REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 119 OF 2012

DOMINIC SILA MUTUA.....APPELLANT

-V E R S U S –

DEVKI STEEL MILLS .....RESPONDENT

(An Appeal from the judgment dated 14th February 2012 and decree dated 22nd February 2012 of the Chief Magistrate's court at Thika by (Mrs) L. W. Wachira SRM delivered on 14th February, 2012)

JUDGEMENT

1. The appellant, Dominic Sila Mutua sued Devki Steel Mills Limited seeking for workman's compensation following injuries suffered on 5th February 2010. The appellant claimed that when he was undertaking the duties assigned to him by his employer, the respondent, a machine spindle cut him near his ribs on his right side causing him severe injuries. The claim is based on an employers' breach of common law contractual duties towards his employee which led to the injuries suffered by the employee while in the course of duty. The appellant attributed the accident to the negligence of the respondent. The respondent denied the appellant's claim by filing a defence. The dispute was heard by the trial magistrate who held the respondent 80% liable and the appellant 20% liable. She further, on quantum, awarded the appellant a total sum of kssh.50,000 in general damages for pain and suffering and kshs.2,000/= as special damages. In total, the honourable magistrate awarded ksh.52,000/=.

2. On appeal, the appellant put forward the following grounds of appeal.

> ***1. The learned magistrate erred in fact and in law in apportioning liability at 20%:80% against the respondent when the respondent led no evidence on causation that would be a basis for apportionment of liability.***
>
> ***2. The learned magistrate erred in fact and in law in making an inordinately low award in general damages.***

3. This being the first appeal, this court is bound to re-evaluate the evidence tendered before the trial court and arrive at an independent conclusion but also taking into account the fact that it did not have the advantage of hearing and observing the demeanour of the witnesses. In the case of **Peters v Sunday Post limited (1958) EA** at page 424, it was held inter alia as follows:

> ***"It is a strong thing that for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which***

should be exercised with caution: It is not enough that the appellate court might itself have come to a different conclusion."

4. The learned counsels appearing in the matter have filed their respective written submissions. I have re-evaluated the case that was before the trial court. I have further considered the rival written submissions plus the authorities cited by the parties. The main points of contention as laid out by the appellant include the twin issues of liability and quantum.

5. On liability, the appellant is aggrieved by the apportionment of 80:20% in favour of the appellant. He contends that he did not contribute to the accident and as such, the respondent ought to have been held fully liable. He argued that by apportioning him 20% liability the learned magistrate failed to take into account the evidence as tendered but based her decision on her own assumptions. He claimed that a defective machine can still run even when it is switch off and that the trial magistrate erred by imagining that a machine cannot switch itself on.

The respondent on his part submitted on liability to the effect that the trial court correctly apportioned the liability at 80:20% since the appellant had testified that he was properly trained on how to handle the machine, including switching it on and off. It further pointed out that the duty to switch on the machine was bestowed on the appellant. The respondent averred further that the machine was neither automatic nor defective and that no evidence had been adduced by the appellant to show that the medical doctor offered contradictory assessments when examining the appellant since he testified that the appellant complained of pain on the right chest yet history notes from Ruiru hospital indicated that the injury was on the left side of the chest. It claimed further that the appellant on cross-examination confirmed that the injuries do not tally. It stated that the trial court properly evaluated the evidence put forth by the respondent's witness and that there were no assumptions on the part of the trial magistrate. The respondent further blamed the appellant for the accident since he negligently operated the machine without the safety apparels and/or protective gear provided by the respondent.

6. Looking at the evidence adduced by the appellant in the trial court, he testified that he worked for the respondent as a machine operator. It was his evidence that on the material day, he was near the machine when be bent to collect some nuts to start working. He claimed that the machine got hold of his clothing and injured his chest yet he had not switched it on. He claimed that he was trained on how to operate the machine but he was not given protective gear. He testified further that he did not switch on the machine and concluded that it must have been defective.

