REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 54 OF 2011

JOSHUA ODUOR.....................................APPELLANT

-VERSUS-

KIBWARI LIMITED............................RESPONDENT

(Being an appeal from the Judgment of the Hon. C.G. Mbogo, Chief Magistrate, delivered on 2 March 2011 in Eldoret CMCC No. 155 of 2009)

JUDGMENT

[1] The Appellant herein, **Joshua Oduor**, was the Plaintiff in **Eldoret Chief Magistrate's Civil Case No. 155 of 2009: Joshua Otieno Oduor vs. Kibwari Limited.** His cause of action was that on or about **19 September 2006**, while lawfully carrying out his duties as an employee of the Respondent in its factory, the *makuti* broom he was using to clean the Cutting, Tearing and Crushing (CTC) roller was caught by the roller, thereby sucking and crushing his right hand. Consequently, the said hand had to be amputated above the elbow, occasioning him pain loss, and damage. He blamed the Respondent for his injuries alleging negligence and/or breach of statutory duty of care on the part of the Respondent. He therefore prayed for General Damages, Interest and Costs from the Respondent.

[2]The Respondent denied the Appellant's allegations before the lower court and contended, in the alternative that, if the Appellant sustained any injuries as alleged, then he was the author of his own misfortune or substantially contributed to the same. Hence, the particulars of negligence attributable to the Appellant were set out at Paragraph 9 of the Respondent's Defence dated **6 April 2009**. Having heard the evidence presented by the Plaintiff and the respective submissions by Learned Counsel for the parties, the Learned Trial Magistrate agreed with the Respondent and dismissed the Appellant's suit with costs, in a Judgment rendered on **2 March 2011**.

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

> **[a]** That the Learned Trial Magistrate erred in law and in fact in holding that the Defendant was not liable in any way for the accident in which the Plaintiff lost his entire right hand;
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> **[b]** That the Learned Trial Magistrate erred in law and in fact in finding that the Plaintiff had not proved his case on a balance of probability in spite of the fact that the Defendant did not call any witnesses to controvert the Plaintiff's claim;
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> **[c]** That the Learned Trial Magistrate erred in law and in fact in stating in his judgment that he would have awarded the Plaintiff **Kshs. 350,000/=,** an award which would have been inordinately low in comparison to the injuries suffered by the Plaintiff;
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> **[d]** That the Learned Trial Magistrate erred in law and in fact in finding that the Plaintiff had already been paid **Kshs. 728,011.20** (Kenya Shillings Seven Hundred and Twenty Eight thousand and Eleven and Twenty Cents) only by way of compensation under the Workmen's Compensation Act, yet the record/proceedings show that the Plaintiff was paid **Kshs. 278,011.20** (Kenya Shillings Two Hundred and Seventy Eight Thousand and Eleven and Twenty Cents) only.

[4] In the premises, the Appellant prayed for the appeal to be allowed with costs; and that the Court be pleased to set aside the Judgment of the Trial Magistrate and award damages with costs to the Appellant.

[5] The appeal was urged by way of written submissions, which were filed herein on **18 November 2014** and **17 July 2017**, respectively. On behalf of the Appellant, it was submitted that, having proved that the accident occurred as a matter of fact; and the Respondent having opted to adduce no evidence before the lower court, the Learned Magistrate erred in finding that the Respondent was not in any way liable for the accident. It was also the contention of the Appellant that the proposed award of **Kshs. 350,000/=** would have been inordinately low given the Appellant's injury as set out on page 29 of the Record of Appeal.

[6] Counsel for the Appellant also found fault with the finding by the Learned Magistrate that the Appellant had been paid **Kshs. 728,011.20** under the **Workmen's Compensation Act;** granted that what was in fact paid was **Kshs. 278,011.20** only. His argument was that the figure of **Kshs. 728,011.20**, which is **Kshs. 450,000/=** more than what he was paid, could have led the Learned Magistrate into thinking that the Appellant had been sufficiently compensated, when this was not the case. Accordingly, Counsel for the Appellant proposed an award of **Kshs. 1,500,000/=.** He relied on **Mombasa High Court Civil Case No. 177 of 1994: Fredrick Otieno Kombo vs. Tana Express Bus and 3 Others**, in which **Kshs. 900,000/=** was awarded for loss of part of the Plaintiff's right arm; and **David Tarus Samwel vs. Tana River Express and 3 Others,** in which **Kshs. 850,000/=** was awarded for los of part of the Plaintiff's right arm.

