REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 65 OF 2016

EASTERN PRODUCE (K) LIMITED

(KEPCHOMO TEA ESTATE).....APPELLANT

-VERSUS-

EVERLYNE SHISIA MASAMBA

(suing as the legal representative and Administrator of the Estate of

ANDREW M. MASAMBA).....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. Kiptoo, SRM delivered on 6 May 2015 in Kapsabet SPMCC No. 289 of 2006)

JUDGMENT

[1] The Appellant was the Defendant in **Kapsabet SPMCC No. 289 of 2006: Andrew Machingi Masamba vs. Eastern Produce (K) Limited (Kepchomo Tea Estate),** wherein the Plaintiff had claimed General and Special Damages for injuries sustained by him while in the course of his employment with the Defendant/Appellant. At paragraph 4 of the Plaint filed before the lower court, it was pleaded that on or about the **2 October 2003**, the Plaintiff was in his ordinary course of his employment as an estate worker, travelling as a lawful authorized passenger, when the Defendant's agents and/or servants so carelessly and/or negligently drove and/or failed to manage and keep proper control of the Defendant's tractor/trailer and caused an accident in which two tractors/trailers collided thereby occasioning serious personal injuries to the Plaintiff.

[2] The claim was resisted before the lower court. In particular, the Defendant/Appellant denied that the Plaintiff was at any time employed by it as a factory worker or in any other position at its **Kepchomo Estate** or any other estate or at all. The Appellant further denied that on or about **23 October 2003**, or any other date at all, the Plaintiff was travelling as a lawful authorized passenger in its tractor; or that an accident occurred as alleged in which the Plaintiff sustained severe injuries or at all. Accordingly, the Appellant had prayed for the dismissal of the Plaintiff's suit with costs.

[3] The lower court record shows that, during the pendency of the suit, the Plaintiff died and the prosecution of the suit was thereafter taken over by his widow and personal representative, **Everlyne Shisia Masamba**. Having heard the evidence that was presented before it, the lower court found the Appellant solely liable for the injuries sustained by the Plaintiff (hereinafter "the Deceased") and proceeded to assess General Damages payable to him at **Kshs. 200,000/=**. Accordingly, an award was made to the estate of the Deceased in that sum together with Special Damages of **Kshs. 3,460/=,** interest and costs, in a Judgment delivered by the Learned Trial Magistrate on **6 May 2015.**

[4] Being aggrieved by that decision, the Appellant lodged this appeal on **25 April 2016** on the following grounds:

> **[a]** That the Learned Trial Magistrate erred in law and fact in holding the Appellant 100% liable against the weight of evidence on record;
>
> **[b]** That the Learned Trial Magistrate erred in law and fact in failing to analyze the evidence presented before court as to arrive at a fair and just decision as regards both liability and quantum of damages payable;
>
> **[c]** That the Learned Trial Magistrate failed to appreciate the fact that the suit was only fit for dismissal in the given set of circumstances, the Plaintiff having failed to prove whether the claim was a tort or breach of contract and which tractor and/or whose tractor caused the accident the subject of the suit;

[d] That the Learned Trial Magistrate totally misconstrued the facts of the case thereby occasioning a miscarriage of justice.

Consequently, the Appellant prayed that the appeal be allowed with costs and that the Judgment of the subordinate court be substituted with an order dismissing the suit with costs.

[5] Pursuant to the directions given herein on **2 April 2019**, the appeal was urged by way of written submissions which were filed by learned Counsel for the parties on **14 May 2019** and **17 June 2019**, respectively. Counsel for the Appellant impugned the decision of the lower court, contending that the evidence adduced was not sufficient to support the findings and conclusions reached by the lower court. Counsel submitted, for instance, that although it was alleged that the Deceased was involved in an accident when two tractors collided, the particulars of the alleged tractors, such as their registration numbers or ownership, were not supplied.

[6] Counsel further faulted the fact that that no eye witness was called to testify before the lower court regarding the circumstances in which the accident occurred; and therefore, that there was no basis for holding the Appellant wholly liable for the accident. He relied on **Eldoret High Court Civil Appeal No. 102 of 2005: Sally Kibii & Another vs. Dr. Francis Ogaro** to support his argument that the absence of an eye witness evidence diminished the Respondent's chance to prove a case for negligence against the Appellant. Counsel for the Appellant further urged the Court to find that, since none of the particulars of negligence alleged by the Respondent at paragraph 4 of the Plaint were proved before the lower court, the finding on liability was flawed.

