REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 51B OF 2012

RAIPLY WOODS (K) LTD.....APPELLANT

VERSUS

TIMOTHY LILEJI SHIKHVOLI.....RESPONDENT

(Being an Appeal from the Judgment of the SeniorResident Magistrate Honourable E.A Obina in Eldoret CMCC No. 336 of 2009, dated 20th April, 2012)

JUDGMENT

INTRODUCTION

The respondent filed a claim in the trial court, Eldoret CMCC No. 336 of 2009 seeking damages following injuries sustained while in the employment of the appellant. He was injured by a forklift as he was preparing to load wood into the cutting machine. The trial court awarded the respondent Kshs. 150,000/- in general damages and Kshs. 1,600/- in special damages. The appellant filed the present appeal based on various grounds and submitted on them jointly.

APPELLANT'S CASE

The appellant submitted that there was no evidence in the trial court that the appellant failed in his duties therefore necessitating the respondents' injuries. The appellant cited *Section 107* of the *Evidence Act* and further submitted that there was no evidence in the trial court that the appellant was contractually obligated to provide the appellant with protective gear. The appellant submitted that the absence of gloves did not cause the accident.

The appellant maintained that there was no duty to provide gloves and referred to the case of ***Sotik Tea Highlands Estate Ltd vs Francis Nyaberi Omayo*** which, in a nutshell, stated that it was the duty of an employer to take reasonable care for the safety if his workmen and that the duty extended to the safety of the place of work, the plant and the method of work.

The appellant maintained there was no breach of duty of care and the respondents' claim therefore failed as it was predicated on this basis. The accident occurred not due to the want of provision of gloves but due to the negligence of the Respondent. The appellants further submitted that liability must come with fault and referred the court to the authority of ***Eastern Produce (K) Ltd vs Joseph Wafula Mwanje.***

The respondent did not prove the particulars of negligence as pleaded. The respondent was injured when he carelessly performed his tasks and a block board injured him. There was nothing the appellant could do to prevent the block board from injuring the respondent. The appellant had no control and cannot be blamed for something it could not have reasonably anticipated to occur.

The appellant relied on the case of ***Statpack industries Ltd. V James Mbithi Munyao (Nairobi HCCA No. 152 of 2003*** the gist of which was that there must be a causal link between someone's negligence and his injury.

The appellant submitted that the award of Kshs. 150,000/- was excessive as the respondent suffered soft tissue injuries. The injuries should have attracted general damages ranging from Kshs. 30,000/- to Kshs. 50,000/-. The respondent did not pray for special damages and it is trite law that special damages must be pleaded specifically and proved. The magistrate erred in awarding special damages as the respondents did not prove the same.

RESPONDENTS' CASE

The respondent submitted that the appellant appealed against the judgment on quantum alone. Considering the injuries, the respondents submitted that the award of Kshs. 150,000/- was not high at all, they relied on the case of ***Johnstone M. Ochieng' & 2 others v CCL Limited & Anor. Nakuru HCCC No. 309 of 1998*** where 90,000/- was awarded and in 2012 having considered issues such as inflation the court

awarded Kshs. 150,000/-

The respondent submitted that the award of Kshs. 151,600/- was not inordinately high given that there was no award for wrongful dismissal which was pleaded. He prays the appeal be dismissed with costs. Costs were not taxed in the lower court and the respondents submit that the court orders dismissal of the appeal with costs both at the lower court and for this appeal.

ISSUES FOR DETERMINATION

a) Whether the appellant was liable

b) Whether the award for general damages was excessive

c) Whether the award for special damages was erroneous

WHETHER THE APPELLANT WAS LIABLE

The appellants were unable to prove that in the event that they had issued protective gear, the same would not have mitigated the injuries sustained. On a balance of probabilities, I find that the protective gear would have mitigated the injuries and the appellants were liable to that extent. Further the failure to provide the protective gear provided an unsafe work environment. It was a foreseeable risk and the appellant is therefore liable.

WHETHER THE AWARD FOR GENERAL DAMAGES WAS EXCESSIVE

The test as to when an appellate court may interfere with an award of damages was stated by Law, J.A. in ***Butt vs Khan (1977) 1 KAR 1*** as follows:

> ***"An appellate court will not disturb an award of damages unless it is 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."***

The appellants have not demonstrated that the judge proceeded on wrong principles or that he misapprehended the evidence in some material aspect and so arrived at an inordinately high figure.

WHETHER THE AWARD FOR SPECIAL DAMAGES WAS ERRONEOUS

It is trite law that special damages must be specifically pleaded and proven. A perusal of the record of appeal shows that the special damages were pleaded in the plaint and proven by way of exhibits and testimony from the doctor. I find that the award for special damages was not erroneous.

The appeal fails on all grounds and is dismissed with costs to the respondent for both the appeal and the trial court.

S. M GITHINJI

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this **5th** day of **April, 2019**

In the absence of:

The appellant

The respondent

Mr. Mwelem – Court assistant