REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 115 OF 2013

NANDI TEA ESTATES LIMITED.....................APPELLANT

-VERSUS-

RICHARD OMARI...................................RESPONDENT

(Being an appeal from the Judgment and Decree of the Principal Magistrate's Court in Kapsabet SRMCC No. 278 of 2010 dated 15 August 2013 by Hon. B.N. Moisiria, PM)

JUDGMENT

[1] This appeal was filed herein on **11 September 2013** by the Appellant, **Nandi Tea Estates Limited,** from the Judgment and Decree of the Principal Magistrate at Kapsabet Law Courts, **Hon. B.N. Moisiria**, in **Kapsabet SRMCC No. 278 of 2010: Richard Omari vs. Nandi Tea Estates Limited.** In that suit, the Respondent had sued the Appellant claiming Special Damages and General Damages, costs of the suit, interest and any other relief deemed fit by the lower court. His cause of action was that, on or about the **17 November 2008,** while in the course of his employment with the Appellant, he was injured by a machine, thereby sustaining a deep cut wound on the right thumb.

[2] It was the contention of the Respondent that the said accident was attributable to breach of statutory duty of care on the part of the Appellant. The Respondent supplied the particulars of breach at paragraph 6 of the Respondent's Plaint dated **25 November 2010**. In the same vein, the Respondent set out the particulars of injuries suffered by him as well as the special damage suffered in paragraph 8 of the Plaint.

[3] The Appellant denied the claim in its Statement of Defence filed on **13 January 2011**. It denied that the Respondent was its employee; or that there existed a contract of employment between it and the Respondent. The Appellant further denied the particulars of breach of statutory duty levelled against it as well as the allegations that the Respondent got injured on **17 November 2008** while in the course of his employment or at all. In the alternative, the Appellant averred that, if an accident occurred as alleged, then the same was wholly or substantially occasioned or contributed to by the negligence of the Respondent as per the particulars set out in Paragraph 9 of the Appellant's Defence dated **12 January 2011**. It was on that basis that the Appellant prayed for the dismissal of the Respondent's suit.

[4] Having heard the evidence that was presented before it, the lower court found the Appellant 100% liable and awarded the Respondent **Kshs. 85,000/=** as General Damages together with costs and interest. The lower court dismissed the Special Damage component of the claim of **Kshs. 1,500/=** on the basis that the same was not proved.

[5] Being aggrieved by that decision, the Appellant lodged this appeal on **11 September 2013** on the following grounds:

> **[a]** That the Learned Magistrate erred in law and in fact in entering judgment for the Plaintiff as against the Defendant when the Plaintiff had not proved his case on a balance of probability or at all;
>
> **[b]** That the Learned Magistrate erred in law and in fact in holding the Defendant 100% liable and/or at all for the injuries suffered by the Plaintiff on **17 November 2008;**
>
> **[c]** That the Learned Magistrate erred in law and in fact in failing to consider the evidence on record and the Defendant's submissions on liability;

[6] Consequently, the Appellant prayed that the appeal be allowed in its entirety; that the Judgment in **Kapsabet SRMCC No. 278 of 2010: Richard Omari vs. Nandi Tea Estates Ltd** be set aside; and that this Court be pleased to make its own finding on liability. The Appellant also prayed for cost of the appeal and any other relief this Court may deem fit and just to grant.

[7] Pursuant to the directions made herein on **26 March 2019** at the instance of the parties, the appeal was urged by way of written submissions. Thus, the Appellant's written submissions were filed herein on **21 June 2019** while the Respondent's written submissions were filed on **30 April 2019.** Counsel for the Appellant relied on **Peters vs. Sunday Post Ltd** [1958] EA 424 in urging the Court to reconsider and re-evaluate the whole evidence afresh and come up with its own independent conclusion in the matter. Counsel urged the Court to find that, since there is a dispensary at Nandi Tea Estate, there was no justification for the Respondent to go to Nandi Hills District Hospital for treatment. The Court was thus urged to find in this act proof that the alleged accident never happened.

[8] Counsel also took issue with the fact that the Respondent never called, as a witness, the employee who allegedly switched on the machine, to corroborate his testimony. He accordingly urged the Court to find that the Respondent was the author of his own misfortune; having failed to prove a causal link between someone else’s negligence and his injuries. Counsel relied on **Kakamega Civil Appeal No. 58 of 2000: Mumias Sugar Co. Ltd vs. Samson Muyinda** and **James Finlay (K) Ltd vs. Evans Nyati** [2011] eKLR to support his submissions and in urging the Court to find that the Respondent did not prove his case to the requisite standard to warrant the subordinate court’s finding of 100% liability.

