REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL APPEAL NUMBER 10 OF 2013

(Being an Appeal from the Judgment and Decree of Hon. J. A. Awiti Principal Magistrate in Kitale SPMCC No. 408 of 2005)

MT. ELGON ORCHARDS LTD.....APPELLANT

VERSES

BERNARD WAMUKOTA NYONGESA.....RESPONDENT

JUDGMENT

1. The appellant being dissatisfied with the lower court decision has appealed against the same on both quantum and liability. There are several grounds raised by the appellant and before looking at them it may be appropriate to set out the brief summary of the evidence as presented during trial.

2. The Respondent who stated that he was an employee of the Appellant said that he was doing some spraying work at the Appellant's orchards on the 22nd April, 2004 when the horse pipe busted and the chemicals splashed on him and he sustained serious burns.

a). chemical burns on the neck.

b). chemical burns on the chest

c). Chemical burns on the abdomen

3. He attributed negligence on the appellant whom he blamed for not providing a safe working environment and proper working tools.as a result of the said injuries he prayed for damages.

4. In its defence the appellant denied the claim and insisted that the responded was indeed negligent and was not on duty that particular day.

5. When the matter came up for hearing the Respondent did narrate how the accident occurred but he did not call any witness. He said that his friend Francis Shikuku switches off the machine and he was taken to the clinic and thereafter taken to kitale district hospital.

6. During cross examination he admitted that he had been trained by the appellant and he was provided with the cloves and overall as well as other safety gadgets.

7. **PW2 CHRISANDUS MASINDE** a clinical officer from Kitale District Hospital produced the treatment documents on behalf of the Respondent which showed that he was treated at the said hospital.

8. The medical legal report by Dr. Kiamba was thereafter produced by consent. The appellant called 2 witnesses and closed its case. The same was later set aside and the appellant granted chance to recall them for cross-examination. The said consent reopening the defence case was premised on the fact that in the event that they don't turn up their exparte evidence would be set aside.

9. The respondents witnesses failed to turn up and as such the contents of the consent wsa effected namely that the case was closed without the inpute from the respondent. The above position seemed not to have been captured by the trial court because a closer look at its judgment shows that it proceeded as though the defence was tendered.

10. Be it as it may the issues at hand are clear and straight forward namely whether in light of the evidence offered by the respondent negligence was established against the appellant.

11. Although there was suggestion that the Respondent was no longer on duty and that he may not have been on duty that day there was no

sufficient evidence to that effect from the Respondent.

12. It is now well settled that the appellate court will only interfere with the decision of the trial court if the damages given was too low or too high in the circumstances, or the court took into account irrelevant factors inter alia**. See KEMFRO AFRICA LTD t/a MERU EXPRESS AND ANOTHER VERSES A.M LUBIA AND ANOTHER (NO 2)1987 KLR 3O.**

13. As there was no defence offered by the appellant the evidence tendered by the respondent would be considered. On the question of negligence the respondent simply told the court that the pipe simply busted. There was nothing to suggest at was the cause of the burst. Neither was there evidence to suggest that the same was faulty or not.

14. It was admitted during the cross examination of the Respondent that he had been provided with the necessary working tools. If that was the case then the Appellant in my view had generally met its obligation.

15. What then is the way forward? In my considered opinion accidents do not simply happen. Someone must have caused it. This could not be what is generally called, an act of God. I find that there was blameworthiness on both sides. First of all there was every chance that there was faultiness on the pipe either through wear and tear or due to lack of maintenance and repairs. Secondly there was possibility that the Respondent did not handle the same well as per the laid down instructions. This second conclusion is buttressed by the fact that he did not call his workmate who put off the machine when he realised that it had busted.

16. For the above foregoing reasons and in the absence of the evidence by the Appellant I find that the trial court ought to have shared the negligence between the parties. This courts in the premises hold that liability is divided between the appellant and the Respondent equally.

17. Turning now to the issue of damages ,the court has considered the same especially the injuries sustained by the respondent and the quoted authorities relied on by the trial court as well as those submitted in this appeal, I reluctantly refused to accept that the award was excessive un the circumstances. Moreover taking into account the contributory negligence as found above I find that the same should not be disturbed.

18. The upshot is therefore that the lower courts findings on liability is hereby set aside. Liability between the Appellant is hereby shared equally and for the avoidance of doubt on 50:50 basis.

19. The prayer on damages is hereby disallowed.

20. The Appellant shall get half the cost of this appeal and at the lower court. The general damages as awarded to the respondent is reduced by half namely ksh 50000.

21. Orders accordingly.

Dated, signed and delivered at Kitale this 13th May, 2019.

H .K CHEMITEI

JUDGE

13/5/19

In the presence of:

Mr. Onyancha for Mr Okile for Respodnents

No Appearence for the Appellant

Court Assistant – Kirong

Judgment read in open court.