REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 78 OF 2013

FRANCIS NGELECHEI TARUS.....APPELLANT

-VERSUS-

ROBERT BARASA KHAEMBA.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. F.N. Kyambia, Principal Magistrate, delivered on 24 May 2013 in Eldoret CMCC No. 92 of 2012)

JUDGMENT

[1] This appeal arises from the Judgment of **Hon. F.N. Kyambia**, Principal Magistrate, delivered on **24 May 2013** in **Eldoret Chief Magistrate's Civil Case No. 92 of 2012: Robert Barasa Khaemba vs. Francis Ngelechei Tarus**. In that suit, the Respondent had sued the Appellant for general and special damages as well as interest and costs in connection with injuries sustained in an accident that occurred on **28 December 2010** while he was engaged in his duties as an employee of the Appellant. It was the contention of the Respondent that he was feeding raw materials into a machine to prepare animal feed when his left hand got caught by the roller of the machine thereby causing him severe injuries on the fingers of that hand.

[2] It was further the contention of the Respondent before the lower court that the accident was attributable solely to the breach of the contract of employment and/or statutory and/or breach of common law duty of care by the Appellant and/or its servants, agents or other employees. Particulars thereof were supplied in Paragraph 6 of the Plaint dated **31 January 2012**. The Appellant denied those allegations vide his Defence filed on **15 March 2012**; and in a Judgment rendered on **13 May 2016**, the lower court found the Appellant liable and awarded the Respondent General Damages of **Kshs. 200,000/=** for his pain, suffering and loss of amenities and **Kshs. 3,650/=** as Special Damages.

[3] Being aggrieved by that decision, the Appellant filed this appeal on the following grounds:

[a] That the Learned Trial Magistrate erred in law and in fact in holding the Appellant 100% liable in negligence without any sufficient evidence and/or proof in that regard in support of the court's decision.

[b] That the Learned Trial Magistrate erred in law and in fact in failing to hold that no accident occurred in the Appellant's premises.

[c] That the Learned Trial Magistrate erred in law and in fact in failing to deal with and consider all issues raised in the pleadings and evidence on record and hence arrived at an erroneous judgment.

[d] That the Learned Trial Magistrate erred in law and in fact in contravening the provisions of **Order 21 Rule 4** of the **Civil Procedure Rules, 2010.**

[e] That the Learned Trial Magistrate erred in law and in fact in failing to hold that if at all an accident occurred, the same was not foreseeable and/or was an inevitable accident.

[f] That the Learned Trial Magistrate erred in law and in fact in failing to dismiss the Respondent's case for want of proof with costs to the Appellant.

[g] 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.

[h] That the Learned Trial Magistrate erred in law and in fact by holding that the Respondent was an employee of the Appellant at the time of the alleged accident.

[i] That the Learned Trial Magistrate erred in law and in fact in failing to hold that the Respondent left the Appellant's employ at the time of the alleged accident.

[j] That the Learned Trial Magistrate erred in law and in fact in failing to appreciate that even when the Respondent was the Appellant's employee, his employment was tenable at the Appellant's Kiplombe Farm and he was never at any time at work or retained to work in Keiyo.

[k] That the Learned Trial Magistrate erred in law and in fact in failing to consider and apply the provisions of the **Evidence Act**, **Chapter 80, Laws of Kenya** and in particular **Sections l07, 108 and 109** thereof.

[l] That, in the alternative and without prejudice to the foregoing, the Learned Trial Magistrate erred in law and in fact in failing to hold that the alleged accident if at all it occurred was wholly and/or substantially caused by the Respondent's own carelessness and/or negligence while carrying out his duties.

[m] That the Learned Trial Magistrate erred in awarding excessive damages inconsistent with the principles of award thereof.

