REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 45 OF 2014

HANTEX GARMENTS (EPZ) LTD ……..……...…..... APPELLANT

VERSUS

HARON MWASALA MWAKAWA ……..……..…….. RESPONDENT

(An appeal from the judgment of Hon. S.R. Wewa (P.M.) in SRMCC No. 279 of 2012 delivered on 18th March, 2014).

JUDGMENT

1. On 11th April, 2014, the appellant herein Hantex Garments (EPZ) Ltd., filed a memorandum of appeal raising the following grounds of appeal:-

> (i) That the Learned trial Magistrate erred in law and in fact in awarding liability at 20% against the plaintiff and 80% against the defendant having disregarded the evidence adduced by the defence witness and the defence supporting documents;
>
> (ii) That the Learned trial Magistrate erred in law and in applying wrong principles while assessing general damages and the decision therein being exorbitantly high and excessive in the circumstances; and
>
> (iii) That the Learned Trial Magistrate erred in law and in disregarding the submissions and evidence of the appellant.

2. The appellant therefore prays for orders that:-

> (a) This honourable court be pleased to set aside the said judgment of the subordinate court; and reassess the damages payable, if at all;
>
> (b) Any other or further orders that this court may deem just and expedient to grant; and
>
> (c) That the respondent be condemned to pay the costs of this appeal.

3. The Counsel for the parties filed written submissions which they highlighted. Ms. Kaguri, Learned Counsel for the appellant submitted that the appeal arises from an industrial accident. She informed this court that the respondent who was a Counting Clerk testified in the lower court that he was injured when he tried to reach an empty trolley which was amidst many trolleys with garments. The accident happened

at 7.25 a.m., when he was on duty. Ms. Kaguri stated that on cross-examination, the respondent confirmed that someone used to take clothes in trolleys to him. He testified that the clothes fell on him and he got injured.

4. Counsel further submitted that the defence witness testified that someone used to take clothes in trolleys to the respondent thus his attempt to remove the trolleys with garments was not part of his job description. She indicated that the court awarded liability at 80% against the appellant and 20% against the respondent. In her view, the court ought to have discharged any liability on the part of the appellant as the respondent went to do someone else's work, thus he was on a frolic of his own.

5. Ms. Kaguri contended that no injury was recorded on the day in issue and the appellant produced defence exhibit 3, which is a booklet that contained names of injured workers between 31st September, 2012 and 29th October, 2012. The respondent alleged that he was injured on 2nd October, 2012.

6. The appellant produced defence exh. 2 which was a sick sheet for 2nd October, 2012. DW1 confirmed that the sick sheet was given to the respondent to go home for malaria treatment as he was feeling unwell. Counsel prayed for re-assessment of liability.

7. On quantum, she submitted that the court awarded Kshs. 100,000/= to the respondent, yet he suffered minor soft tissue injuries. She informed the court that Kshs. 50,000/= would have been adequate compensation and had submitted as such in the lower court. She requested this court to consider the authorities she had cited. She added that the respondent's Counsel had submitted an authority to support their prayer for an award of general damages of Kshs. 90,000/=. On the issue of costs, Counsel submitted that by virtue of section 27 of the Civil Procedure Rules, Costs follow the event.

8. On his part, Mr. Ongiri, Learned Counsel for the respondent asserted that there is no doubt that the respondent was an employee of the appellant where he would count garments and take them to the store. His supervisor was Franklin Jembe and not Mr. Yego as stated by Counsel for the appellant.

9. He further submitted that the Hon. Magistrate assigned liability at 20% as against the respondent and 80% as against the appellant and awarded Kshs. 100,000/= as general damages and special damages of Kshs. 2,000/= to the respondent. The costs for the Doctor's attendance in court and medical examination was Kshs. 3,550/=. The Learned Magistrate considered the evidence for the defence and disregarded the same. He added that the issue of award of damages is left at the discretion of the court. Counsel urged the court not to interfere with the discretion of the lower court unless it misdirected itself in making the decision.

10. Mr. Ongiri further submitted that the respondent discharged his burden of proof, that he was injured at his work place and that the appellant owed him a duty of care. It was contended that the appellant should have given the respondent protective gear and safety boots. He asserted that DW1 confirmed that the respondent was moving a trolley in the course of his duties.

11. On the issue of damages, he indicated that both Counsel on record tendered in their respective authorities which the Hon. Magistrate considered and awarded the respondent Kshs. 100,000/=. He urged the court to consider the authorities he had cited in his written submissions and dismiss the appeal with costs.

ANALYSIS AND DETERMINATION

The issues for determination are if the Learned Magistrate erred in apportionment of liability and award of quantum of damages.

12. The first appellate court is duty bound to re-examine and analyze the evidence adduced before the lower court bearing in mind that it neither saw nor heard the witnesses who testified. The foregoing was espoused in the case of **Selle vs Associated Motor Boat Company** [1968] EA 123 at P. 126, Sir Clement de Lestang VP stated thus:-

" ….. An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such 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 witness and should make due allowance in that respect. In particular this court is not bound necessarily to follow the 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."

13. In the lower court, the respondent, Haron Mwasala Mwakawa testified as PW1. He informed the court that on 2nd October, 2012 he was working at Hantex EPZ (the appellant) and produced his job card No. 02248 as plf. exh. 1. He reported to work at 7.25 a.m., and went to the store to take an empty trolley. The Supervisor was Frank. The respondent found some trolleys which were full of clothes. There was an empty one in the middle but as he removed it, the one which had clothes fell on him and he got injured. It was his evidence that he was the "Pieces Clerk" whose work was to count 50 pieces of clothes from check (sic) garments. Someone would take the clothes to him by a trolley. The respondent would then take them to the store. After being injured, he reported to the Supervisor and was issued with a sick sheet for 2nd October, 2012, which he produced as plf. exh. 2. He went to Rabai Health Centre where he was treated. He produced the treatment book as plf. exh. 3. An Advocate wrote a demand letter which he produced as plf. exh. 4. The respondent's testimony was that he saw Doctor Ndegwa who prepared medical documents. The medical report was marked as MFI – 5.

14. The respondent blamed the appellant for the accident as there was poor supervision and the trolley was defective. He also had no safety boots and they were being hurried to finish the target. The respondent stated that he wanted to be assisted in payment for the injuries and costs. He was injured on the right leg. He had healed at the time of testifying. It was his evidence that he told the supervisor that he had been injured and was given permission. The respondent informed the trial court that his name was not written on a book to indicate that he was injured.

15. On cross-examination, the respondent stated that someone would take clothes to him, he would count and take them to the store using a trolley. He reported to the Supervisor that he got injured but he kept on ignoring. He stated that he did not go to work feeling unwell. He got injured at work.

16. On re-examination, the respondent asserted that he got injured at work and a sick sheet was issued.

17. PW2 was Doctor Stephen Ndegwa. It was his evidence that on 10th October, 2012 he saw the respondent who had a history of being injured by a trolley on his leg, at his work place on 2nd October, 2012. He sustained bruises on his right leg. He saw the treatment notes and the respondent 8 days after he had been treated at Rabai Health Centre. He had pains and his right leg was slightly swollen. He had soft tissue injuries. PW2 charged Kshs. 2,000/= for the report and Kshs. 3,000/= for court attendance. He produced the medical report as plf. exh. 5 and the receipt for the said report as plf. exh. 6. The receipt for court attendance was produced as plf. exh. 7.

18. The appellant's witness, Julius Yego, testified as DW1. He recalled that on 2nd October, 2012, the respondent reported to work at 7.22 a.m., and started counting garments. He clocked out 10 minutes after 8.00 a.m., on the same day. It was DW1's evidence that the Supervisor, Frankline Chembe took the respondent to the office and said he had malaria. A sick sheet was issued. It was marked as defence exhibit 1. A computer printout produced as defence exh. 2 shows that the appellant left work at 8.10 a.m. The said witness said that the work of the respondent was to count clothes and someone was assigned to take them to him.

