REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 138 OF 2012

NANDI TEA ESTATES LTD ..... APPELLANT

VS.

GEORGE OCHIENG ODUONG ..... RESPONDENT

(An Appeal from the Judgment and Decree of the Principal Magistrate Honourable G. Adhiambo(SRM), in Kapsabet CMCC No. 9 of 2010, dated and delivered on 6.12.2012).

JUDGMENT

1. The appellant was the defendant in the Principal Magistrate's court at Kapsabet Civil Suit No. 9 of 2010. The respondent who was the plaintiff in the suit had sued the appellant seeking general and special damages for injuries sustained in an accident which occurred on 13th July, 2011 in the course of his employment with the appellant.
2. In the plaint dated 16th December 2011, the respondent pleaded that he had been employed by the appellant as a general worker and on 13th July 2011, he was carrying out his assigned duty of digging a trench with the aim of extracting soil for use in the appellant's Estate when a heap of soil placed besides the trench fell on him as a result of which he sustained injuries. He blamed the accident on the appellant and/or its servants or agents negligence, breach of terms of his contract of employment or statutory duty.

   The particulars of the alleged breach of terms of employment, statutory duties or negligence alleged against the appellant were pleaded in paragraph 6 of the plaint.

3. In its statement of defence dated 2nd February, 2012, the appellant denied the respondent's claim and put him to strict proof thereof. On a without prejudice basis, the appellant alternatively pleaded that if the accident involving the respondent occurred on 13th July, 2011 in the course of his employment which was denied, the same was solely or substantially contributed to by the respondent's negligence. The particulars of the contributory negligence attributed to the respondent were stated in paragraph 5 of the statement of defence. The respondent was accused of inter alia failing to adhere to safety rules; exposing himself to risk and/or danger which he ought to have known; failing to make proper use of protective gear provided; carrying out his duties recklessly and negligently without due regard to his safety.
4. After hearing both parties, the learned trial magistrate in a judgment delivered on 6th December 2012 entered judgment against the appellant at the ratio of 70:30%. The respondent was also awarded general damages in the sum of Kshs. 160,000, special damages of Kshs.1,500 less 30% contribution together with costs and interest.
5. Aggrieved by this decision, the appellant proffered the instant appeal to the High Court on the following grounds:-

i. ***That the learned trial magistrate erred in law and in fact in holding the defendant 70% liable despite overwhelming evidence to the contrary.***
ii. ***That the learned trial magistrate erred in law and in fact in awarding damages whereas the plaintiff did not prove his case on a balance of probability.***
iii. ***That the learned magistrate erred in law and in fact in applying wrong principles while assessing damages.***
iv. ***That the trial magistrate erred in law and in fact in awarding damages which were inordinately excessive in the circumstances.***
v. ***That the trial magistrate erred in law and in fact in shifting the burden of proof to the defendant contrary to law.***

6. The appeal was prosecuted by way of written submissions; those of the appellant were filed on 18th August, 2014 while those of the respodnent were filed on 8th October, 2014.
7. This is a first appeal to the High Court. As such, it is an appeal on both facts and the law. As the first appellate court, this court is tasked with the duty of re-evaluating and considering afresh the evidence tendered before the trial court to make its own independent conclusions. In so doing, I should be careful to remember that unlike the trial court, i did not have the benefit of hearing or seeing the witnesses. See ***Williamson Diamonds ltd V Brown (1970) EA I; Peters V Sunday Post LTD [1958] E.A 424.***
8. I have considered the appeal, the evidence presented before the trial court, the judgment of the learned trial magistrate and the rival submissions filed by learned counsel for each party. Having done so, I find that it is common ground that the respondent was the appellant's employee and that on 13th July 2011, he was injured in the appellant's premises in the course of his employment.