7. The respondent called Lawrence Musyoka, DW1, a superior at the Devki Steel Mills. DW1 admitted that the appellant was in their employ but disputed the claim that he was injured. He claimed that he was on duty that day and he did not receive any reports indicating that anyone was injured. He averred that they have their own doctor who treats the workers but added that where the doctor cannot deal, then the injured party is referred to a hospital. It was his evidence that the bolts that the appellants claims to have been picking before he was injured were far from the machine and therefore there is no chance that the machine could have entangled the appellant's clothing. DW1 also testified that they issue all trained workers with protective gears. On cross examination, he admitted that he is not aware whether the appellant was taken to hospital by one Erastus since according to him, an injured person is taken to hospital by the doctor on duty.

8. DW2, Erastus Musee Musyhoka, who works with the respondent in the Human Resources also testified that he did not receive any report to indicate that the appellant was injured. He denied taking the appellant to hospital and further averred that had the appellant been injured, the attendance sheet would have reflected the injury and time of the injury. Since the appellant worked for 12 hours, if he was injured at 8.00am, it would have shown that he was on sick off. He concurred with DW1 that when an employee of the company is injured, it's the doctor or nurse that takes him to hospital. On cross examination, he stated that in case of an injury the supervisor is informed and further averred that the appellant worked even after the injury including June 2010.

9. The question arising is whether the appellant was indeed injured and if so whether the respondent

should be held liable for the injuries suffered. The appellant averred that he was injured at his place of work where he operated a machine. It was his evidence that he would normally pick up some bolts fix them on the machine then switch it on. On the material day however, he claimed that he followed the same routine but when he bent over to pick up the bolts and that the machine which was on took a hold of his clothes causing him chest injuries. It was also his evidence that he was the only employee in the company who was tasked with switching on and off the machine. He therefore concluded that since he had not switched it on then the machine must have been defective. He claimed further that he was not provided with protective gear and had he been given some protective gear, he would not have suffered the chest injuries. On his part, the respondent refutes the claims that the appellant was injured. In its evidence, the respondent claims that the appellant worked full day, being the assigned 12 hours on the material day. DW1 and DW2 who adduced their evidence denied claims of any injuries and DW2 who is said to have taken the appellant to hospital denied having done so and instead intimated that the company policy demands that the company's doctor examines the injured employee and thereafter if need be, the employee is referred to a hospital. It was the respondents evidence that the doctor or nurse is the one tasked with taking the injured party to the hospital. The respondent's witness further averred that had the appellant been injured, it would have reflected in the attendance sheet and medical records of the company which were in DW1's possession, yet that was not the case. They also asserted that the appellant was given protective gear contrary to his claim that he wasn't.

10. In my view, the appellant's claim that he was injured by the company machine is unsubstantiated. PW1, Jane Ikonya, claims that the appellant was injured by a chair while the report of a Dr. Moses Kinuthia reports that he was injured by a machine. The machine in question could only be switched on and off by the appellant who is adamant that on that day he did not switch it on. He therefore presumed that the machine was defective. This presumption was not proved and remains to be mere allegations. The appellant also claimed that he was not provided with protective gear but failed to adduce any evidence to substantiate this claim especially given that the respondent is of a contrary view on the issue. I am therefore not convinced that the appellant was not supplied with any protective gear. During the trial, the appellant was cross examined on the attendance sheet which he concurred did not show that he was injured. He also concurred that there was a company doctor but averred that he was not taken to him.

11. I am not convinced that the appellant was injured at the respondent's premises. The appellant in my view did not prove his case on a standard of probability as required in civil matters in the trial court. I cannot thereof hold the respondent liable for the alleged injuries suffered by the appellant.

12. Had I found the respondent liable given the injuries suffered by the appellant being laceration wound and blunt trauma right chest was as depicted in Dr. Moses Kinuthia's report, I would have upheld the total sum of kshs.50,000/= awarded by the trial magistrate.

13. In the end, I hereby dismiss the appeal and set aside the trial court's judgment. The respondent to have the costs of the suit and those of the appeal.

Dated, Signed and Delivered in open court this 11th day of November, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent