REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 33 OF 2011

ELDORET STEEL MILLS LIMITED ..... APPELLANT

VERSUS

GILBERT NYANCHOKA MOGOI ..... RESPONDENT

(Being an appeal from the Judgment of Hon. G. A. Mmasi (Senior Resident Magistrate) delivered on 15th April, 2011 in Eldoret Chief Magistrate's Civil Case

No. 434 of 2009)

JUDGMENT

The Respondent herein was an employee of the Appellant. He was involved in a factory accident on the 2nd of February, 2009 for which he blamed the Appellant for not providing him with a safe working environment.

He was the Plaintiff in the trial court. Judgment was entered in his favour on liability at 90:10%. The Respondent was to shoulder 10% contributory negligence for unspecified reasons. The learned trial Magistrate awarded general damages in the sum of Ksh. 100,000/= and special damages to the tune of Ksh. 2,000/=. Both were deducted by 10% giving the sums of Ksh. 90,000/= and Ksh. 1,800/= respectively. The Respondent was also awarded costs and interests.

The Appellant was dissatisfied with the Judgment. In a Memorandum of Appeal dated 16th February, 2011, it filed the following grounds of appeal:-

1. That the learned trial Magistrate erred in law and fact in using wrong principles in the assessment of damages such that the amount awarded was excessive and does not reflect the extent of injuries sustained.

2. That the learned trial Magistrate erred in law and fact in failing to hold that the Respondent did not require any skill to perform the basic task assigned to him and which required due diligence and care on his part.

3. That the learned trial Magistrate erred in law and fact in failing to hold that the Respondent was wholly or substantially liable for the accident.

4. That the learned trial Magistrate erred in law and fact in deciding a matter which does not fall within her jurisdiction.

5. That the learned trial Magistrate erred in law and fact in failing to hold that she had no jurisdiction to handle the case as jurisdiction is exclusively granted to the Industrial Court under the Provisions of Section 87 of the Employment Act (Act No. 11 of 2007) and Section 12 of the Labour Institutions Act (Act No. 12 of 2007).

6. That the learned trial Magistrate erred in law and fact in holding the Appellant liable to the extent of 90% when the evidence on record shows that the Respondent was the sole and/or substantial cause of his own injuries.

7. That the learned trial Magistrate erred in law and fact in arriving at a decision against the weight of evidence on record without considering the provisions of Order XX Rule 4 of the Civil Procedure Rules.

8. That the learned trial Magistrate erred in law and fact in failing to dismiss the Respondent's claim with costs for want of proof on a balance of probability as required by law.

9. That the learned trial Magistrate erred in law and fact in failing to hold that the Respondent was careless and the cause of the accident.

Based on the above nine grounds of appeal, I would summarize the issues for determination under the following heads:-

1. Liability

2. Award of damages

3. Jurisdiction of the Magistrate's court.

This is the first appellate court whose duty is to re-evaluate the evidence on record and arrive at its own conclusion – See case of **KENYA PORTS AUTHORITY -VS- KUSTON (KENYA) LIMITED (2009) 2 E.A. 212** in which the Court of Appeal stated:-

"On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect."

LIABILITY

Bearing in mind the words of the Court of Appeal, it is important that I briefly summarize the evidence on record. Each of the parties called only one witness. The Plaintiff Gilbert Nyanchoka testified as PW1. He stated that he worked for the Appellant Company and that on the 2nd February, 2009, he was carrying a steel rod from plate to boiler with one Emmanuel. Emmanuel then slipped and fell down and released the rod which hit and burned him. He injured his right foot. He was treated at Uasin Gishu District Hospital. Thereafter a medical report was prepared by Doctor Aluda. He blamed the Appellant Company for not providing him with protective clothings like over coat and gumboots hence making the working environment not conducive.

