REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 11 OF 2016

ELDORET GRAINS LIMITED.....APPELLANT

-VERSUS-

ANDERSON MUKOLWE NDAKALA.....RESPONDENT

(Being an appeal from the Judgment and Decree of the Hon. C. Obulutsa, Senior Principal Magistrate, delivered on 11 January 2016 in Eldoret CMCC No. 572 of 2013)

JUDGMENT

[1] This is an appeal from the Judgment of the Learned Senior Principal Magistrate, **Hon. C. Obulutsa,** delivered on **11 January 2016** in **Eldoret Chief Magistrates Court Civil Case No. 572 of 2013: Anderson Mukolwe Ndakala vs. Eldoret Grains Limited**. The suit had been filed by the Respondent herein, **Anderson Mukolwe Ndakala**, against the Appellant, **Eldoret Grains Limited** for General and Special Damages plus costs and interest on account of injuries suffered by the Respondent on about **11 May 2013** while in the course of his work as an employee of the Appellant.

[2] It was the contention of the Respondent before the lower court that at all times material to his suit, he was employed by the Appellant as a general worker; and that it was a term of his contract of employment that the Appellant would take all reasonable precautions for his safety while he was engaged upon the said employment; and not to expose him to a risk of damage or injury which the Appellant knew or ought to have known. It was further the contention of the Respondent before the lower court that it was the duty of the Appellant to provide him with a safe and proper system of work, coupled with effective supervision.

[3] It was thus the Respondent's cause of action before the lower court that, on or about **11 May 2013**, while he was lawfully engaged upon his duties, he got seriously injured on the left leg due to the negligence of the Appellant and/or its employees. The particulars of negligence alleged were accordingly set out in Paragraph 5 of the Plaint dated **28 August 2013;** while the particulars of injuries suffered were provided in Paragraph 7 thereof. It was on account of the foregoing that the Respondent sought compensation by way of General Damages together with costs of the suit and interest at court rates.

[4] The Appellant denied the claim in a Defence filed on **16 January 2014.** In particular, it denied that the Respondent was its employee, or that there was a contract of employment between it and the Plaintiff as alleged or at all. Consequently, the Appellant denied that the Plaintiff was lawfully on duty on **11 May 2013** or that he was injured on the said day or at all. The particulars of negligence and injuries as set out in the Respondent's Plaint were similarly denied by the Appellant. The Learned Trial Magistrate, upon trying the facts of the matter, came to the conclusion that the Respondent had proved negligence on the part of the Appellant and recorded Judgment in his favour on the basis of 100% liability. He assessed the quantum of damages payable at **Kshs. 250,000/=** and entered Judgment in that regard together with costs and interest.

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

> **[a]** That the Learned Trial Magistrate erred in law in holding the Appellant 100% liable despite overwhelming evidence to the contrary;
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> **[b]** That the Learned Trial Magistrate erred in law and in fact in awarding damages whereas the Respondent did not prove his case on a balance of probability;
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> **[c]** That the Learned Trial Magistrate erred in law and in fact in applying wrong principle while assessing damages;
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> **[d]** That the Learned Trial Magistrate erred in law and in fact in awarding damages which were inordinately excessive in the circumstances;

[e] That the Trial Magistrate erred in law and in fact in shifting the burden of proof to the Appellant contrary to law;

[f] That the Trial Magistrate erred in law and in fact in failing to dismiss the Respondent's case;

[g] That the Trial Magistrate was biased and disregarded the Appellant's evidence on record;

In the premises, the Appellant prayed that the appeal be allowed and the Judgment of the court of first instance be set aside with costs to the Appellant.

[6] The appeal was canvassed by way of written submissions, which were filed herein on **21 November 2018** and **4 December 2018**, respectively. On behalf of the Appellant, Learned Counsel faulted the evidence adduced before the lower court by the Respondent as being untruthful and therefore ought to have been disregarded. It was submitted that it was humanly impossible for a person to carry a sack weighing 180 kgs as was posited by the Respondent. Accordingly, he urged the Court to find that the Respondent was the author of his own misfortune. Reliance was placed on **Statpack Industries vs. James Mbithi Munyao** for the holding that an employer has no obligation to babysit an employee.