[7] The Respondent's Counsel on the other hand, was of the view that the Learned Trial Magistrate was right in dismissing the Appellant's suit with costs, the Appellant having failed to satisfy the court that he had a valid cause of action. He pointed out, on the authority of Nairobi **HCCA No. 334 of 2006: Joseph Anjichi vs. Kenya Vehicle Manufacturers Limited; Kisumu HCCA No. 69 of 2012: Mombasa Millers vs. Charles Otieno Owino**, and **Nakuru HCCA No. 272 of 2004: Amalgamated Saw Mills Ltd vs. Tabitha Wanjiku**, that it was imperative for the Appellant to not only prove that he was injured during the course of his employment, but also that the Respondent was either negligent or in breach of its statutory duty.

[8] Similarly, the Respondent relied on **Mwanyule vs. Swalahedin t/a Jomvu Total Service Station; Muthuku vs. Kenya Cargo Ltd [1991] KLR 468** and **Civil Appeal No. 302 of 2000: Kiboswa Tea Estate vs. Alfred Juma Bilauni** to support the argument that the Appellant had failed to prove fault on the part of the Respondent and was therefore the author of his own misfortune. The Court was thus urged to find that the Appellant was duly paid **Kshs. 728,011.20** under the **Workmen's Compensation Act** and therefore that the appeal lacks merit and ought to be dismissed with costs.

[9] This being a first appeal, it is the duty of this Court to re-evaluate the evidence that was 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..."**

[10] A perusal of the lower court record shows that the Appellant testified on **9 October 2009** and stated that he was on duty at **Kibwana Tea Factory** where he was then employed as a supervisor/mechanic. He had, by then, worked for the Respondent for 13 years. He testified that, as he was cleaning the CTC rollers using a *makuti* broom, one roller got stuck and it sucked the broom and his hand as well, thereby crushing and cutting off his right hand above the elbow. It was further the evidence of the Appellant that although he pressed the emergency switch that was closest to him, it failed to stop the machine from running. He then screamed for help and a colleague ran to the main switch inside the power room and switched off the power supply. He was then given first aid before being rushed to **Nandi Hills District Hospital** where he was admitted for 10 days.

[11] The Appellant conceded that he filled the workmen's compensation forms which he produced before the lower court as an exhibit along with his Discharge Summary and pay slip for the month of **May 2007.** He conceded that he was paid **Kshs. 278,011.20** under the **Workmen's Compensation Act**. The Appellant called **Dr. Samuel Aluda (PW2)**, a Medical Practitioner in Eldoret Town who examined him on **23 September 2009** and prepared a Medical Report marked the **Plaintiff's Exhibit No. 2** before the lower court. **PW2** confirmed that the Appellant suffered a traumatic amputation of the right arm above the elbow. The report shows that as at **23 September 2009**, the Appellant experienced slight tenderness in the right arm with occasional pain.

[12] As has been indicated herein above, the Respondent opted to not call any witness in defence. Thus, it is therefore manifest from the evidence that was adduced before the lower court that there was no dispute that the Respondent was an employee of the Appellant; or that he was on duty on the **19 September 2006** when the accident happened. It is similarly indubitable that, as a result of the accident, the Appellant suffered a traumatic amputation of his right arm. What was in contest, and which the Court must reconsider and take a decision on are the twin issues of **liability** and **quantum.**

[13] On **liability,** the Appellant alleged that he was exposed to danger because the nearby switch failed to function. He therefore contended, *inter alia*, that the Respondent failed to make or keep his place of work safe as was required of it. 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."**

[14] The evidence of the Appellant was that, as he was cleaning the CTC rollers using a *makuti* broom, one roller got stuck and it sucked the broom and his hand as well, thereby cutting off his right hand above the elbow. He had worked at the factory for 13 years and had finished cleaning one half of the rollers when the incident occurred. It was further the evidence of the Appellant that the Manager had issued instructions that:

> **"...the machines must be on while they are being cleaned to avoid tea being returned inside the machine..."**

[15] The Appellant further testified that he pressed the emergency switch that was closest to him but that it failed to stop the machine from running. He had to scream for help from a colleague to have the main switch inside the power room put off for the situation to be put under

control. Thus, having testified as to the failure of the emergency switch, the onus of proof shifted to the Respondent to rebut the Appellant's allegations and demonstrate that indeed, the Appellant was the author of his own misfortune as alleged by it.

[16] No evidence was adduced by the Respondent to demonstrate, for instance that the Appellant was careless, negligent and reckless whilst engaged upon his duties; or that he was going about his duties without presence of mind; or that the Appellant intentionally caused injury to himself as was alleged in Paragraph 9 of the Defence. Similarly, there was no proof that the Appellant exposed himself to an obvious risk which he could have reasonably foreseen and or anticipated; or even that he failed to follow the supervisor's guidance. The Appellant's evidence that the emergency switch completely failed was also uncontroverted. There was therefore sufficient basis for the lower court to find the Respondent liable.