In cross-examination, PW1 stated that he had no documents to prove that he worked for the Appellant although he was employed in the year 2006. He stated that he was with his supervisor one Wajoku. He was carrying a metal rod weighing 60 Kilograms with Emmanuel. He stated that they were using tongs to carry the rod. When Emmanuel slid and fell, the rod burnt him. He wore no protective clothings. He denied he injured himself deliberately.

The defence witness (DW1) Ratemo Cyrus stated that he had worked for the Appellant company for fifteen (15) years. On 2nd February, 2009 he was stationed in the general section. PW1 was also on duty in the same section and he sustained injuries. He testified that, as the Plaintiff (PW1) and

Emmanuel were carrying a rod, Emmanuel fell down forcing him to release the rod which fell on PW1's right foot. He stated that the Plaintiff was entirely to blame for the injuries.

In cross-examination, DW1 confirmed that PW1 was on duty on the 2nd February, 2009 and that he fell and got injured. He stated that the Plaintiff had been supplied with gloves and overall but not shoes. He also confirmed that he was an employee of the Appellant company.

In re-examination, he stated that PW1 should have jumped away to avoid being burned by the metal rod. He said that workers go to work in their own shoes.

In submissions, counsel for the Appellant submitted that, although the Respondent had not been provided with protective gear, the accident was not caused by lack of gloves or other device. He cited **WILFIELD AND JOLOWICS** on Tort at page 203 which reads that;

"At common law the employer's duty of care follows that the burden of proving negligence rests with the Plaintiff workman throughout the case. It has even been said that if he alleges a failure to provide a reasonably safe system of working the Plaintiff must plead, and therefore prove what the proper system was and in what relevant respects it was not observed."

and Section 107 of the Evidence Act that ***"whoever desires any court to give Judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove those facts exist".***

It was submitted that the Respondent did not prove that a duty of care was owed to him by the Appellant.

It was further submitted that the Appellant had no control over what befell the Respondent as it could not reasonably anticipate the accident. The case of **MUMIAS SUGAR COMPANY LIMITED -VS- SAMSON MUYINDA (KAKAMEGA HCCA. NO. 58 OF 2000** was cited. In the appeal, the court held that:-

"Where an employee is engaged in manual labour that does not require any skill and injured himself then such an employee cannot hold the employer liable under statute or common law and that where the use of a panga or a slasher for cutting cane or grass is within the power and control of an employee, he cannot hold the employer liable in negligence."

The case of **STAT PACK INDUSTRIES LIMITED -VS- JAMES MBITHI MUNYAO NAIROBI HCCA. NO. 152 OF 2003** was also cited by counsel for the Appellant in which it was held that;

"It is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which on a balance of probability a connection between the two may be drawn. Not every injury is necessary as a result of someone's negligence. An injury per se is not sufficient to hold someone liable."

In this respect it was submitted that the Appellant could not constantly watch the Respondent as he did the work and he ought to have been more careful in the way he worked. The Appellant ought not to have been held negligent.

On quantum, it was submitted that the damages awarded were excessive and that an award of Ksh. 15,000/= would have sufficed.

The Respondent's counsel on the other hand submitted that the Respondent did not voluntarily injure himself. The Respondent blamed the Respondent's co-worker Emmanuel for which the Appellant was vicariously liable. It was submitted that the Appellant must shoulder the liability for

failing to provide the Respondent with protective garments.

On quantum, it was submitted that the sum of Ksh. 90,000/= awarded was reasonable given the injuries the Plaintiff sustained.

On jurisdiction the Respondent submitted that the Appellant did not raise the issue in its defence and since parties are bound by their pleadings, that submission cannot bail out the Appellant.

Having considered the evidence, it is not in doubt that the Respondent was an employee of the Appellant and that he got injured in the course of his duty. What did not come out clearly from both sides is in what respect the Respondent worked for the Appellant. That is to say, whether he was a casual labourer or a permanent worker. Be that as it may, it was not disputed that he had worked there since the year 2006. The Appellant did not also dispute that he was injured while in the melting section. According to DW1 the Respondent had hitherto worked in the general section. This meant that he had just been moved to the melting section, which in my view not only required skilled workmanship but also adequate safe and conducive working environment.