19. DW1 explained that on being injured, one is given first aid and goes to a clinic for further check up. If there is need to be taken to hospital, the name of the injured person is registered. He produced the records for 2nd October, 2012 but the respondent's name was not there. The register was produced as defence exh. 3. DW1 confirmed that the respondent had no safety boots. DW1 wrote a letter to the Inspector explaining the circumstances, as no injury was reported. He produced it as def. exh. 4.

20. On cross examination, DW1 stated that they did not indicate on the sick sheet that the respondent was suffering from malaria. In DW1's view, the claim was fraudulent. He indicated that safety boots are offered to mechanics and warehouse people. The other people are not issued with the same as it is not necessary.

21. On re-examination, DW1 indicated that the Supervisor writes a report for those injured but no report was written for there was no injury. Documents relating to injury are taken to insurance. He re-emphasized that the claim was not genuine.

22. In her judgment, the Hon. Magistrate apportioned liability at 20% in favour of the respondent as against 80% for the appellant and awarded general damages of Kshs. 100,000/= less 20% contribution and special damages at the sum of Kshs. 2,000/=. Ksh. 3,500/= for court attendance was to be treated as costs. He found that the respondent had proved his case on a balance of probability. This was after finding that the respondent blamed the appellant for not providing a safe working system and that trolleys were haphazardly arranged and no safety gear had been assigned to the respondent.

23. The evidence on record is clear that the respondent reported on duty on 2nd October, 2012 at 7.22 a.m., according to def. exh. 2 which is a computer printout of the time he reported at work. He left work shortly thereafter, at 8.10 a.m. It cannot be disputed at this point that the respondent was not an employee of the appellant company. He was and produced his work identity card. The contentious issue is if the respondent left work on the material day because he was sick suffering from malaria or if he left after being injured by a trolley. DW2 in his evidence stated that he did not indicate in the sick sheet that the respondent was suffering from malaria. A perusal of the sick sheet, def. exh. 2, reveals that the respondent was given permission from 2nd October, 2012 to 3rd October, 2012 for being sick. The Sectional Head, the Manager and the respondent signed the permission application form No. 6417.

24. The appellant's argument was to the effect that if the respondent had been injured, his name would have been entered in the register of injuries, an extract of which was produced as def. exh. 4. DW1 asserted that the respondent's name was not in the register as he sustained no injury.

25. On this point, I am in agreement with the authority cited before the lower court in the respondent's written submissions, of **Sokoro Saw Mills Ltd. vs Grace Nduta Ndungu** [2006] eKLR where it was held thus:-

> ***"the evidence of the master roll and the accident book which were produced as exhibits by the appellants were documents which were prepared by the appellant itself with no input by the respondent. The evidence of the said records therefore cannot be considered to be factual in the face of the evidence which was adduced by the respondent and her witness."***

26. In the present case, the respondent had no control over the inclusion of his name in the register of the workers that had sustained injuries in the applicant's work place. The making of such entries was left in the sole discretion of the respondent's superiors at work.

27. The respondent's evidence was that he was injured when a trolley laden with clothes fell on him. This happened as he was trying to reach an empty trolley in the midst of trolleys full of clothes. He stated that although someone used to take clothes to him to count, it was his duty to take the clothes to the store after counting. The appellant's witness, DW1 did not dispute that piece of evidence and I therefore hold that the respondent was not on a frolic of his own when he got injured. DW1 confirmed that the respondent had not been issued with safety boots as in his view, it was not necessary to do so.

28. PW2, Dr. Ndegwa confirmed that the respondent was treated at Rabai Health Center on 2nd October, 2012 as per his the treatment notes. He saw the respondent 8 days post accident. He prepared a medical report dated 10th October, 2012 and noted that the respondent had bruises, blunt trauma, swelling and tenderness on the right leg. At the time of examination, the respondent had pain on the said leg. The Doctor classified the injuries as severe soft tissue injuries. No permanent incapacity was expected.

