REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO. 28 OF 2015

EFIL ENTERPRISES LIMITED.....APPELLANT

-VERSUS-

DICKSON MATHAMBYO KILONZO.....RESPONDENT

(Being an appeal from the judgment of the Chief Magistrate at Machakos Hon. L Simiyu, RM delivered on 6th February, 2015 in Machakos CMCC No. 1321 of 2009)

BETWEEN

DICKSON MATHAMBYO KILONZO.....PLAINTIFF

VERSUS

EFIL ENTERPRISES LIMITED.....DEFENDANT

JUDGEMENT

1. By a plaint dated 16th September, 2009, the Respondent herein instituted a suit against the Appellant herein claiming Special Damages in the sum of Kshs 3,040/-, General Damages, Costs and interests.

2. The Respondent's suit was premised on the fact that the Respondent was an employee of the defendant. On or about the 29th October, 2007, the Respondent during the course of his duties was pushing a wheel barrow at the Appellant's premises when he was injured on the left arm. According to him the incident was caused by the negligence and/or breach of statutory duty of care on the part of the Appellant particulars whereof he outlined. It was due to the foregoing that the Respondent instituted these proceedings.

3. According to the Respondent, on the said day at 8.00 he was transporting sand and concrete at a construction site using a wheelbarrow along a stony path. He testified that he was with a colleague and while he was pulling the wheelbarrow his colleague, **Muthui Michael Makau**, was pushing the same. In his evidence, the pulling was necessary in order for the wheelbarrow to move against the rocky path. According to him, in the process of doing so, the rope snapped and he fell injuring his left hand around the wrist. It was his evidence that despite asking for protective gear he was not supplied with any. Neither was he trained. Upon completing his treatment, he returned to work but was laid off without being compensated. The Respondent produced documents in support of his case.

4. On behalf of the Appellant, no evidence was adduced.

5. In her judgement, the Learned Trial Magistrate found that the Appellant had a statutory duty to ensure that the work environment was safe to the employees and in particular the Respondent herein. This duty, it was held entailed the provision of safe working environment including levelled and well accustomed walkways that were clear and free from debris. In the absence of evidence from the defence, the Court found that there was no evidence that the Appellant had taken steps to ameliorate injury in the event of an accident for instance by providing safety apparel, proper supervision and training of workers.

6. The Court therefore found that the Respondent ad proved his case and proceeded to award him Kshs 350,000/= General Damages for pain and suffering with costs and interests.

7. In the present appeal, the Appellant sets out the following grounds of appeal:

> **1) The Learned magistrate erred in law and fact by not taking into account the Appellant's submissions on liability, thereby erroneously finding the Appellant 100% liable in spite of the fact that the Respondent had not established a causal link between his injury and any negligence on the Appellant's part.**
>
> **2) The Learned magistrate erred in law and fact by failing to take into account the Appellant's submissions on quantum thereby erroneously awarding the Respondent damages which are inordinately high and excessive given the nature of the injuries sustained by the Respondent.**

8. It was submitted that submits that **though there is a general rule that 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, this does not mean that the employer would always be liable in all circumstances regardless of what caused the accident in question because there are scenarios where an accident happens due to the employee's own negligence. In that regard the Appellant relied on the provisions of** *section 13(1) (a)* **of the** ***Occupational Safety and Health Act*** **which provides:-**

> ***13(1) Every employee shall, while at the workplace:-***
>
> ***(a) Ensure his own safety and health and that of other persons who may be affected by his acts or omissions at the workplace.***

9. It was therefore submitted that an employee is under a duty to exercise due care and diligence when undertaking his duties so as not to harm himself, his employer or 3rd parties while at the workplace. According to the appellant, during the trial before the lower Court, the Respondent clearly admitted that neither the Appellant nor its agents ever trained, advised or instructed him to make use of a rope to help in pulling the wheelbarrow. He was only instructed to push the wheelbarrow from one point to another together with his co-worker yet he, of his own volition, decided to make use of a rope to make the tasks he was performing easier and in the process, the rope snapped and he fell injuring his wrist. Further, the task that the Respondent was assigned was manual and did not require exceptional or special skills or training to perform. He testified to previously having competently performed the task without injuries. It was therefore submitted that the Respondent did not prove at trial that there was a hidden inherent danger in the operation of pushing a wheelbarrow of which the Appellant ought to have warned the Respondent. To ensure that he was not injured while performing his duties was a matter that was particularly within the power and control of the Respondent. He did not demonstrate to the trial Court what he did to avoid the injury to himself. The Appellant in the premises submitted that the Respondent cannot therefore blame the Appellant if he got injured hence the Court was urged to find that the Respondent was negligent in performing his duties and allow this appeal as prayed. In support of this position, the Appellant relied on **African Highlands Produce Co. Ltd v Wilfred Otieno Odhiambo [2011] eKLR.**

10. As regards the allegation by the Respondent that the Appellant exposed him to an unsafe system of work by allowing the Respondent to work on a rough surface, it was submitted that the scene of the accident was a construction site that could not be kept free of debris and hard surface. The Respondent no doubt was aware of the condition of the site and as such, he even ought to have been extremely careful when he carried out his duties. He cannot therefore blame the Appellant if he did not excise due care and attention as expected of him thus exposing himself to injuries.

11. The Appellant submitted further that in circumstances where the danger is due to a latent defect which is not discoverable by reasonable care and skill on the part of anyone, then the employer would be excused from liability. Like it was in this particular case, it cannot be said that the Appellant was expected to inspect and ensure that the rope that the Respondent used to pull the wheelbarrow was in good condition and that the same would not expose the Respondent to injuries. It was reiterated that it is indeed the Respondent that was expected to exercise due care and attention when making use of the rope to ensure that he did not harm himself.

12. According to the Appellant, when a party pleads negligence he has to prove the casual link between the injury and the duty of care placed upon the employer in negligence thus where an employee is undertaking manual work as is the case hereof, he is to take reasonable care of his own safety as the employer is not expected to babysit or supervise such manual tasks that need no supervision. To this extend, the Appellant relied on the decision of the Court in **Amalgamated Saw Mills vs. David K. Kariuki [2016] eKLR** where the learned **Mulwa J.** in dismissing the appeal held:

> ***"An employer cannot babysit an employee especially in manual tasks that need no special training or supervision. He must work and at the same time take precautions on his own security and safety".***

13. From the foregoing, the Appellant submitted that the Respondent did not prove any one or more of the particulars of negligence and breach of statutory duty pleaded as against the Appellant, and to show that he was also not negligent in the performance of his duties. That having not been done, this Court was urged the overturn the decision of the trial Court on liability and allow this appeal as prayed.

14. As regards the quantum, it was submitted that the award of Kshs. Kshs. 350,000/= made by the trial Court as general damages is inordinately high and excessive. According to the appellant, the medical report prepared by **Dr. Wokabi** and tendered at trial as Respondent's exhibit 4 shows that the Respondent was found to have sustained a fracture of the distal end of the left radius near the wrist joint. When the Respondent was later re-examined by **Dr. Barad** about four years from the date of the injury, he was found to have fully recovered from the injuries with no risk of a permanent incapacitation. Further, the said injury did not prevent the Respondent from performing any gainful employment.

15. According to the appellant, the trial magistrate failed to consider its submissions on quantum and the authorities cited therein hence arriving at an award that is excessive in the circumstances. Since the Respondent suffered only one injury being a fracture of the left radius from which he had fully recovered, the Appellant submitted that an award of between Kshs. 250,000/= and Kshs. 300,000/= would have been adequate compensation and in so submitting the Appellant relied on the case of **Homegrown (K) Ltd v Jackline Bonaberi Otieno (2014)**

16. The Appellant therefore urged the Court to set aside the award of the trial magistrate on quantum of damages and in the alternative, this Court do make its own finding on quantum of damages payable if any, to the Respondent.