Hence, the Appellant prayed that the appeal be allowed and the Judgment of the lower court be set aside in its entirety; and that in lieu thereof there be an order dismissing the Respondent's claim with costs. **[4]** The appeal was canvassed by way of written submissions, which were filed herein pursuant to the directions given herein on **19 September 2017.** Thus, the Respondent's written submissions were filed on **29 January 2018** by the firm of **M/s Z. K. Yego Law Offices**, while the Appellant's written submissions were filed on **30 April 2018** by the firm of **M/s Nyairo and Company Advocates.** The Appellant opted to reduce the 13 Grounds of Appeal into the following issues for the purposes of determination:

[a] Whether the Respondent had proved that he was an employee of the Appellant at the time of the accident;

[b] Whether the Respondent proved negligence on the part of the Appellant; and

[c] Whether the general damages awarded were excessive.

[5] Citing the case of **Kirugi and Another vs. Kabiya and 3 Others [1987] eKLR,** it was the submission of the Appellant's Counsel that it was the duty of the Respondent, as the Plaintiff before the lower court, to prove on a balance of probability that he was an employee of the Appellant at the time of the accident, which burden was not discharged. That the Respondent did not produce any documents to show that he was on duty at the material time, or that it was his responsibility to operate the animal feed cutting machine. It was further submitted on behalf of the Appellant that the Respondent completely failed to prove the ownership of the machine and the tractor he was working on; or that the Appellant owed him a duty of care in any way. Similarly, it was the submission of the Appellant that the Respondent failed to establish the particulars of negligence alleged in the Plaint, having failed to call as his witnesses the people he was allegedly working with. The cases of **Kreative Roses Limited vs. Olpher Kerubo Sumo [2014] eKLR** and **Kiema Mutuku vs. Kenya Cargo Hauling Services Limited [1991] 2 KAR 253** were also relied on by the Appellant in persuading the Court to find for him.

[6] On behalf of the Respondent, it was submitted that proof had been offered before the lower court to the effect that on **28 December 2010,** the Respondent reported for duty as one of the Appellant's employees, and that he was assigned to perform the duty of preparing animal feed using a machine that was being powered by a tractor; and that as he was feeding the material into the machine, his left hand got caught by the roller of the machine thereby injuring his left small finger and left ring finger and causing a traumatic amputation of two phalanges of the left middle finger. Counsel discredited the evidence of the Appellant and urged the Court to believe what the Respondent told the lower court and find that the determination of the lower court was based on sound evidence.

[7] Counsel for the Respondent relied on **Kisii HCCA No. 179 of 2006: Keberigo Tea Factory vs. Jared Raini** and **Nguku vs. Republic** in urging the Court to draw an adverse inference from the fact that the Appellant failed to avail a record of his employees for the month in question to rebut the contention of the Respondent that he was an employee of the Appellants at all times relevant to this matter. Counsel urged the Court to uphold the decision of the lower court and find the Appellant 100% liable to the Respondent for his injuries.

[8] On quantum, it was the submission of the Respondent that the Appellant had failed to demonstrate that the award by the lower court was either excessive or inconsistent with the applicable principles for assessment of damages. Reliance was placed on **Nairobi HCCA No. 701 of 2001: Joseph Henry Ruhui vs. Attorney General [2004] eKLR** wherein the test laid down in **Butt vs. Khan [1977] 1 KAR** was followed; and the case of **Nakuru Nursery School vs. Bilha Wamaitha Maina [2006] eKLR** wherein an award of **Kshs. 120,000/=** for similar injuries was upheld on appeal. Thus, it was the contention of the Respondent that the decision of the Learned Trial Magistrate ought not to be disturbed.

[9] I have carefully considered the pleadings filed before the lower court as well as the evidence adduced herein and the submissions made by the parties in respect thereof. I have similarly given careful consideration to the Grounds of Appeal filed herein and the submissions made by Learned Counsel for the parties. Needless to say that, in a first appeal such as this, it is the duty of this Court to re-evaluate the evidence and make its own conclusion in respect of the issues in contention, while being mindful that it did not have the advantage of seeing or hearing the witnesses. This principle was well explicated 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..."