[17] Besides, 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, unless negligence is shown on the part of the employee. 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..."**

[18] Thus, the Respondent having failed to demonstrate negligence on the part of the Appellant, the Learned Trial Magistrate erred, in my considered view, in dismissing the Appellant's suit. **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.**

[19] 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.**

[20] Accordingly, I would agree with and adopt the expressions of **Mabeya J.** in **Safarilink Aviation Limited vs. Trident Aviation Kenya Limited & Another [2015] eKLR,** that:

> **"...failure to rebut evidence tendered by one party leaves the court with no option but to draw an inference that the facts as presented are true..."**

[21] 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..."**

[22] In **Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited** (supra), 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."**

[23] Other than a general statement that the lower court had considered the submissions and the authorities cited by the respective Counsel in their submissions, it is not evident how the authorities cited impacted on the lower court's determination. The Learned Trial Magistrate did consider the nature of the Respondent's injuries and came to the conclusion that **Kshs. 350,000/=** would suffice, had he found for the Appellant on liability. He, however, did not give any basis for that conclusion. Thus, in the case of **H. West and Son Ltd v. Shepherd (1964) AC.326 it was proposed that, in so far as possible, comparable injuries should be compensated by comparable awards. It was held thus:**

"…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….."

[24] In the light of the foregoing, Counsel for the Appellant proposed an award of **Kshs. 1,500,000/=** and cited **Mombasa High Court Civil Case No. 177 of 1994: Fredrick Otieno Kombo vs. Tana Express Bus and 3 Others**, in which **Kshs. 900,000/=** was awarded on **19 June 1995** for loss of part of the Plaintiff's right arm. I note however that the Plaintiff in that case also sustained head injury with loss of consciousness for 8 hours and post-traumatic amnesia for about 3 days. It is noteworthy too that the amputation was at the level of the shoulder joint. The Appellant also relied on **David Tarus Samwel vs. Tana River Express and 3 Others,** in which **Kshs. 850,000/=** was awarded for loss of part of the Plaintiff's right arm on **8 December 1993**. Similarly, the injuries were more severe as they involved loss of consciousness for three days and amputation at the shoulder level.

[25] The Respondent's Counsel did not make any proposals or refer the Court to any comparable precedents. I find the following comparable precedents instructive:

[a] In **Roba Doti Guyo vs. Jiang Zhongemei Engineering Company [2015] eKLR**, the Plaintiff, an employee of the Defendant, was trying to remove a stuck stock using his right hand from the Defendant's crusher when the crusher was abruptly started by a fellow employee, thereby crushing the Plaintiff's right hand. The crushed hand was amputated leaving the Plaintiff with an ugly stump. The Plaintiff was awarded **Kshs. 2,500,000/=** on **22 October 2015** as General Damages for his pain, suffering and loss of amenities.

[b] In **Umoja Rubber Products Limited vs. Bobson Rimba Lewa [2015] eKLR,** the Respondent was involved in an industrial accident while working for the Appellant that entailed the amputation of the left hand below the elbow. He was awarded **Kshs. 2,200,000/=** as General Damages for his pain and suffering. The Appellant was aggrieved by the decision of the trial court, contending that the award was so excessive as to amount to an erroneous estimate of the damages payable to the Respondent. The appeal was dismissed **27 October 2015** on the ground that the award was reasonable granted the severe injury that the Respondent suffered.

[26] Thus, on the basis of the foregoing, I consider an award of **Kshs. 2,000,000**/= to be fair recompense for the Appellant's pain, suffering and loss of amenities. Having been paid **Kshs. 278,011.20** under the **Workmen's Compensation Act**, it is only fair that the said amount be accounted for. Indeed, **Section 25(1)** of the repealed **Workmen's Compensation Act** recognized that:

(1) Where the injury was caused by the personal negligence or wilful act of the employer or of some other person for whose act or default the employer is responsible, nothing in this Act shall prevent proceedings to recover damages being instituted against the employer in a civil court independently of this Act:

Provided that -

(i) if damages are awarded after compensation has been paid, the amount of damages awarded in such proceedings shall take into account the compensation paid in respect of the same injury under this Act;

Accordingly, I would reduce the award by the said sum of **Kshs. 278,011.20.**

[27] 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 Appellant had not proved his case on a balance of probabilities and in finding that he had been paid **Kshs. 782,011.20** under the **Workmen's Compensation Act;** yet what was paid in fact was a sum of **Kshs. 278,011.20** only. I would accordingly set aside the Judgment of the lower court and replace it with a Judgment in favour of the Plaintiff for **Kshs. 2,000,000/=** and reduce therefrom the aforesaid sum of **Kshs. 278,011.20; hence Kshs. 1,721,988.80;** together with interest from the date of the Judgment of the lower court and costs. The Plaintiff will also have costs of the appeal

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 8TH DAY OF MAY 2019

OLGA SEWE

JUDGE