[7] On quantum, Counsel for the Appellant directed the attention of the Court to the evidence of **DW1** and **DW2**, which was to the effect that no visible injuries were suffered by the Deceased; and that his treatment consisted only of pain killers. He pointed out that the Deceased died, not as a result of injuries sustained in the accident but of cancer; and that the death occurred two years from the date of the accident. In the premises, it was the submission of Counsel for the Appellant that the award of **Kshs. 200,000/=** by way of General Damages was inordinately high; and that, if anything, a sum of **Kshs. 36,000/=** would have sufficed in the circumstances. Counsel accordingly urged the Court to re-evaluate the evidence on record and find that the Learned Trial Magistrate erred in awarding the Respondent a sum of **Kshs. 200,000/=** in General Damages.

[8] On behalf of the Respondent, **Mr. C. M. Mwebi, Advocate**, defended the decision of the lower court, contending that credible evidence was adduced to demonstrate that the Deceased was an employee of the Appellant; that he was on duty on the date in question and that, in the course of his duty as an employee of the Appellant, he was involved in an accident in which he was injured when two tractors collided. It was thus the contention of Counsel for the Respondent that in those circumstances, the lower court cannot be faulted for holding the Appellant 100% liable to the estate of the Deceased, as it was the Appellant that exposed the Deceased to the risks of travelling in a tractor/trailer in the course of his duties.

[9] In response to the submissions that no particulars of the tractors were supplied before the lower court, Counsel for the Respondent posited that, since the Appellant admitted the accident in the Statement of **William Maina (DW1),** proof of the particulars of the tractor was unnecessary. Counsel further submitted that, if the Appellant was of the view that the driver of the third-party tractor was to blame for the accident, then it was its responsibility, and not that of the Respondent, to enjoin that party and adduce evidence in proof of its allegations. Counsel similarly defended the award of both General and Special Damages by the lower court, terming the same "very reasonable" in the circumstances. He accordingly urged for the dismissal of this appeal with costs.

[10] This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court with a view of satisfying itself as to the soundness of the lower court's decision. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123,** this principle was elucidated 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] Accordingly, I have carefully perused and considered the record of the lower court; and in particular the evidence adduced therein by either side. The Respondent, **Everlyne Shisia (PW1)** took to the witness stand on **26 July 2013** and told the lower court that the Deceased was an employee of the Appellant; and that before his death on **15 May 2006**, he got involved in an accident on **23 October 2003** while working for the Appellant at **Kepchemo Tea Estate**. It was the testimony of **PW1** that she was living with the Deceased at **Kepchemo Tea Estate**; and that she was called on that material date and told that an accident had occurred; and that her husband was one of the injured. She added that the Deceased was then working as a turnboy and that he sustained injuries on the chest for which he was treated at the **Kepchemo Tea Estate** Dispensary and thereafter was referred to **Nandi Hills District Hospital. PW1** further told the lower court that the Deceased was also treated at **Kakamega General Hospital** and **Aga Khan Hospital** in Kisumu. She produced some of the pertinent documents as exhibits before the lower court. The rest were produced by consent of the parties on **6 September 2013**.

[12] On behalf of the Defence, reliance was placed on the Witness Statements of **William Maina** and **Jonah Koskey** dated **7 November 2014**. A consent to that effect was recorded on **11 February 2015**. The statements were marked **Defence Exhibits 1 and 2**; and with that the Defence closed its case. Hence, although in the written submissions **William Maina** was referred to as **DW1** and **Jonah Koskey** as **DW2**, in actual fact, no witness was called by or for the Defence.

[13] Be that as it may, in his Witness Statement, **William Maina** stated that he was working for the Appellant at **Kepchomo Tea Estate** as a Green Leaf Clerk; and that on **23 October 2003**, they were transporting tea leaves to the factory aboard a tractor/trailer when a collision occurred between the tractor/trailer and another tractor/trailer belonging to one **Sara Boit. William Maina** further stated that the Plaintiff, **Andrew Machingi Masamba,** was also aboard the same tractor/trailer belonging to the Appellant; and that, to the best of his knowledge, he sustained no injuries; though he visited the local dispensary and was attended to. He added that the Plaintiff thereafter went on with his work as normal.

