REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 180B OF 2009

ELDORET STEEL MILLSLIMITED.....APPELLANT

VERSUS

MAURICE OCHIENG.....RESPONDENT

(An Appeal from the Judgment of the Senior Resident Magistrate Honourable A. Mon'gare

in Eldoret CMCC No. 1025 of 2007, dated 5th October, 2009)

JUDGMENT

This appeal arises from the judgment and decree in Eldoret CMCC No. 1025 of 2007 delivered on 5th October, 2009. The respondent filed a plaint dated 19th November, 2007 based on negligence and breach of statutory duty of care where he alleged that on or about 14th August 2006 while he was lawfully engaged upon his duties at the appellant's premises he was injured. The trial court delivered judgment in favour of the respondent and found the appellant 100% liable. The court awarded general damages of Kshs. 230,000 and special damages of Kshs. 2,000.

APPELLANT'S CASE

The appellant condensed its submissions into 3 topics.

The appellant submitted that the respondent did not prove his case on a balance of probability. It cited section 107 and 108 of the Evidence Act and the case of ***Kirugi & Another vs Kabiya & 3 others (1987) eKLR*** on the burden of proof. It submitted that the burden of proof was on the plaintiff.

The respondent did not adduce evidence to show that the appellant was negligent in its duty as an employer to provide a safe working environment. The respondent did not adduce evidence to show that the appellant failed to provide him with safety garments and that the safety apparel would have prevented the accident from happening. The respondent did not adduce evidence to show that the machine was defective and to prove that he had reported to the appellant that the machine was defective.

The respondent failed to exercise due diligence. If the machine was defective, he owed himself the duty of care to report the problem. He failed to adhere to the safety rules and precautions.

The appellant cited the case of ***Statpack Industries v James Mbithi Munyao Nairobi HCCC No. 152 of 2005*** on the employer's duty of care.

The appellant cited the case of ***Loice Iminza v Nyayo Tea Zones Development Corporation Eldoret, HCCA 185 of 2010*** and submitted that an employer can only be held liable for damage which was foreseeable and which he failed to avoid by taking reasonable precautions. The accident was not foreseeable.

The mere fact that the respondent was injured while working at the appellant's factory does not make the appellant negligent and liable. The respondent ought to have proven the particulars of negligence stated in the plaint as per the law and he failed to do so.

The amount awarded was not justifiable as the respondent stated that he had healed and was working as normal. It cited the case of ***Butt v Khan*** that states the principles upon which a court can disturb a trial court's award for damages. Further, it submitted that the trial magistrate failed to take into account the relevant facts and evidence with regards to the accident and the nature of the injuries the respondent suffered.

The magistrate termed the burn wounds severe which is contrary to the doctor's assessment (PExhb1) that the injuries were 1% superficial burns. The trial magistrate erred in awarding special damages of Kshs. 2000 which was contrary to the amount in the plaint. The trial magistrate erred in awarding an amount that was not pleaded. It relied on the case of ***Mohammed Ali & Another v Sagoo Radiators Limited (2013) eKLR.***

The applicant cited the cases of ***Lilian Otieno v Joseph Kimani NRB HCCC 2670 of 1986*** and ***Eastern Produce Kakuzi Limited v Edwin Wasike Eldoret HCCA 51 of 2002 (2012)*** where the court awarded Kshs. 150,000/- and Kshs. 100,000/- respectively. The injuries sustained in those cases were more severe.

The respondent was not entitled to any general damages and the appeal should be allowed.

RESPONDENT'S CASE

The respondents did not file submissions in response to the appeal.

ISSUES FOR DETERMINATION

a) Whether the respondent proved his case on a balance of probabilities

b) Quantum and Liability

WHETHER THE RESPONDENT PROVED HIS CASE ON A BALANCE OF PROBABILITIES:-

The respondent testified that he was injured on 14/08/2006 when he was on duty working for the appellant. He produced a medical report and blamed the appellant as he was not provided with protective gear. The machines were not serviced and he was not trained on safety procedures. The defence witness confirmed that the respondent was on duty and was injured while on duty.

