REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 5 OF 2013

EASTERN PRODUCE (K) LIMITED……..….APPELLANT

VERSUS

JOSEPH MAMBOLEO KHAMADI…….……RESPONDENT

(Being an appeal from the original judgment of B. Mosiria, Principal Magistrate

in Kapsabet CMCC No. 104 of 2011 delivered on 20th December 2012)

JUDGMENT

1. The appellant is aggrieved by the judgment and decree in the Principal Magistrates Court dated 20th December 2013. The respondent was an employee of the appellant. He sued the appellant for negligence for injuries sustained in the course of his employment. The learned trial Magistrate found that the appellant was liable in the ratio of 80% to 20%. The trial court awarded the respondent Kshs 120,000 as general damages and Kshs 1,500 as special damages. The net award was thus Kshs 97,200 or thereabouts. The learned trial Magistrate also awarded the appellant costs and interest.
2. The appellant has lodged a memorandum of appeal dated 17th January 2013. It urges seven grounds: First, that the respondent did not prove his case on a balance of probabilities; secondly, that the learned trial Magistrate exaggerated the degree of injuries or liability; thirdly, that the trial court failed to give reasons for its findings; fourthly, that the trial court misapprehended the evidence and took irrelevant matters into consideration; fifthly, that the trial court failed to consider that the defence of the respondent was uncontroverted; sixthly, that the learned trial Magistrate erred by finding the respondent guilty of contributory negligence; and, lastly that the impugned decision was founded on wrong principles.
3. This a first appeal to the High Court. It is thus an appeal on both facts and the law. I am required to re-evaluate all the evidence on record and to draw independent conclusions. There is a caveat because I have neither seen nor heard the witnesses. See *Selle v Associated Motor Boat Company Ltd* [1968] EA 123, *Williamson Diamonds Ltd v Brown* [1970] EA 1. I have considered the grounds of appeal, the pleadings in the lower court, the evidence in the trial court and the written submissions by learned counsel for both parties.
4. The respondent had testified that he was a hawker. He also used to pick tea. On 6th September 2008, he was on duty at the appellant's Zavani Tea Estate. He claimed that the appellant's supervisor, Francis Bosire, allocated him duties to cut some wood using a power saw. He testified that it was the very first time he was undertaking the task. In the course of using the machine, his right middle finger was cut. He blamed the appellant. The appellant denied the claim.

5. It is common ground that the respondent used to pick tea at the appellant's Zavani Estate. What was disputed was whether the respondent was on duty or injured on the material date. The appellant called its supervisor, Francis Korir (DW1), to the stand. He confirmed that the respondent used to work at Kamkong Division of the Estate. He said the appellant had no supervisor by the name Francis Bosire. He denied that an accident occurred on the material date involving the respondent. He produced the *Green Leaf Weighing Machine Sheet* for the day (Defence exhibit 1). The name of the plaintiff was not there. The witness also testified that had the respondent been injured at work, he would have sent him to the appellant's dispensary.
6. I have studied the *particulars* of negligence pleaded in the plaint. It was claimed that the employer failed to provide a safe working system or environment. The plaintiff blamed the employer for failing to provide "gloves, apparel, gumboots, masks, or goggles and any other protective gear". He pleaded that he was given a defective power saw; that he was not trained, supervised or warned of the dangers associated with the machine. He also pleaded that no measures were taken by the employer to prevent the injuries.
7. The learned trial Magistrate after considering the evidence held as follows-

> *"The defendant witness DW1 admitted he knew a supervisor called Sabure [who] was not called to deny plaintiff wasn't injured that day. The outpatient register produced has entries for injuries sustained at homes, the court wonders why accident register with injuries of workers was not produced.*
>
> *"Failure of the defendant to produce the relevant documents to show that the plaintiff was not injured only means that he was injured and defendant is concealing the fact. I do find that indeed the plaintiff was injured at work that day that is why his supervisor was not called to testify, his name was not in a tea pluckers list since he was doing factory duties where he was injured….an accidents register should have been produced".*

8. The burden to prove negligence fell squarely on the respondent. To that extent, I do not, with great respect, agree with the reasoning by the learned trial Magistrate. But as I shall discuss shortly, the defence put forth by the appellant was a sham. Regarding contributory negligence, the trial court found as follows-

> *"I do find the [defendant] is to a great extent liable for the injuries sustained by the plaintiff, however since machine was held and controlled by plaintiff himself, I do find he ought to have been more careful and I do find plaintiff 20% liable".*

9. From the evidence, the respondent had been employed to pick tea. He had not used a power saw before. Although the respondent had pleaded that the power saw was faulty, he never led such evidence. All that he said in cross-examination is that he "didn't know the machine had a problem". I accept that a power saw, if not handled appropriately, is a dangerous machine. Although the appellant contested that the respondent was cut by the power saw, there is the corroboration by the clinical officer, PW1. He said the respondent was attended to at Nandi Hills Hospital by a Mr. Baraza Juma on 6th September 2008, the day of the accident.
10. From the report, the cut "was bleeding with tendons exposed, imputation was cut finger due to machine injury". The doctor stitched the wound and gave a tetanus vaccine and other medication. Although the appellant took issue with the fact that Baraza never testified, its counsel, by consent, admitted the medical report of Dr. Aluda into evidence. The evidence of the clinical officer and the medical report confirmed that the plaintiff's finger was cut by a machine. DW2, a nurse at Zavani Tea Estate was not at the company dispensary that day and failed to produce the treatment chits. It also transpired that the respondent had a supervisor called Sabure who was not called to the stand. The plaintiff claimed he was assigned duties to cut trees. I would then agree with the learned trial Magistrate that the *Green Leaf Weighing Machine Sheet* for the day (Defence exhibit 1) was not a reasonable rebuttal. In a word, the defence on liability had glaring gaps and was a frail answer to the plaintiff's claim.
11. The next key question is whether the appellant was entirely to blame for the injury. The instrument of a power saw called for specialized training or supervision. It was a dangerous tool.