[7] On quantum, the Appellant faulted the award of **Kshs. 250,000/=** for what were essentially soft tissue injuries. Counsel instead proposed an award of **Kshs. 60,000/**= and relied on the following authorities:

[a] Ndungu Dennis vs. Ann Wangari Ndirangu & Another [2018] eKLR;

[b] Sovoko Saw Mills Ltd vs. Grace Nduta Ndungu;

[c] Peter Kahungu & Another vs. Sarah Norah Ongango [2004] eKLR;

[d] Eastern Produce Kenya Ltd vs. Gilbert Muhunzi Makotsi [2013] eKLR;

[8] The Respondent's Counsel, on the other hand, supported the lower court's decision, contending that there was sufficient proof that the Appellant did not provide the Respondent with protective gear, notably gumboots, which would have enhanced his grip to avoid the injury. Counsel submitted that it was the duty of the Appellant to assign the Respondent duties that were reasonable and within the limits that he could undertake; and that the Respondent exercised due skill, care and prudence but the environment in which he was working exposed him to a risk of damage and injury; and that this fact was admitted by the Appellant's witness. Counsel for the Respondent cited **Nakuru HCCA No. 38 of 1995: Sokoro Saw Mills Ltd vs. Benard Muthambi Njenga** to buttress his argument that it was the duty of the Appellant as the employer to provide the Respondent with a safe place of work.

[9] On quantum, the Respondent's submission was that an award of **Kshs. 250,000/=** as General Damages is not so inordinately high as to warrant interference by this Court. He urged the Court to seek guidance from **Martin M. Mugu vs. Attorney General** and **Kiwanjani Hardware Ltd & Another vs. Nicholas Mule Mutinda** in which awards of **Kshs. 300,000/=** and **Kshs. 150,000/=,** respectively, were made.

[10] 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..."**

[11] Before the lower court, the Respondent testified as **PW1** and told that court that he was, at all times material to the suit, working for the Appellant as a loader; and that he was on duty on **11 May 2013**. He testified that, as he was lawfully going about his assigned duties, he fell and got injured because he had been assigned excess load of 180 kgs to carry. In support of the Respondent's case, **Dr. Rono** of **Moi Teaching and Referral Hospital** testified as **PW2** before the lower court and produced his Discharge Summary to show that the Respondent was attended to at the facility on **11 May 2013** for an accident injury. The Respondent also called **Dr. Aluda (PW3),** who confirmed that he examined the Respondent and prepared a Medical Report dated **17 June 2013**. The said Medical Report was produced before the lower court and marked the **Plaintiff's Exhibit 2.**

[12] The Appellant called one of its supervisors, **Godfrey Tabu (DW1)** who confirmed that the Respondent was an employee of the Appellant; and that he was on duty on **11 May 2013**. He further conceded that, in the course of his work that day, the Respondent lost balance and fell down after missing a step; and that he was thus injured as a result.

[13] 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 **11 May 2013**. There is, likewise, no dispute that the Respondent was injured while engaged in his duties at the Appellant's premises. Accordingly, the only issues that presented themselves for determination by the lower court was whether the Appellant was liable to the Respondent in the circumstances; and if so, the quantum of damages payable.

[14] On liability, the Respondent provided a credible account as to how the accident happened. Notwithstanding the controversy as to the exact weight of the load he was carrying, the bottom-line is that he lost his balance and fell as he was going about his duties that day; and that he attributed his injuries to the fact that he was not supplied with gumboots. The foregoing evidence was not only uncontroverted, but was

conceded to by **DW1**. In cross-examination, **DW1** conceded that one cannot injure oneself intentionally; and that the Appellant had not provided the Respondent with gumboots or any such protective gear as would have prevented or minimized his injury. Clearly therefore, the Respondent demonstrated sufficient nexus between his injuries and the negligence of the Appellant (see **Statpack Industries vs. James Mbithi Munyao [2005] eKLR);** and, as there was no plea or proof of contributory negligence, the lower court cannot be faulted for finding the Appellant 100% liable to the Respondent.