[10] Accordingly, I have given careful consideration to the evidence that was placed before the lower court. The Respondent testified on **3 December 2012** as **PW3.** His evidence was that he had been employed by the Appellant as a gardener from **April 2008**; and that on **28 December 2010**, he was working at the Appellant's home in Kiplome when the Appellant called him and told him to go and guard the animal feed machine. That he then went to Kimining in Keiyo and that on the fateful day, he was instructed by his employer to prepare animal feed. According to the Respondent, this was the first time he was required to work on the machine which was powered by a tractor; and added that he had no prior training on how to operate the machine. He told the lower court that the rollers were not covered and that as he was working, his left hand got trapped in the machine causing injuries to his fingers, one of which was chopped off.

[11] It was further the testimony of **PW3** that he was rushed, by the Appellant to Moi Teaching and Referral Hospital for treatment and that the expenses were borne by the Appellant. He produced the treatment documents as his exhibits before the lower court. The Respondent denied that he contributed in any way to the accident. He called **Dr. S. Aluda (PW1)** and **Dr. Paul Kipkorir Rono** of Moi Teaching and Referral Hospital **(PW2)** as his witnesses.

[12] Dr. Aluda testified that he examined the Respondent on **24 January 2012** after his treatment at Moi Teaching and Referral Hospital and confirmed that he had sustained a cut wound on the left small finger, a deep cut on the left ring finger and a traumatic amputation of the left middle finger, thereby losing two phalanges. He produced the Medical Report that he compiled in respect of the examination as the **Plaintiff's Exhibit No. 1** and his receipt for **Kshs. 1,500/=,** being his consultation fees, as the **Plaintiff's Exhibit No. 2. Dr. Rono** similarly confirmed that the Respondent had been seen at their facility on **28 December 2010.** That he presented a history of having been cut by a machine and had injuries on the fingers of the left hand, the most severe of which was a crush injury on the middle finger. He identified and produced as exhibits the documents that emanated from their facility.

[13] The Appellant, on his part, testified as **DW1** and told the lower court that the Respondent was casual labourer at one of his farms from **March 2009** to **November 2010.** His evidence was that the Respondent was employed as a herds boy and had never operated an animal feeds machine. Regarding the events of **28 December 2012, DW1** testified that he was at home and never met the Respondent at all on that day. He denied having forced the Respondent to operate the animal feeds machine and therefore asserted that he did not have any responsibility to provide him with protective gear, contending that the Respondent was not in his employ at the time. He added that, in any event, he had leased his tractor to another farmer and no such accident could have occurred on his farm on the date in question.

[14] In the premises, I would agree with Counsel for the Appellant that the issues for consideration in this appeal can be summarized as follows:

[a] Whether the Respondent proved on a balance of probabilities that he was an employee of the Appellant at the time of the accident;

[b] Whether the Respondent proved negligence and therefore liability on the part of the Appellant; and

[c] Whether the general damages awarded were excessive

[a] <u>On Whether the Respondent had proved that he was an employee of the Appellant at the time of the accident</u>

[15] The Appellant acknowledged that the Respondent was his employee, but contended that he had left his employ by **November 2010** and was therefore not on duty on the date of the alleged accident. It was further the contention of the Appellant that, in any event, he did not own any such machine as was described by the Respondent, adding that he had lent out his tractor to a fellow farmer at the time period in issue.

[16] It was thus the Respondent's word against the Appellant's and therefore boiled down to credibility. The Learned Trial Magistrate applied his mind to the pleadings and the evidence adduced before him, as well as the submissions made by the parties' advocates. He believed the Respondent and gave his reasons for so doing in his Judgment, which appears at pages 47 to 51 of the Record of Appeal. Here is what the lower court had to say in his Judgment:

"...I have carefully considered the evidence tendered by both parties. I have also considered the submissions by both counsels and the authorities relied on. From the said evidence it is not disputed that the plaintiff was employed by the defendant as a casual. This fact was admitted by the defendant, the defendant however stated that as at the date of the alleged injury that is on 28.12.2010, the plaintiff had left his employment. However the defendant did not clearly say when the plaintiff left his employment...On whether the plaintiff was injured, the defendant denied having owned animal feeds machine. However, when cross examined by the plaintiff's counsel and particularly referred to his statement filed in court on 16.3.2012 he admitted the same save that he had leased it out. This contradictory evidence by the defendant is a clear manifestation that the defendant is not a truthful witness. My finding is that the defendant owned the said machine and on the material day the Plaintiff was working at it...I find that the plaintiff was employed by the defendant and the accident occurred as described by the plaintiff. The plaintiff was not provided with protective gear and consequently I find the defendant 100% to blame..."

