REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 18 OF 2012

RUPA MILLS LIMITED...APPELLANT

VERSUS

DANIEL MACHOKA OSORO...RESPONDENT

(Appeal against the judgement and decree of Hon. A. Ong'injo (SPM) delivered on 25th January, 2012 in Eldoret CMCC No. 712 of 2009)

JUDGEMENT

1. The appellant was sued by the respondent for recovery of damages arising from an accident alleged to have occurred on 23rd August, 2004. It was the respondent's claim that he was on the material day lawfully on duty working under the appellant's employment when he slipped and fell on a machine and as a result thereof sustained a blunt trauma to the left knee which was tender and his left heel was swollen and tender with a lacerated wound. He further sought special damages of KShs. 1,500/- for medical report.

2. It was the respondent's evidence that he was employed as a machine operator by the appellant and produced payslips in that regard as P. Exhibit 1. He stated that while at work on the material day, the handle of machine No. 38 got broken and hit his left leg and he fell. He was issued with a gate pass and he went to Moi Teaching and Referral Hospital (MT & RH) for treatment. He produced an attendance card (P. Exhibit 3) to show that he was given two days off duty. He was later examined by Dr. Aluda who prepared a medical report to that effect. He stated that he has healed but still felt pain and that he was left with a scar. He blamed the appellant for the accident because the machine was defective and was not given protective garment. Dr. Aluda (PW2) stated that he examined the respondent on 15th June, 2009 and established that he had suffered blunt trauma to the left knee which was tender and that his left heel was swollen and tender with lacerated wound. He opined that the injuries had healed at the time of examination and that the same were soft tissue injuries. He produced the medical report and a receipt thereof for KShs. 1,500/- as P. Exhibit 4a and b. Dr. Joseph Embenzi (PW3) a Senior Medical Officer at MT&RH confirmed that the respondent was attended to at the facility under casualty no. 17051 of 2004 on 28th August, 2004 for left knee injury. He produced a treatment card in that respect as P. Exhibit 2.

3. The appellant denied the respondent's claim. Elijah Mukoya Garo (DW1) who is a clerk at the appellant's premises stated that his duty entailed maintaining the master roll and that the respondent was not on duty on the material day. He produced a master roll for the period 21.10.2004 and 20.11.2004 as D. Exhibit 1 and 21.8.2004 to 20. 9. 2004 as D. Exhibit 2. Referred to D. Exhibit 3 a card from the appellant's company he stated that it shows that the respondent was on duty on 23.8.2004. He stated that the signature on the card was different from the one on the master roll. Shown the master roll, he stated that it shows the respondent was on duty on 23.9.2004.

4. It was the appellant's submission that the respondent's claim was time barred the alleged cause of action having arisen on 23rd August, 2004 and the suit instituted on 4th September, 2009. The appellant cited in reliance **Rawal v. Rawal [1990] KLR 275**. It was submitted that no contract was produced by the respondent to prove there existed a contract between the parties. That that coupled with the fact that the appellant's witness testified that he was not on duty on the material date, the appellant cannot be held liable.

5. The respondent submitted that the appellant failed to provide the respondent with protective garments to ensure lesser danger therefore breached duty of care and in that regard cited Winfred and Jolowilz on Tort by WVH Rogers, 14th Edition, London Sweet and Maxwell at page 213. On damages, it was submitted that no error of principle has been proved to warrant this court to interfere with the trial court's finding on damages. It was submitted that the suit is not time barred since his claim is founded on contract and not tort. In this regard he cited **Mathius v. Kuwait Bechtel Corporation [1959] 2 911 E.R. 345** and **Maize Milling Co. Ltd v. Jacktone O. Otina [2016] eKLR**.

6. Aggrieved by the trial court's finding, the appellant filed this appeal on grounds that can be summarized as the trial court erred in apportioning liability at 100% and that the trial magistrate erred in awarding damages that was inordinately high.

7. This is a first appeal, this court is therefore under duty to re-evaluate the evidence adduced at the subordinate court both on points of facts and law and come up with its findings and conclusions. See: **Selle v. Associated Motor Boat Co. Limited [1968] EA, 123**. The issues for determination in this appeal are:

a) Whether or not the magistrate erred in apportioning liability at 100% on the appellant and enter judgment in favour of the respondent.

b) Whether or not the magistrate erred in awarding the respondent damages.

8. The appellant tendered documentary evidence to demonstrate that the respondent was not on duty on the material day and could not have been injured at the appellant's premises. It is noteworthy however that documents produced were not authentic for having no company seals. Further, I find that the appellant did not controvert the respondent's allegation that she was not issued with gloves. The appellant herein did not adduce any evidence to controvert the respondent's case. The consequence of such failure has been vastly discussed for instance in **Karuru Munyoro v. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988** Makhandia J held:

> ***"The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon."***

It follows therefore that the appellant was in breach of duty and therefore liable. In **Winfield and Jolowicz on Tort by WVH Rogers 14th Edition, London Sweet and Maxwell at page 213** it is stated that:

> ***"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."***

9. The position was affirmed in **Mumende -v- Nyali Golf & County Club (1991) KLR 13** where the court was of the opinion that it is the employer's responsibility to ensure a safe working place. However, in measuring the duty of care, one must balance the risk against the measures necessary to eliminate the risks. The respondent ought to have been careful having the knowledge of the risk involved. In the circumstances I find that the trial court erred in apportioning liability wholly on the appellant. Liability is hereby apportioned at the ratio of 80:20 between the Appellant and Respondent.

10. The principles to be applied by an appellate court to determine whether or not to interfere with a trial court's finding on quantum was discussed in **Loice Wanjiku Kagunda -vs- Julius Gachau Mwangi C A No. 142 of 2003 (UR)** where the Court held:

> ***"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 or 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 Mariga –vs- Musila (1984) KLR 257.)"***

11. In awarding the said damages, the trial court bore in mind the extent of the injury suffered and authorities relevant thereto. The cases and injuries were comparable to the circumstances of the Respondent. In the circumstances, I am unable to find that the trial court erred in awarding the damages as done. In the end, I set aside the trial court's finding on liability and substitute it with liability apportioned at 80:20 between the appellant and the respondent. The Appellant is awarded half costs of the appeal while the Respondent shall have full costs in the lower court.

Orders accordingly.

D. K. KEMEI

JUDGE

Delivered at Eldoret this **22nd** day of **November, 2018.**

HELLEN OMONDI

JUDGE