[9] On quantum, it was the Appellant’s submission that **Kshs. 20,000/=** would be sufficient to compensate the Respondent for his alleged cut wound on the right thumb and pain. Reliance was placed on **Nairobi HCCC No. 4150 of 1999: Loise Nyambeki Oyugi vs. Omar Haji Hassan** and **Civil Appeal No. 10 of 2004: Zipporah Wambui Wamaina & 817 others vs. Gachuru Kiongera & 2 Others**. Thus Counsel submitted that, should this Court find the Appellant liable to the Respondent, the lower court award of **Kshs. 85,000/=** should be reduced to **Kshs. 20,000/=.**

[10] On behalf of the Respondent, it was submitted that the learned magistrate made a proper finding on the basis of the evidence presented before the lower court and urged the Court to find that the court rightly found the Appellant 100% liable. He pointed out that **DW1** admitted that the Respondent was not supplied with gloves; and that he was injured, not by his own mistake but on account of the mistake of a co-worker. It was accordingly submitted that, in those circumstances, the lower court had no option but to find the Appellant liable.

[11] This being a first appeal, it is the duty of the Court to re-evaluate the evidence adduced before the lower court with a view of satisfying itself as to the soundness of the lower court's decision. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123,** this principle was elucidated 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] What then, was the evidence presented before the lower court? The Respondent testified before the lower court on **10 October 2011** as **PW1.** He stated that he was working at the material time for the Appellant as a casual labourer. His evidence was that, on the **17 November 2008**, he was working in the workshop, and was in the process of measuring a piece of iron sheet so as to cut it for use in repairing a radiator. He added that he was using a grinder machine to mark the line on the iron sheet and that the grinder was switched off at the time. It was the testimony of **PW1** that it was then that a certain fellow worker suddenly put on the grinder, thereby causing it to cut him on the thumb of his right hand.

[13] PW1 further stated that he reported the occurrence to Justus Onyango who was his foreman and was taken to **Nandi Hills District Hospital** for treatment. According to **PW1**, it was the duty of the Appellant to provide him with protective gear, such as gloves, overall and shoes; but that this was not done. He produced his pay slip for **November 2008** and his treatment documents as exhibits before the lower court.

[14] Dr. Joseph Sokobe of Eldoret Hospital was the second witness before the lower court. He testified that he examined the Respondent on **18 March 2011** and found him with a healed scar tissue on the right thumb. He thereafter prepared a Medical Report which he produced before the lower court as the **Plaintiff’s Exhibit No. 3. PW2** confirmed that the history presented by the Respondent was that he was working for the Appellant when he was cut on this right thumb by a machine.

[15] On his part, **Amos Kipruto (PW3)** testified that he was then stationed at Nandi Hills District Hospital; and that on **17 November 2008**, the Respondent visited the hospital complaining of having sustained a cut wound on the right hand while working. He then examined him and noted that he indeed had a bleeding wound on the right thumb, which he cleaned and dressed. He then prescribed appropriate medication the Respondent and recommended 2 days’ rest. **PW3** produced the treatment chit he prepared as **the Plaintiff’s Exhibit 2.**

[16] The Appellant called one witness, namely, **Justus Ongaya (DW1)**. He had retired by the time he testified on **2 July 2013**. He admitted to knowing the Respondent and confirmed that he was, at some point in time, employed by the Appellant as a casual labourer in the factory under his charge. According to **DW1**, the Respondent only worked for the Appellant between **August 2007** and **January 2008**; and therefore that he was not an employee of the Appellant as of **17 November 2008** when he is alleged to have been injured. It was therefore the evidence of **DW1** that there is no possibility that the Respondent was injured while at the factory. **DW1** also explained the procedure in place in the event of work-related injury; and that the first port of call would be the Appellant’s Taito Dispensary; from where serious cases would be referred to Nandi Hills District Hospital.

[17] DW1 also told the lower court that the Appellant kept a master roll for the purpose of recording daily attendance of workers. He produced the register as the **Defendant’s Exhibit 1** and pointed out that it confirmed his assertion that the Respondent worked for the Appellant only for the period between **August 2007** and **January 2008**. **DW1** also produced the master roll for **November 2008** as **the Defendant’s Exhibit 2** and told the lower court that it did not bear the name of the Respondent; a confirmation, in his view, that the Respondent had long left the employ of the Appellant.