In the case of ***Bungoma Criminal Appeal No. 144 of 2011; Peter Wafula Juma & 2 others vs Republic***, the court held;

> ***"Evidential burden initially rests on the party with legal burden, but as the weight of evidence given by either party during the trial varies, so also will the evidential burden shift to the party who would fail without further evidence…. Even in civil cases, when prima facie evidence is adduced by the plaintiff, evidential burden is created on the shoulders of the defendant who must be called upon to prove the contrary. In both cases, where evidential burden has been properly created in law, the accused and the defendant are entitled to call for evidence in rebuttal, and where evidential burden is not discharged, judgment may be entered against the defendant – in case of a civil case – or a conviction against the accused – in case of a criminal case."***

The burden of proof was upon the appellant to show that the employees were provided with safety gear and that the machines were regularly serviced. The appellant did not adduce any evidence to show the same. Further, there was no evidence that the employees were trained on safety procedures. It is trite law that the employer has a statutory duty of care to provide a safe working environment for employees. The appellant failed to prove that he had done the same. There was no evidence to rebut the claim that the appellant did not provide a safe working environment.

The medical report was proof that the respondent was injured and the accident's occurrence was confirmed by the defence witness.

I do find that the respondent proved his case on a balance of probabilities.

QUANTUM AND LIABILITY

The burns were superficial and were less than 1% therefore the trial court erred in terming them as severe as there is nowhere in the medical report where the same is stated. The report terms them as 1st degree burns. The plaint pleaded that the special damages were Kshs. 1500 but the court awarded Kshs. 2,000 which is wrong.

In ***Mwanyule vs. Said t/a Jomvu Total Service Station [2004] 1 KLR 47,*** the Court of Appeal concluded that the employer owes no absolute duty to the employee, and the only duty owed is that of reasonable care against risk of injury caused by events reasonably foreseeable, or which would be prevented by taking reasonable precaution. In order for the respondent in this case to succeed in his claim, he had to establish that the appellant failed to exercise reasonable care for his safety against risks which were reasonably foreseeable.

It was foreseeable that when working in the mill there is the possibility of injury from melted steel. An overall and protective gear would have prevented or reduced the severity of the injury sustained. In the premises I find that the appellant was 100% liable as there was no safety gear provided and it failed to prove that the environment was safe.

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 trial court erred in terming he burns as severe yet the medical report is clear that they were superficial.

In ***Eastern Produce Kakuzi Ltd v Edwin Wasike, Eldoret High Court Civil Appeal 51 of 2002 [2012] eKLR,*** the court awarded general damages of Kshs 100,000 for chemical burns to both legs and toes. In ***Devki Steel Mills Limited v joseph Mulwa Nairobi, High Court Civil Appeal 658 of 2002 [2004] eKLR*** the plaintiff was electrocuted and suffered burns on the head,

right hand, thumb, elbow, right foot and stomach. He was awarded 150,000. In ***Kanyenyaini Tea Factory Company Limited v Stanley Muhia Gichure High Court, Nyeri, Civil Appeal 37 of 2006 [2008] eKLR,*** the plaintiff slid and fell into a pit that had a fire and got extensive superficial burns. He was awarded Kshs 100,000 in general damages.

As the burns to the respondent were not as severe and the appellant has proven that the trial court misapprehended the evidence in some material aspect, I find that the general damages of Kshs. 150,000/- is reasonable and adequate.

On special damages the court in ***Hahn vs Singh (1985) KLR 716***, stated:

> ***"……special damages must not only be claimed specifically but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the act themselves"***

The respondent pleaded Kshs. 1500/- and produced a receipt for Kshs. 2,000/-. On this I find that the trial court erred in awarding special damages that had not been pleaded. The special damages is therefore reduced to Kshs. 1500 as that was the amount pleaded.

The appeal therefore succeeds only to the extent that the damages are reduced to Kshs. 151, 500/-.

Each party to bear own costs of this appeal.

S. M GITHINJI

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this **3rd** day of **October, 2019**

In the presence of:

Ms Nyamweya holding brief for Ms Wahome for the Appellant

Firm of Ndunya Omollo for the Respondent absent

Ms Abigael – Court Assistant