited [2015] eKLR**, thus:

"As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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 at a figure which was either inordinately high or low. The Court must be satisfied that either the Judge, 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 high that it must be a wholly erroneous estimate of the damages."

[28] A perusal of the Judgment of the lower court does show that the learned magistrate took into consideration the treatment notes and medical report by **Dr. Sokobe**, as well as the written submissions filed by Counsel for the parties and the authorities cited. In particular, the trial magistrate made reference to the case of **Philip Musembi vs. Coastal Tyre Retreating Company Ltd** (supra) where an award was made on **20 June 1995** in the sum of **Kshs. 120,000/=** for burn injuries. The case involved a 22-year-old student who sustained 2nd degree burns on the dorsum of her right hand extending from the proximal phalanges to the elbows and rib cage. The burns healed with a resultant **"ugly and unsightly"** permanent gross scarring on the dorsum of her hand, wrist and distal part of her forearm, though wrist, hand and

finger movements were unaffected.

[29] Clearly the injuries sustained in the authority aforementioned were more serious than the Respondent's. Other than a scar on the right palm between the 1st and 2nd finger and on the left knee and foot, there was nothing abnormal noted by **Dr. Sokobe** in his report dated **6 May 2016**. I therefore find the award of the lower court to be inordinately high for soft tissue injuries that were expected to fully heal. Hence for the soft tissue injuries, I would have awarded the Respondent **Kshs. 75,000/=** only. In **Eldoret Steel Mills Limited vs. Moenga Obino Josephat** [2014] eKLR, wherein the Respondent had filed a suit claiming general and special damages when a piece of metal rolled out of a machine at high speed and burnt him on his forearm, the High Court (**Hon. Kimondo, J.**) considered an award of **Kshs. 75,000/=** in general damages to be fair. In this case, in addition to the hand injury, the Respondent also got injured on the left knee and left leg.

[30] I find succor in the expression made in the case of **H. West and Son Ltd vs. Shepherd (1964) AC.326** that:

“...money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional...”

[31] As for the contention that the Respondent filed two similar cases in respect of the same alleged cause of action; and therefore that the Respondent's claim was cooked up and/or imaginary, a careful perusal of the lower court record reveals that this issue was not at all taken up before the lower court where it ought to have been raised pursuant to the Subjudice Rule. This is because **Section 6** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**, does provide that:

"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

[32] In the result, having re-evaluated the evidence that was presented before the lower court, it is my view that the learned trial magistrate misdirected himself and therefore erred in principle in concluding that the Respondent had proved his case on a balance of probabilities. I therefore find merit in the appeal and would allow it with costs and order that the Judgment and Decree of the lower court be and is hereby set aside; and that the same be substituted with an order dismissing the Respondent's suit with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 15TH DAY OF MAY 2020

OLGA SEWE

JUDGE