29. Although Ms. Kaguri submitted that the Hon. Magistrate erred in apportioning liability at 80:20 as against the appellant and the respondent, I am of a contrary view. The appellant was under duty to provide a safe working environment for the respondent which it failed to do. I therefore see no justifiable reason to interfere with the liability as apportioned.

30. Counsel for the appellant referred to the case of **Statpack Industries Limited vs James Mbithi Munyao,** Nairobi HCCA No. 152 of 2003 to show that the issue of causal link between the appellant's negligence and the respondent's injury was not proved. In this case, the appellant's failure to ensure that the trolleys laden with clothes were well arranged and empty trolleys were well within the respondent's reach without him having to push his way amidst laden trolleys in search of an empty one shows negligence on the part of the appellant; and there lies the causal link.

31. The appellant's Counsel also relied on the case of **South Nyanza Sugar Co. Ltd. vs Daniel Odek Matoka** [2011] eKLR in submitting that the respondent did not call any witness to buttress his claim on employment. I have already addressed the said issue and held that all the evidence points to an employer - employee relationship between the appellant and the respondent respectively. The said issue was not contended by DW1 in his evidence, if anything, he confirmed that the respondent was an employee of the appellant.

32. On the issue of liability, the Hon. Magistrate did not in particular address her mind to the authorities relied on by Counsel for the parties herein. I will therefore make reference to the same. The respondent's Counsel had sought general damages to the tune of Kshs. 180,000/= and relied on the case of **Stanford O. Ochieng vs C.C. Ltd & Another**, Nakuru HCC No. 309 of 1998 where the court in the year 2000 awarded general damages of Kshs. 90,000/=. The said Counsel had submitted that the said case was 13 years old and taking into account the passage of time and inflation of the Kenyan Shilling, Kshs. 180,000/= would be adequate compensation.

33. On quantum, Counsel for the appellant had relied on the case of **Francis Mwai Kahuthu & Another vs Daniel Munene Njoroge,** Nairobi HCCC No. 6 of 1999, where the plaintiff sustained superficial laceration on the frontal aspect of the right wrist tender chest and head injury concussion. An award of Kshs. 50,000/= was made for pain, suffering and loss of amenities. It had therefore been submitted before the Hon. Magistrate that Kshs. 50,000/= in general damages in this case would be sufficient.

34. The authority of **Stanford O. Ochieng vs C.C. Ltd & Another** (supra) relied upon by the Counsel for the respondent indicates that the plaintiff therein suffered multiple soft tissue injuries of bruises over the abdomen, chest and the right thigh. The injuries healed without any permanent disability.

35. In the case of **Butler vs Butler** [1984] KLR 225, the Court stated as follows:-

> ***"the assessment of damages is more like an exercise of discretion by the trial Judge and an appellate court should be slow to reverse the trial Judge unless he has acted on wrong principles or awarded so excessive or so little damages that no reasonable court would; or the has taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered and, in the result, arrived at a wrong decision."***

36. In his judgment, the Hon. Magistrate stated that on quantum she was guided by the medical documents and the submissions and authorities cited. She also noted that the injuries were soft tissue in nature and no permanent incapacity was expected. In apportionment of liability the Hon. Magistrate found that the respondent stated he worked in an environment where the appellant failed to provide a safe working system yet he put no fine cautionary measure in place, thus apportioned liability at 80:20 as against the appellant and the respondent.

37. Bearing the foregoing in mind, and the fact that the decision cited by Counsel for the appellant in the lower court was decided in the year 1999, yet judgment in this case was delivered in the year 2014, I do not see any misdirection on the part of the Hon. Magistrate that would persuade me to interfere with the discretion she exercised in making the award in this case.

38. I therefore find that the appeal is unmerited. It is hereby dismissed. Costs of the lower court case and this appeal are awarded to the respondent. Interest is awarded to the respondent at court rates.

DELIVERED, **DATED** and **SIGNED** at **MOMBASA** on this **13TH DAY of JULY 2017**.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Kaguri for the appellant

No appearance for the respondent

Mr. Oliver Musundi - Court Assistant