[18] From the foregoing summary of the evidence adduced before the lower court, there appears to be no dispute that the Respondent was an

employee of the Appellant; or that he was employed by the Appellant as a general casual laborer in the mechanical engineering section. Whereas the Respondent asserted that he was on duty on **17 November 2008** and was injured in the normal course of work, **DW1** took the position, on behalf of the Appellant, that the Respondent was no longer in the employ of the Respondent as at that date. In proof of this assertion, **DW1** relied on extracts of the master roll, **Defence Exhibits 1 and 2.**

[19] Having carefully perused and considered the two documents relied on by the Appellant, it is manifest that they do not give the full picture of all the employees of the Appellant at that particular point in time; and as noted by the trial magistrate, they do not indicate the particular section concerned; such that, one cannot say, by simply looking at **Defence Exhibit 2,** for instance, that the Respondent was no longer in the employment of the Appellant as at **17 November 2008** in the absence of proof that he resigned, deserted duties or that his services were otherwise terminated. Thus, I have no reason to doubt that he remained an employee of the Appellant and that he was on duty on the **17 November 2008.**

[20] The foregoing being my view, the pertinent issues to resolved are whether the Respondent was injured as alleged by him; and if so, whether the Appellant is liable for the same. Consideration will also be given to the lower court's award and whether it is tenable in the circumstances.

[a] <u>On Whether the Respondent was injured:</u>

[21] The evidence by the Respondent was that he was in the process of measuring a piece of iron sheet and marking it with a grinder with a view of cutting it for use in repairing a radiator when a fellow worker suddenly switched the grinder on, thereby causing it to cut him on the thumb of his right hand. **PW1** further stated that he reported the occurrence to his foreman, **Justus Onyango,** and was thereafter taken to **Nandi Hills District Hospital** for treatment. The evidence of **PW1,** which was entirely unrebutted, was corroborated by the medical evidence adduced by **PW2** and **PW3**. Accordingly, the Trial Magistrate cannot be faulted for coming to the conclusion that the Respondent was indeed injured at his workplace.

[b] <u>On whether the Appellant is liable for the Respondent's injury:</u>

[22] According to **PW1**, it was the duty of the Appellant to provide him with protective gear, such as gloves, overall and shoes; but that this was not done. Hence, it was submitted that had he been supplied with protective gear the accident would may have been avoided altogether. Indeed, in **<u>Purity Wambui Muriithi vs. Highlands Mineral Water Co. Limited [2015] eKLR</u>** it was held that:

> **"...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..."**

[23] There is no denying that the kind of work the Respondent was deployed to carry out on **17 November 2008** required that he supplied with protective gloves. No reference was made to this aspect of the Respondent's evidence by **DW1**. In the same vein, no attempt was made by the Appellant to prove the allegations of negligence attributed to the Respondent in paragraph 9 of its Defence. For instance, there was no demonstration that the Respondent was at fault, or that he failed to carry out his work as per instructions. It was not proved by **DW1** that the Respondent failed to heed or follow safety regulations or procedures laid down by the Appellant.

[24] **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.***

[25] Likewise, **Sections 109** and **112** of the **Evidence** ***Act*** provide that:

> ***109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.***
>
> **...**
>
> ***112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.***

[26] In the premises, I would take the same view as did the trial court that there was sufficient material for holding the Appellant wholly liable to the Respondent for the injury he suffered while performing his duties at the Appellant's farm on **17 November 2008**.

[c] <u>On Quantum of Damages</u>

[27] The trial court, having considered the evidence adduced before it, the submissions made by Learned Counsel for the parties and the authorities cited settled on an award of **Kshs. 85,000/=** as General Damages. Other than stating that the award was against the weight of evidence, the Appellant failed to show in what sense the award was erroneous.

[28] Thus, since assessment of damages is a matter of discretion in respect of which an appellate court ought not to interfere without justifiable cause, I would be disinclined to disturb the lower court's award. In **<u>Peters vs. Sunday Post Limited [1958] EA 424</u>** it was held that:

> **"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion..."**

[29] Likewise, in **Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited** [2015] eKLR, the Court of Appeal restated this principle as follows:

> **"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."**

[30] Moreover, in **H. West & Son Ltd vs. Shephard [1964] AC 326**, it was acknowledged that:

> **"...In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."**

[31] In the light of the foregoing, I would find no reason to disturb the award made by the learned trial magistrate. In the result, I would uphold the lower court's Judgment on liability and quantum and dismiss this appeal with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 12TH DAY OF MAY 2020

OLGA SEWE

JUDGE