[14] On his part, **Jonah Koskey** stated that he was then working for **Kepchomo Tea Estate** as a nurse, and that from the records held at their dispensary, the Plaintiff, **Andrew Machingi Masamba,** visited the dispensary on **23 October 2013** at 4.30 p.m. complaining of having been injured in a road traffic accident. He further stated that the Plaintiff complained of chest pain only; and that he attended to him by performing general examination; and that, in his finding, there was no open injuries or any sign of fracture. He added that he gave the Plaintiff diclofenac tablets and referred him to **Nandi Hills Hospital** for further investigations; and that thereafter, the Plaintiff went on with his work as usual.

[15] Thus, from the foregoing summary of the evidence, the Learned Trial Magistrate cannot be faulted for finding that the Respondent was, at all times material to the suit, an employee of the Appellant; or that he was on duty on the **23 October 2003**. The Respondent produced, as an exhibit before the lower court, a pay slip for the Deceased for the month of **November** and **December 2003** (**Plaintiff's Exhibit 2a and 2b)** in proof thereof. In any event, the Appellant expressly admitted these facts vide the Witness Statements of **William Maina** and **Jonah Koskey** dated **7 November 2014**.

[16] There is similarly no dispute that the Deceased was involved in an accident on **23 October 2003** while in the course of his employment. Again, the Appellant conceded as much by way of the Witness Statements of **William Maina** and **Jonah Koskey** dated **7 November 2014** on which it relied. In the Witness Statement of **William Maina** it was expressly stated that the Deceased was aboard the Appellant's tractor/trailer on **23 October 2003** when a collision occurred between the tractor/trailer and another tractor/trailer belonging to one **Sara Boit;** and that, following the accident, the Deceased visited the local dispensary and was attended to; a fact confirmed in the Witness Statement of **Jonah Koskey,** a nurse in the employ of the Appellant at **Kepchomo Tea Estate.**

[17] Indeed, **Johan Koskey** stated that, from the records held at their dispensary, **Andrew Machingi Masamba** visited the dispensary on **23 October 2013** at 4.30 p.m. complaining of having been injured in a road traffic accident. He further stated that the Plaintiff complained of chest pain, and that he attended to him by performing general examination. It was therefore conceded by the Appellant that, though the Deceased presented no open or visible injuries, he was feeling pain from the accident for which he was given pain killers and referred to **Nandi Hills Hospital** for further investigations.

[18] The Respondent presented several treatment documents before the lower court, some of which were admitted by consent of the parties, an indication that the Appellant had no objection or issue to raise in respect of the contents of the said documents. One of the documents admitted by consent was **Plaintiff's Exhibit 4a,** an Outpatient Card issued to the Deceased at **Nandi Hills Hospital**. That document shows that the Deceased was seen at the facility on **3 November 2003** complaining of chest pain after being hit on the chest by a metallic part of a lorry. The document further shows that the Deceased had sustained a dislocation of the sternoclavicular bone of the chest.

[19] Then there is the Medical Report on **Andrew Machingi Masamba,** prepared by **Dr. Charles M. Andai** dated **6 December 2004**. The said report was one of the documents admitted by the parties by consent. It was marked the **Plaintiff's Exhibit No. 9** before the lower court. It confirms that the Deceased suffered chest contusion leading to *haemoptysis* (coughing of blood) and that he sustained a dislocation of the right sternoclavicular joint for which he was admitted for treatment at **Nandi Hills District Hospital** for three days. At the time of examination, the patient still had mild tenderness on the right side of his chest. Thus, in the opinion of **Dr. Andai, Andrew Machingi Masamba**, then a young man aged 26 years, suffered soft tissue injuries in the accident in the form of chest contusion as well as a dislocation of the right sternoclavicular joint which was still in the process of healing. He expected complete recovery in 2 years from the date of examination.

[20] It is noteworthy too, that one of the documents produced before the lower court by the Respondent was a duly filled and signed Notice by Employer of Accident Causing Injury to or Death of a Workman, Form LD 104/1. It was produced before the lower court as the **Plaintiff's Exhibit No.8** and it confirms that **Andrew Masamba** was then a workman of the Appellant for purposes of the **Workmen's Compensation Act, Chapter 236 of the Laws of Kenya;** that he was involved in an accident on **23 October 2003** at 4.30 p.m. in the course of his duties as an employee of the Appellant when two trailers collided. The document further confirms that the workman suffered chest injury in the accident for which he was treated at **Nandi Hills Hospital.**

[21] On the reverse of the said Notice, it is manifest that the Appellant caused the Deceased to be presented before the Medical Officer of Health, Nandi South District and the injury was further confirmed as dislocated right sternoclavicular joint; and that the workman suffered temporary incapacity and therefore unable to attend to his duties for two months. In the premises, the fact that the Deceased was involved in an accident on **23 October 2003** while on duty as an employee of the Appellant was not disputed before the lower court. It was further not in dispute that he suffered injuries as set out at paragraph 4 of the Plaint; which injuries were amply proved by the Respondent as aforementioned. Accordingly, the only issues for my determination in this appeal are the questions as to whether the lower court was correct in holding the Appellant 100% liable for the injuries suffered by the Deceased; and whether the award is defensible.

[a] <u>On whether the Appellant is liable for the Respondent's injury:</u>

[22] Needless to say that it was the responsibility of the Appellant to provide its employees with safe working conditions. In **<u>Purity Wambui Muriithi vs. Highlands Mineral Water Co. Limited [2015] eKLR</u>** it was held 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..."**

[23] The Appellant having admitted that the accident occurred, the doctrine of *res ipsa loquitor* kicked in; and it was therefore the duty of the Appellant to clear itself of the blame and to show why the doctrine was inapplicable as pleaded by it in paragraph 8 of its Defence. In respect of the doctrine of *res ipsa loquitor*, the Court of Appeal (Hon. Gachuhi, JA) made reference to the English case of ***<u>Barkway v South Wales Transport Company Limited</u>*** **[1956] 1 ALLER 392**, **393 B** in ***<u>Nandwa vs. Kenya Kazi Limited</u>*** **[1988] eKLR**, and held thus:

> ***"The application of the doctrine of res ipsa loquitur, which was no more than a rule of evidence affecting onus of proof of which the essence was that an event which, in the ordinary course of things, was more likely than not to have been caused by***

negligence was itself evidence of negligence, depended on the absence of explanation of an accident, but, although it was the duty of the Respondents to give an adequate explanation, if the facts were sufficiently known, the question reached would be one where facts spoke for themselves, and the solution must be found by determining whether or not on the established facts negligence was to be confirmed."

[24] In the premises, I would agree with the Learned Trial Magistrate that the Appellant failed in its duty of care towards the Respondent. Indeed, **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.***

[25] Likewise, **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.***

[26] In the premises, I would be of the same view as the trial court that there was sufficient material for holding the Appellant 100% liable to the Respondent for the injury he suffered while performing his duties as an employee of the Appellant.

[b] <u>On Quantum of Damages</u>

[27] It is trite that assessment of damages is a matter of discretion in respect of which an appellate court ought not to interfere without justifiable cause. In **<u>Peters vs. Sunday Post Limited [1958] EA 424</u>** it was held that:

> **"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..."**

[28] Likewise, in **<u>Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited [2015] eKLR</u>**, 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."**

[29] In its Judgment, the Learned Trial Magistrate took into account the nature of the injuries suffered by the Plaintiff and the impact thereof as per the Medical Report prepared by **Dr. Andai**. He likewise considered the authorities relied on by the parties and their respective ages, bearing in mind the principle that that comparable injuries ought to be compensated by comparable awards. There is nothing to show that the Learned Trial Magistrate proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was inordinately high. Likewise, I am far from satisfied that the Learned Trial Magistrate took into account an irrelevant factor, or left out of account a relevant one; or that amount is so inordinately high that it must be a wholly erroneous estimate of the damages.

[30] The observation in **<u>H. West & Son Ltd vs. Shephard [1964] AC 326</u>**, is instructive, namely, that:

> **"...In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."**

[31] Accordingly, I would find no reason to disturb the award made by the Learned Trial Magistrate. The Special Damage component was similarly proved.

[32] In the result, I would uphold the lower court's Judgment on liability and quantum and dismiss this appeal with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 9TH DAY OF OCTOBER, 2019

OLGA SEWE

JUDGE