[17] The Learned Trial Magistrate was entitled to come to the conclusion aforestated and I find no particular reason to differ or find fault with that decision. As was aptly observed in the case of **<u>Peters vs. Sunday Post Limited [1958] EA 424</u>** by Sir Kenneth O'Connor:

"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..."

[b] <u>On Whether the Respondent proved negligence on the part of the Appellant</u>:

[18] Having found that the Respondent was an employee of the Appellant; and that he was on duty at the material time of the accident, and was working for the first time on a dangerous machine with no protective gear, the Learned Trial Magistrate cannot be faulted for holding the Appellant liable in the circumstances. In spite of the Appellant's protestations, the Respondent adduced consistent and cogent evidence to the effect that the animal feed machine had rollers which had no guards. It was imperative therefore that the Respondent be instructed on, not only how to safely operate the machine, but also be provided with protective gear for his own safety. From the record, the Appellant did neither of these. Consequently, the holding in **<u>Purity Wambui Muriithi vs. Highlands Mineral Water Co. Limited [2015] eKLR</u>** would come into play, namely, 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..."

[19] This is all the more so because**,** whereas contributory negligence was pleaded by the Appellant in the Defence, no proof was availed in support of those assertions. Having made the assertions, the burden of proof was on the Appellant to satisfy the lower court on those issues, for **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.

[20] Similarly, **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.

[21] Hence, the Appellant having failed to discharge the burden of proving the particulars alleged by it, the lower court cannot be faulted for relying on the credible evidence of the Respondent regarding the circumstances in which the injuries occurred and for invoking the general rule, in those circumstances. The Appellant was thus rightly found 100% liable to the Respondent for the injuries sustained by the Respondent in the course of discharging his duties**.**

[c] <u>On whether the general damages awarded were excessive:</u>

[22] In awarding the Respondent General Damages of **Kshs. 200,000/=** the Trial Court considered the injuries suffered by him and the submissions and authorities relied on by Learned Counsel. 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 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 **<u>Butt vs. Khan [1981 KLR 349</u>**, this principle was restated 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..."

[23] Before the lower court, the Respondent's Counsel had asked for an award of **Kshs. 500,000/=** as general damages. Counsel relied on the case of **<u>Nakuru Nursery School vs. Bilha Wamaitha Maina</u>** in which **Kshs. 120,000/=** was awarded similar injuries. Counsel for the Appellant on the other hand had proposed an award of **Kshs. 66,000/=** and relied on **<u>Amalgamated Saw Mills Limited vs. Andrew Nyamoyo Onyancha [2011] eKLR</u>**. The lower court considered these propositions and expressed reasons for arriving at the figure of **Kshs. 200,000.** I therefore have no quarrel with the lower court's assessment of General Damages.

[24] The Respondent also claimed **Kshs. 3,650** as special damages for the Medical Report and treatment expenses. It is trite that special damages must be specifically proved. The Respondent and his witnesses produced receipts to show that he paid **Kshs. 1,500** for **Dr. Aluda's** services; and that he paid various sums of money for his treatment at Moi Teaching and Referral Hospital. The receipts appear at pages 28 to 33 of the Record of Appeal. Accordingly, there was sound basis upon which the lower court awarded the sum of **Kshs. 3,650/=** as Special Damages.

[25] In the result, having re-evaluated the evidence that was presented before the lower court, I am satisfied that the decision of the Learned Trial Magistrate on the twin issues of liability and quantum was sound and cannot therefore be faulted. I consequently find no merit in the appeal and would dismiss it with costs, which I hereby do.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 17TH DAY OF JANUARY 2019

OLGA SEWE

JUDGE