9. I also find that there are only two key issues arising for my determination in this appeal which are whether the learned trial magistrate erred in apportioning liability between the parties in the ratio of 70:30 % with the appellant shouldering the greater percentage of 70% and whether the quantum of damages awarded were excessive or manifestly high as to be unreasonable given the injuries suffered by the respondent.
10. According to the respondent, the appellant was to blame for the accident in which he was injured because he had been employed as a tea plucker but he was assigned the duty of harvesting soil from a trench by his supervisor (DW1), a duty he was not familiar with. He was also not provided with any protective gear like a helmet or gumboots but he was provided with an apron. He also testified that when he was inside the deep trench digging for soil, the soil placed in a heap on the ground besides the trench fell on him occasioning him injuries on the chest, back and neck.
11. From the judgment of the learned trial magistrate, it is clear that the appellant was held liable in negligence to the greater extent of 70% because of exposing the respondent to an unsafe working environment by failing to remove heaps of soil previously dug from the same trench thus exposing him to the risk of injury; failing to provide him with protective gear like helmet, boots or apron and failure of its agent to provide effective supervision. The respondent in his evidence however admitted that he had been provided with an apron.
12. The appellant through the evidence of DW1 admitted that it had not provided the respondent with a helmet or gumboots but in my view, provision of gumboots or a helmet were not necessary for the kind of work the respondent had been assigned to perform that day. Though the respondent claimed in his evidence that he had been employed as a tea plucker but was assigned the unfamiliar task of digging a trench, I find that besides the fact that in his pleadings the respondent had admitted to having been employed as a general worker, the work of digging a trench did not require any special training or expertise and this is work the respondent in his own admission agreed to undertake even with the presence of the heap of soil besides the trench. In as much as the appellant was negligent in not removing heaps of soil previously dug from the trench thus exposing the respondent to the risk of injury, the respondent also had a duty to ensure his own safety and ought to have kept a careful look out for any signs of the ground around him weakening in order to take action that would have prevented or mitigated his injuries. Though I am also in agreement with the learned trial magistrate that the appellant shouldered a slightly higher responsibility than the respondent for the occurrence of the accident in view of the uncollected heap of soil, I find that an apportionment of liability in the ratio of 60:40% with the appellant

bearing 60% liability would have been more reasonable in the circumstances of this case. In apportioning liability at the ratio of 70:30%, the trial magistrate misdirected herself in finding that the work of digging a trench required close supervision and provision of protective gear like gumboots or helmets.

I therefore set aside the trial court's judgment on liability and substitute it with judgment for the respondent against the appellant at the ratio of 60:40%.

13. On quantum of damages, as noted earlier, the respondent was awarded general damages in the sum of Ksh. 160,000/- and special damages of Kshs.1,500/-.

It is trite that the award of general damages is at the discretion of the trial court. That discretion must however be exercised judiciously in accordance with the law. As a general rule, an appellate court will not interfere with quantum of damages unless the award is too high or inordinately low or founded on wrong legal principles – See ***Butt V Khan (1982-88) KAR 1, Arkay Industries Ltd V Amani (1990) KLR 309***; and ***Akamba Public Road Services Ltd V Omambia Court of Appeal, Kisumu Civil Appeal No. 89 of 2010 (2013) eKLR***

14. The medical report produced in evidence by *Dr. ALuda* dated 14th November, 2011 confirmed the injuries sustained by the respondent which were in any event not disputed by the appellant. The injuries were classified as soft tissue injuries which had healed at the time of examination save for occasional pains in the affected areas.

The learned trial magistrate in her judgment indicated that she had considered the authorities cited before her by both parties before arriving at her decision on quantum. The respondent had proposed a sum of Kshs. 350,000/- relying on the authority of ***Catherine Wanjiru Kingori & 3 others V Gibson Theuri Gichohi Nyeri HCC No. 320 of 1998*** while the appellant had proposed a sum of Kshs. 90,000/- relying on two authorities namely ***Veronica Awet Turwell V The Attorney General Nairobi HCC No. 2048 of 1996*** and ***Lucy Nthambi Mumo Munyoki vs Josephat Bett Kimtai Nairobi HCCC No. 2034 of 1993.***

I have noted that the plaintiffs in the authorities relied upon by the appellant in the trial court had sustained largely different injuries from those sustained by the respondent herein and had been decided over 15 years earlier.

15. Given the evidence in this case and the submissions on quantum made before the trial court, I cannot say that an award of Ksh.160,000/- as general damages for pain, suffering and loss of amenities was either too high or inordinately low. I cannot also say that the award was arbitrary or unreasonable. There is also nothing to suggest that in arriving at her decision, the trial magistrate applied the wrong legal principles. The law is that an appellate court cannot substitute its discretion with that of the trial court on assessment of damages.
16. In view of the foregoing, I find that I have no basis to interfere with the quantum of general damages awarded to the respondent by the learned trial magistrate. Special damages in the sum of Kshs.1,500/- were specifically pleaded and proved. The award of Kshs.161,500 special and general damages is therefore upheld. Given the judgment of this court on liability, this amount will be subject to 40% contribution by the respondent.

The amount awarded will attract interest at court rates from today's date until full payment.

17. Since the appeal has partially succeeded, I order that each party will bear his/its own costs of the appeal. The appellant shall however pay the respondents costs in the lower court.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 5th day of November, 2015.

In the presence of:-

Mr. Kagunza for the Appellant

No appearance for the Respondent

Mr. Lesinge Court clerk