REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 89 OF 2016

NATIONAL CEREALS & PRODUCE BOARD.....APPELLANT

-VERSUS-

PROTAS WAFULA WANYAMA.....RESPONDENT

(Being an appeal from the Judgment of Hon. C. Obulutsa, Senior Principal Magistrate, delivered on 13 May 2016 in Eldoret CMCC No. 192 of 2014)

JUDGMENT

[1] This appeal arises from the Judgment of **Hon. C. Obulutsa**, Senior Principal Magistrate, delivered on **13 May 2016** in **Eldoret Chief Magistrates Court Civil Case No. 192 of 2014: Protus Wafula Wanyama vs. National Cereals and Produce Board**. In that suit, the Respondent had sued for general and special damages as well as interest and costs in connection with injuries that he sustained in an accident that occurred on **18 February 2014** while he was engaged in his duties as an employee of the Appellant. It was the contention of the Respondent before the lower court that the accident was caused solely by reason of breach of common law and/or statutory duty of care and or breach of contract of employment and or terms thereof on the part of the Appellant, its servants and/or employees.

[2] In a Judgment rendered on **13 May 2016**, the Senior Principal Magistrate came to the conclusion that the Respondent had proved his claim against the Appellant, and on the basis thereof he found the Appellant fully liable for the Respondent's injuries. He proceeded to assess General Damages at **Kshs. 400,000/=** and together with the Special Damages claimed, Judgment was entered in the Respondent's favour for **Kshs. 423,300/=** together with interest and costs.

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

> **[a]** That the Learned Magistrate erred in law and in fact and misdirected himself in holding that the Respondent had proved his case against the Appellant to the required standard;
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> **[b]** That the Learned Magistrate erred in law and in fact in holding the Appellant herein 100% liable;
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> **[c]** That the Learned Magistrate erred in law and in fact and misdirected himself in the evaluation of the evidence adduced by the parties to the suit;
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> **[d]** That the Learned Magistrate erred in law and in fact and misdirected himself in disregarding the documentary and oral evidence of the Appellant's witness in deciding upon the issue of liability;
>
> **[e]** That the Learned Magistrate erred in law and in fact and misdirected himself in relying on the wrong principles to arrive at his Judgment;
>
> **[f]** That the Learned Magistrate erred in both law and fact in not applying the principle of *volenti non fit injuria* by failing to find that the injuries to the Respondent were self-inflicted by the Respondent;
>
> **[g]** That the Learned Magistrate erred in both law and fact by not considering the submissions and authorities tendered on behalf of the Appellant;

Accordingly, the Appellant prayed that the appeal to be allowed and the Judgment of the lower court be set aside in its entirety; and that the

Respondent be condemned to pay the costs of this appeal and the costs at the subordinate court.

[4] The appeal was canvassed by way of written submissions, which were filed herein pursuant to the directions issued on **19 June 2018.** Hence, the Appellants written submissions were filed on **2 July 2018** by the firm of **M/s B.O. Akang'o Advocates**, while the Respondent's written submissions were filed on **29 June 2018.** Counsel for the Appellant chose to collapse the 7 Grounds of Appeal into 3 broad themes, namely:

> **[a]** That the Trial Court erred in fact and law in holding that the Respondent had proved his case to the required standard;
>
> **[b]** That the Trial Court erred in fact and law in not applying the principle of *volenti non fit injuria* by failing to find that the injuries to the Respondent were self-inflicted;
>
> **[c]** That the Trial Court erred in fact and law and misdirected itself in evaluation of the evidence adduced by the parties.

[5] It was the submission of the Appellant that contrary to the assertions by the Trial Court on the issue of the safety boots, the work that the Respondent was employed to undertake was carrying sacks of maize and loading the said sacks of maize on the conveyor belt; and therefore that the question of the Respondent needing safety boots did not arise as safety apparel go hand in hand with the job description of an employee. It was further the submission of Counsel for the Appellant that the crucial question that the Trial Court was expected to deal with and apply in apportioning liability was how the accident happened and why the Respondent had placed his legs on the conveyor during the time the machine had stopped working.

[6] Counsel for the Appellant relied on the case of **Statpack Industries vs. James Mbithi Munyao [2005] eKLR** for the proposition that the Respondent was under obligation to prove a causal link between the negligence alleged against the Appellant and the injuries that he suffered; which burden was not discharged. It was further submitted that had the Learned Trial Magistrate correctly evaluated the evidence and directed himself, he would have found that the Respondent had no role to play in the causation of the accident and neither did he contributed to the same. Reliance was placed on **Devki Steel Mills Limited vs. Thaikon Mwakha Okutoyi [2017] eKLR** in support of this argument.