17. On behalf of the Respondent, it was submitted that the Respondent had proved his case and that the decision of the Learned Trial Magistrate was justified as the Appellant did not adduce any evidence to rebut the evidence adduced by the Respondent.

18. As regards the quantum, it was submitted that this Court not to interfere with the award since it had not been show that the same was inordinately high to warrant interference.

Determination

19. I have considered the submissions of the parties in this appeal. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

> **"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

20. Therefore this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

21. However in **Peters vs. Sunday Post Limited [1958] EA 424,** it was held that:

> **"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given…Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question…It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."**

22. However in **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** the Court of Appeal held that:

> **"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

23. In this case, it is clear that the issue to be resolved is whether the appellant, based on the evidence presented before the Trial Court proved her case. Section 107(1) of the ***Evidence Act***, Cap 80 Laws of Kenya provides 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.***

24. This is called the legal burden of proof. There is however evidential burden of proof which is captured in sections 109 and 112 of the same Act as follows:

> ***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.***

25. The two provisions were dealt with in **Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334,** in which the Court of Appeal held that:

> **"As a general proposition under section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act."**

26. It follows that the initial burden of proof lies on the plaintiff, the respondent in this appeal, but the same may shift to the defendants, the appellant in this case depending on the circumstances of the case.

27. In this case, the respondent's evidence was that he was employed by the Appellant and on the material day while he was pulling the wheelbarrow, the rope which he was using snapped as a result of which he fell and got injured. In this case it is clear that the immediate cause of the accident was the snapping of the rope. However, the Respondent testified that the task of pulling the wheelbarrow was necessitated by the rocky surface on which they were transporting the sand and concrete. In my view the Appellant cannot escape liability by simply saying that the Respondent was not instructed to pull the wheelbarrow. I agree with **Koome, J** (as she then was) in **Samson Emuru vs. Ol Suswa Farm Ltd Nakuru HCCA No. 6 of 2003** that:

> **"The duty of the employers to provide the servant with a safe place of work not merely to warn against unusual dangers known to them, … but also to make the place of employment…as safe as the exercise of reasonable skill and care would permit…The duty thus described is a higher… the master is under a duty to make his servants to take reasonable steps to avoid harm arise."**

28. To accept the Appellant's line of reasoning would imply that the defence of *volenti non fit injuria* would have absolved the Appellant from liability. However as is stated in In ***Halsbury's Laws of England* 3rd Edition Vol 28 Paragraph 28**:

> **"where the relationship of master and servant exists, the defence of *volenti non fit injuria* is theoretically available but is unlikely to succeed. If the servant was acting under the compulsion of his duty to his employer, acceptance of the risk will rarely be inferred. Owing to his contract of service, a servant is not generally in a position to choose freely between acceptance and rejection of the risk and so the defence does not apply in an action against the employer."**

29. If the Respondent and his colleagues were instructed to transport, the sand and the concrete by using the wheelbarrow, it was upon the Appellant to ensure that the environment in which the Respondent operated was safe for the nature of the work he was supposed to undertake. The Court of Appeal in the case of **Makala Mailu Mumende vs. Nyali Golf County Club [1991] KLR 13** stated thus:

> **"No employer in the position of the defendant would warrant the total continuous security of an employee engaged in the kind of work the plaintiff was engaged in, but inherently, dangerous. An employer is expected to reasonably take steps in respect of the employment, to lessen danger or injury to the employee. It is the employer's responsibility to ensure a safe working place for its employees."** [Underlining added].

30. Similarly, in ***Halsbury's Laws of England*, 4th Edition vol. 16 Para 560,** it is stated that:

> **"At common law an employer is under a duty to take reasonable care for the safety of his employees in all the circumstances...So as not to expose them to an unnecessary risk."**

31. In ***Winfield and Jolowicz on Tort* by WVH Rogers, 14th Edition, London Sweet & Maxwell at page 213**, it is stated as follows *inter alia*:

> **"If a worker is injured just because no one has taken the trouble to provide him an obviously necessary safety devise, it is sufficient and in general, satisfactory to say that the employer has not fulfilled its duty."**

32. In **Garton Limited vs. Nancy Njeri Nyoike [2016] eKLR**, **Aburili, J** held that:

> **"In this regard, it is expected that the appellant employer when assigning its employees to work in an environment where there is potential risk of injury…then it is prudent for them to provide proper appliances to safeguard the workers. The primary duty rests with the employer to prove that there were precautions put in place and brought to the attention**

of the employee but the employee failed to adhere and deliberately put himself in harm's way…In this case I find that the appellant owed a common law duty of care to ensure the safety of the respondent while she was engaged upon her duties in the appellant's employment…For example, had the respondent been provided with a head gear and boots, she could not have injured her head on falling down and or the leg."

33. It was therefore held by the Court of Appeal in **Kiema Muthuku vs. Kenya Cargo Handling Services [1991] KLR 464; [1988-92] 2 KAR 258; [1990-1994] EA 427** that:

> **"Even assuming that other systems of carrying out the work, e.g. by the use of safety belts or ladders, were impracticable, the employer is still under an obligation to ensure that the system that was adopted was a reasonably safe as it could be made and that their employees were instructed as to the steps to be taken to avoid accidents… The law cannot be that even where it is known that a particular system is dangerous yet an employer can get away with it unless the employee can show a safer alternative system. Even where a system is known to be inherently dangerous, and there are no practical alternatives to operating it, yet the employer must still 'ensure that the system that was adopted was as reasonably safe as it could be made and that their employees were instructed as to the steps to be taken to avoid accidents."**

34. In my view the Appellant failed to show what steps, if any, it took to ensure the environment under which the Respondent worked was safe. There was no evidence that attempts were made by the Appellant to make the path through which the Respondent was to follow with the wheelbarrow was such that it was not necessary to resort to pulling the same. Further, if the same was to be pulled, there was no evidence that the Appellant supplied appropriate implements for the said purpose. As stated by the Court of Appeal in **Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR**:

> **"Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "*marketing language*", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."**

35. Similarly in **Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749**, the Court held that:

> **"As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."**

36. As was held by **Mwera, J** (as he then was) in **Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007**:

> **"Submissions simply concretise and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided."**

37. The same Judge in **Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993** expressed himself as follows:

> **"Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."**

38. In the premises I am unable to interfere with the finding of the Learned Trial Magistrate on liability.

39. As regards the quantum, in **Loice Wanjiku Kagunda vs. Julius Gachau Mwangi CA 142/2003** (unreported) the Court of Appeal held that:

> **"We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see Manga V Musila [1984] KLR 257)."**

40. In **Butt vs. Khan (1982-1988) KAR 1**, the Court of Appeal stated that:

> **"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."

41. In this case I have carefully considered the decision and award of the trial court on quantum and the authorities cited by the appellant and respondent's counsels. I find nothing on record to show that the trial court considered irrelevant matter or failed to consider any relevant matter. The trial magistrate in her judgment considered the submissions of both parties' advocates. Whereas, this Court may well have awarded a different figure as was held by the East African Court of Appeal in **Henry Hidaya Ilanga vs. Manyema Manyoka Civil Appeal No. 64 of 1961 [1961] EA 705**:

> **"The principles which apply in interfering with an award of damages are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage."**

42. The award in question was Kshs 350,000/=. In this appeal the Appellant suggests an award of between Kshs. 250,000/= and Kshs. 300,000/=. I am not satisfied that the difference of Kshs 50,000/= was so inordinately high to warrant interference.

43. In the premises I find this appeal unmerited. Consequently, the same is dismissed with costs.

44. Orders accordingly.

Read, signed and delivered in open Court at Machakos this 6th day of November, 2018

G V ODUNGA

JUDGE

Delivered the presence of:

Miss Mutua for Mr Mulwa for the Appellant

CA Geoffrey