But it was being used by the respondent and fully in his control. The respondent knew it was risky. The respondent did not prove the machine was faulty. He could have declined the task or asked to be trained on its use. The employer on the other hand was negligent by handing out a lethal machine to an untrained employee and without any supervision. The employee took the power saw at his own peril. He was injured. Considering all those circumstances, I would blame both parties equally. I am unable to agree with the learned trial magistrate that the employer was to blame to a *greater* extent. See *Statpack Industries v James Mbithi Munyao*, High Court Nairobi, Civil Appeal 152 of 2003 [2005] eKLR.

12. There was an implied term of the contract that the respondent took the risks *incidental* to his duties. The respondent was cognizant of the dangers of using the power saw. It was then the respondent's primary duty to keep a safe look out. I have taken into consideration that cutting trees using a power saw was *not* his ordinary work. True, the employer may not have supplied him with gloves, gumboots, goggles and such like apparel. But I am at a loss how they would have mitigated the impact of a sharp rotating chain. But that is a theory not borne out clearly by the evidence. I thus say so *obiter*.
13. The duty of the employer to ensure the safety of an employee is not *absolute*; it is one of *reasonable care* against a foreseeable risk or one that can be avoided by taking reasonable measures or precautions. It would be unreasonable to expect an employer to be his employee's insurer round the clock. See *Halsbury's Laws of England* 4th edition volume 16 paragraph 562, *Mwanyule v Said* [2004] KLR 1, *Arkay Industries Ltd v Amani* [1990] KLR 309, *Eldoret Steel Mills Limited v Moenga Obino*, High Court, Eldoret Civil Appeal 3 of 2011 [2014] eKLR.
14. From the evidence, there was no basis for blaming the employer *more* than the employee. That is why I have apportioned liability equally. See *Woods v Durable Suites Ltd* [1953] 2 All ER 391. In *Devki Steel Mills Limited v joseph Mulwa* Nairobi, High Court Civil Appeal 658 of 2002 [2004] eKLR, *Statpack Industries v James Mbithi Munyao*, High Court Nairobi, Civil Appeal 152 of 2003 [2005] eKLR, *Eldoret Steel Mills Limited v Moenga Obino*, High Court, Eldoret Civil Appeal 3 of 2011 [2014] eKLR. I will thus set aside the judgment on liability and order that both parties share liability at 50% each.
15. I will now turn to the quantum of damages. The appellant contends that the award of Kshs 120,000 as general damages was too high. It proposes a sum of Kshs 30,000 as being more appropriate for the injuries. As a general rule, an appellate court will not interfere with quantum of damages unless the award is so high or inordinately low or founded on wrong principles. See *Butt v Khan* [1982-88] KAR 1, *Arkay Industries Ltd v Amani* [1990] KLR 309, *Karanja v Malele* [1983] KLR 42, *Kemfro Africa Limited & another v Lubia & another* [1987] KLR 30, *Akamba Public Road Services Ltd v Omambia* Court of appeal, Kisumu, Civil Appeal 89 of 2010 [2013] eKLR.
16. From the medical report of Dr. Aluda dated 14th March 2011, the respondent suffered a cut wound on the right middle finger; and, severe pains incurred during and after the injury. The doctor opined that the injuries were severe but had healed. The pain would eventually subside. The only permanent feature would be the scar. The injuries were thus of a *soft tissue* nature. They would not affect the respondent's employment as a general or manual worker.
17. Granted the evidence, I would say that the award of general damages of Kshs 120,000 was *manifestly* high. I have studied the authorities cited by the appellant. In *Peter Kahugu & another v Ongaro*, High Court, Nairobi, Civil Appeal 676 of 2000 [2004] eKLR, the plaintiff suffered soft tissue injuries. An award of Kshs 80,000 was made. In *Sokoro Saw Mills Limited v Grace Nduta Ndungu* High Court, Nakuru, Civil Appeal 99 of 2000 [2004] eKLR the court reduced the general damages for soft tissue injuries to Kshs 30,000. The respondent did not cite any authorities to me to support the award in the lower court. But I have considered the precedent he relied on in the lower court in *Catherine Wanjiru Kingori and others v Gibson Theuri Gichubi* High Court, Nyeri Civil case 320 of 1998 [2005] eKLR. The award in that case of Kshs 350,000 to the third plaintiff related to *multiple* soft tissue injuries as well as to the elbow and both ankles. Considering inflation and the nature of soft tissue injuries to the finger in the case before me, and which have completely healed, an award of Kshs 50,000 is sufficient. I will not disturb the award on special damages. They were specifically pleaded and strictly proved.
18. In the result, this appeal succeeds in part. The judgment and decree dated 20th December 2012 are hereby set aside. Judgment on liability is apportioned *equally*. Judgment is entered for the

respondent against the appellant in the total sum of Kshs. 51,500. As the respondent was 50% liable for the accident, the appellant shall only pay Kshs. 25,750 to the respondent. Interest shall apply from the date of this decree until full payment. Each party shall bear its own costs at the High Court and in the lower court.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET this 3rd day of March 2015.**

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:-

Mr. P. N. Wekesa for the appellant instructed by Kibichiy & Company Advocates.

No appearance for the respondent.

Mr. J. Kemboi, Court clerk.