[7] Lastly, Counsel for the Appellant faulted the Learned Trial Magistrate for his failure to consider or apply the principle of *volenti non fit injuria* yet it was evident that the Plaintiff got onto the conveyor belt when his job description did not entail repairs. In this regard, Counsel relied on **Hysal Hardware Limited & Another vs. Jones Kimuyu Julius [2017] eKLR**.

[8] The Respondent's Counsel fully supported the lower court's findings on liability and quantum. His submission was that the Respondent was injured while reloading maize on the conveyor belt, and therefore was within the scope of his work; and that he was injured because he had not been provided with protective apparel. Accordingly, Counsel submitted that the lower court was correct in finding the Appellant 100% liable. He relied on **Nakuru HCCA No. 38 of 1995: Sokoro Saw Mills Ltd vs. Benard Muthambi Njenga** in which the court held that it was the duty of the employer to provide the servants with as safe a place of work as the exercise of reasonable skill and care would permit.

[9] On quantum, the Respondent's submission was that the Trial Magistrate correctly assessed the general damages payable at **Kshs. 400,000/=;** and that the award was well founded, given the injuries suffered by the Appellant. Counsel relied on **Mombasa HCCC No. 165 of 1990: Katana Ngao vs. Andrew Kamau Wokabi & Another** in which an award of **Kshs. 300,000/=** was made for the loss of 5 toes of the left foot. Accordingly, Counsel urged the Court to dismiss the appeal with costs.

[10] In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123,** it was held that:

> **"...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] Hence, 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. To that end, I have given careful consideration to the evidence that was placed before the lower court. In support of his case, the Respondent testified as **PW1** and stated that he was at the material time working for the Appellant in its Shelling Section. He testified that, on **18 May 2014,** he was on duty when the machine developed problems; and that it stopped and then suddenly started shelling; and in the process the conveyor cut his toe. He was taken to Moi's Bridge Health Centre for treatment and was thereafter examined by **Dr. Aluda**. He added that he had not been issued with any safety gears like gloves or boots.

[12] The Respondent's second witness was **Peter Wanyama (PW2)**. He was then working at Moi's Bridge Centre; and while there he received and treated the Respondent for cut woulds that he sustained at his place of work. He produced the treatment chits as the **Plaintiff's Exhibits No. 1 and 2** before the lower court.

[13] The Appellant called, as its witness, **Erick Kiprono Limo (DW1)**, the Assistant Sales Manager at the Appellant's Moi's Bridge Depot. He conceded that on the date in question, the Respondent was working for the Appellant as a casual labourer. He stated that his duty was to reload maize onto the conveyor belt and that while in the course of his work, he got injured. He denied that the Appellant was negligent in any way, positing that the conveyor belts did not require safety gears. In his evidence, it was the Respondent who failed to heed the instruction that he had been given and used his feet when he ought to have used his head in loading the maize onto the conveyor belt.

[14] From the foregoing summary, it is manifest that there was no dispute before the lower court that the Respondent was, at all times material to his claim, working for the Appellant as a casual labourer. It is further not in contention that he got injured while in the course of

his employment. Indeed, **DW2** conceded that it was the Appellant that ensured the Respondent was taken to the local health centre for treatment. The injuries pleaded at Paragraph 7 of the Plaint were as follows:

> **[a]** Right foot was swollen and tender;
>
> **[b]** He had a cut wound on the right middle toe which was tender;
>
> **[c]** Traumatic amputation of the right 4th toe which was tender;
>
> **[d]** Cut wound on the right 5th toe which was tender.

[15] These injuries were duly proved vide the evidence of both the Respondent and **Peter Wanyama (PW2). Dr. Aluda's** report was also produced before the lower court and marked the **Plaintiff's Exhibit No. 4**. That evidence confirms that the Respondent sustained cuts on two toes, one of which had to be amputated. And, as was rightly submitted by Counsel for the Appellant, the critical issue for determination by the lower court was whether the injuries were attributable to the negligence or breach of duty of care or contract on the part of the Appellant.

[16] As was observed in **Statpack Industries vs. James Mbithi Munyao [2005] eKLR,** the burden was on the Respondent to prove his allegations on a balance of probabilities. Here is what the Court had to say in the **Statpack Industries Case**:

> **"It is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone's negligence. An injury *per se* is not sufficient to hold someone liable."**

[17] The Respondent's evidence that he was at the material time deployed to work for the Appellant in its Shelling Section was not refuted. He further stated that part of his work involved loading sacks of maize onto the conveyor, a fact conceded to by **DW1**. The evidence further shows that, as the Respondent was going about his duty that day the machine, which was faulty, stalled and then suddenly restarted itself. And that it was in that process that the conveyor cut his toes. That evidence was not rebutted by the Appellant. **DW1** whose evidence it was that the Respondent had placed his foot on the conveyor, conceded that he did not see the Respondent put his foot on the conveyor and that he just heard him screaming. He was therefore not in a position to prove any of the elements of negligence pleaded at paragraph 7 of the Defence against the Respondent. For instance, there was no proof that the Respondent performed his duties without care for his own safety, or that he failed to follow instructions, or even that he failed to wear protective devices.

[18] The Trial Court was therefore correct in finding that the Appellant had failed to provide safety boots to the workers and thereby exposed the Respondent to risk of injury given the express admission by **DW1** that the Respondent had not been provided with any protective gear. He was emphatic that "**Those belts are not for safety gears**" and yet was unable to rebut the Respondent's evidence that the machine was faulty, hence the need for extra care and protection by way of protective gear. Taking all the foregoing into account, I have no hesitation in holding that the Trial Magistrate came to the correct conclusion in holding the Appellant fully liable for the Respondent's injuries. There was clearly no basis laid out for him to apply the doctrine of *volenti non fit injuria.*

[19] In **Purity Wambui Muriithi vs. Highlands Mineral Water Co. Limited [2015] eKLR** thus:

> **"...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..."**

[20] And where, as in this case, contributory negligence was pleaded by the Appellant, the burden of proof was on the Appellant to satisfy the lower court on those issues, for **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.***

[21] Similarly, **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.***

[22] Hence, the Appellant having failed to discharge the burden of proving the particulars alleged by it, the lower court cannot be faulted for relying on the uncontroverted evidence of the Respondent regarding the circumstances in which the injuries occurred and for invoking the general rule, in those circumstances. The Appellant was thus rightly found 100% liable to the Respondent for the injuries sustained by the

Respondent in the course of discharging his duties**.**

[23] In awarding the Respondent General Damages of **Kshs. 400,000/=** the Trial Court considered the injuries suffered by him and the submissions and authorities relied on by Learned Counsel. 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**, this principle was restated 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..."**

[24] Before the lower court, the Respondent's Counsel had asked for an award of **Kshs.600,000/=** as general damages. Counsel relied on the case of **Katana Ngao vs. Andrew Kamau HCCC No. 165 of 1990** in which **Kshs. 300,000/=** was awarded in **1993** for loss of all 5 toes of the left foot. Although the Learned Trial Magistrate acknowledged that the facts of **the Katana Ngao** case were somewhat different in that the injuries were far more serious, he failed to give any justification as to why he considered an award of **Kshs. 400,000/=** appropriate.

[25] In his prognosis, **Dr. Aluda** was of the view that whereas the soft tissue injuries would heal with time, the amputation of the 4th toe had caused the Respondent a permanent disability. There was no indication however as to how, if any, this disability would affect the Respondent's day to day activities of life. In the premises, I have looked at the case of **Peter Kioko & Another vs. Hellen Muthee Muema Kiambu HCCA No. 153 of 2014** in which the Respondent had suffered blunt head injury and crush injury of the left big toe, resulting in amputation of the toe. The appellate court reduced the sum awarded by the lower court from **Kshs. 300,000/=** to **Kshs. 200,000/=.** I would similarly be of the view that the award of **Kshs. 400,000/=** for the amputation of the 4th toe was on the higher side and therefore amounts to an erroneous estimate, based on the facts presented before the lower court. I would accordingly reduce the same to **Kshs. 200,000/=.**

[26] The Respondent also claimed **Kshs. 22,305** as special damages for the Medical Report and treatment expenses. Needless to say that special damages must be specifically proved. In his evidence before the lower court, the Respondent only mentioned the payment he made for the Medical Report for which a receipt was produced and marked the **Plaintiff's Exhibit No. 4b** before the lower court. That receipt is attributed to **Dr. Aluda** and is for **Kshs. 1,500/=** as pleaded. There was no mention, let alone proof, of the sum of **Kshs. 20,805/=** that the Respondent asked for as treatment expenses. Accordingly, there was no basis upon which the lower court awarded that sum. I therefore hold that in allowing that aspect of special damages, the Trial Magistrate fell into error, which warrants correction. I would thus reduce the special damages from **Kshs. 22,305/=** to **Kshs. 1,500/=.**

[27] In the result, having re-evaluated the evidence that was presented before the lower court, I am satisfied that the Learned Trial Magistrate came to the right conclusion and cannot be faulted on the issue of liability; and that on quantum, the general damages due is hereby reduced to **Kshs. 200,000/=** while the special damage component is reduced to **Kshs. 1,500/=**. The appeal therefore succeeds partially, and only to the extent aforementioned on quantum. The lower court judgment and decree are hereby set aside and substituted with Judgment for **Kshs. 201,500/=** only with interest thereon from the date of the lower court Judgment. I would also award costs of the appeal and of the lower court to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 21ST DAY OF NOVEMBER 2018

OLGA SEWE

JUDGE