[c] Whether the Plaintiff was entitled to damages as awarded

[15] On quantum, again the evidence of the Respondent, which was augmented by the evidence of the two doctors, **Dr. Rono (PW2)** and **Dr. Aluda (PW3)**, was that he sustained injuries on the left leg; which was lacerated, swollen and tender. By the time he was examined by **Dr. Aluda** on **17 June 2013**, the left leg was still swollen and tender. **Dr. Aluda's** prognosis was that the injuries, which were basically soft tissue in nature, were continuing to heal and that the pains and swelling would subside with time.

[16] Needless to say 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 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..."**

[17] The lower court's award of **Kshs. 250,000/=** was impugned by the Appellant; and rightly so, in my view, granted the nature of the Respondent's injuries. It is a cardinal principle that, in making awards, due regard be given to comparable awards for more or less similar injuries. In this regard, the trial court simply stated that:

> **"The court is satisfied on a balance of probability that the plaintiff has established negligence in full against the defendant. On quantum the court has concluded the evidence where by the plaintiff and finds that ... The provision of 300,000 is on the high side. The court gives an award of 250,000/- equal general damages...Judgment will be entered for 250,000 plus costs for the suit and interest."**

[18] There is therefore no demonstration that due attention was given to comparable injuries. In **H. West and Son Ltd v. Shepherd (1964) AC.326 it was acknowledged that**:

> ***"…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..."***

[19] I note that the two authorities relied on by the Respondent's Counsel to defend the lower court award involved far more serious injuries. In **Martin Mugi vs. Attorney General** (supra), the plaintiff sustained a deep extension cut on the face and mild concussion in addition to generalized soft tissue injures. The doctor had suggested that the plaintiff would need cosmetic surgery to reconstruct his facial scar. Accordingly, the **Kshs. 300,000/=** that was awarded included the cost of the cosmetic surgery proposed. This was not the case herein. Similarly, in Kiwanjani **Hardware Ltd & Another vs. Nicholas Mule Mutinda** (supra) the plaintiff suffered the following injuries:

> **[a]** blunt injury to the head without loss of consciousness;
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> **[b]** blunt injury to the neck;
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> **[c]** a cut to the throat;
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> **[d]** blunt injury to the left shoulder and back;
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> **[e]** blunt injury to the chest;
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> **[f]** blunt injury to the right forearm;
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> **[g]** deep penetrating wound on the left leg with cuts and bruises on the same leg.

The High Court upheld the lower court award of **Kshs. 150,000/=.** Again, the injuries are not comparable to the injury that the Respondent herein sustained.

[20] On the other hand, Counsel for the Appellant proposed an award of **Kshs. 60,000/=** on the basis of the following authorities:

> **[a]** In Sovoko Saw Mills Ltd vs. Grace Nduta Ngungu, the sum of **Kshs. 80,000/=** awarded by the lower court for soft tissue injuries was reduced to **Kshs. 30,000/=.**

[b] In **Eastern Produce Kenya Ltd (Savani) Estate vs. Gilbert Muhunzi Makotsi [2013] eKLR** the plaintiff suffered soft tissue injuries and was awarded **Kshs. 130,000/=.** The same was reduced to **Kshs. 70,000/=** on appeal.

[c] In **Ndungu Dennis vs. Ann Wangari Ndirangu & Another [2018] eKLR**, the plaintiff suffered minor bruises on the back and tenderness on the right leg. The award of **Kshs. 300,000/=** by the lower court was considered "manifestly excessive" and was accordingly reduced to **Kshs. 100,000/=.**

[21] In the premises, and considering the award in the recent case of **Ndungu Dennis vs. Ann Wangari Ndirangu & Another (supra),** it is my finding that the award of **Kshs. 250,000/=** was so excessive as to amount to an entirely erroneous estimate based on a misapprehension of the evidence. I would set the same aside and replace it with an award of **Kshs. 80,000/=.**

[22] Thus, the appeal succeeds in part and the Judgment of the lower court dated **11 January 2016** is hereby set aside and substituted with Judgment in favour of the Plaintiff/Respondent in the sum of **Kshs. 80,000/=** together with interest and costs. It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 5TH DAY OF JUNE 2019

OLGA SEWE

JUDGE