Undoubtedly, he was hit by the metal rod after his co-worker, Emmanuel slipped and released it. Of course such an accident was not foreseen. But had the Respondent been wearing protective garments, he probably would not have been injured or the injury would not have been of such magnitude. I concur with the learned Magistrate that it is difficult for a worker to injure himself for purposes of getting compensation. For all intent and purposes, the foregoing leads me to conclude that the Appellant owed the Respondent the duty of care of providing him with a safe working environment which included protective garments such as gumboots and gloves. It failed to fulfill this noble task for which it must be held entirely negligent.

In this respect, I fault the learned trial magistrate for finding the Respondent at 10% to blame. Indeed, she did not give the reasoning behind apportioning the contributory negligence. All she said was that the Respondent would be subjected to "10% contribution". That was erroneous as there was no reason given as to why the Respondent ought to have shouldered any blame.

QUANTUM

On quantum, the medical report of Doctor S. I. Aluda indicated that the Respondent suffered burns on the right leg. The burns were cleaned and dressed and appropriate medication given. At the time of examination which was in the year 2009 the same had healed safe for occasional pains in the burnt region. It is my view that a global award of Ksh. 90,000/= would have sufficed.

JURISDICTION

On the issue of jurisdiction, the Appellant submitted that, under Section 87 of the Employment Act, (Act No. 11 of 2007) and Section 12 of the Labour Institutions Act (Act No. 12 of 2007), the matter ought to have been heard by the Industrial Court.

Section 87 of the Employment Act, Act No. 11 of 2007) reads;

" 87. (1) Subject to the provisions of this Act whenever-

(a) an employer or employee neglects or refuses to fulfill a contract of service; or

(b) any question, difference or dispute arises as to the rights or liabilities of either party; or

(c) touching any misconduct, neglect or ill treatment of either party or any injury to the person or property of either party, under any contract of service,

the aggrieved party may complain to the labour officer or lodge a complaint or suit in the

Industrial Court.

(2) No court other than the Industrial Court shall determine any complaint or suit referred to in subsection (1).

(3) This section shall not apply in a suit where the dispute over a contract of service or any other matter referred to in subsection (1) is similar or secondary to the main issue in dispute. ”

Whereas Section 12 of the Labour Institutions Act (Act No. 12 of 2002) reads;

*“**12. (1) The Industrial Court shall have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim or complaint or infringement of any of the provisions of this Act or any other legislation which extends jurisdiction to the Industrial Court, or in respect of any matter which may arise at common law between an employer and employee in the course of employment, between an employee or employer’s organisation and a trade union or between a trade union, an employer’s organisation, a federation and a member thereof.***

(2) An application, claim or complaint may be lodged with the Industrial Court by or against an employee, an employer, a trade union, an employer’s organisation, a federation, the Commissioner for Labour or the Minister.

(3) The Industrial Court may consolidate claims for the purpose of hearing witnesses as appropriate.

(4) In the discharge of its functions under this Act, the Industrial Court shall have the powers to grant injunctive relief, prohibition, declaratory order, award of damages, specific performance or reinstatement of an employee.

(5) In deciding on a matter, the Industrial Court may make any other order it deems necessary which will promote the purpose and objects of this Act.

(6) Any decision or order by the Industrial Court shall have the same force and effect as a judgment of the High Court and a certificate signed by the Registrar of the Industrial Court shall be conclusive evidence of the existence of such decision or order.

(7) Any matter of law arising from a decision at a sitting of the Industrial Court and any question as to whether a matter for decision is a matter of law or a matter of fact shall be decided by the presiding judge of the Industrial Court provided that on all other issues, the decision of the majority of the members shall be the

decision of the Industrial Court.

(8) The Industrial Court may make an order for payment of costs, according to the requirements of the law and fairness and in so doing, the Industrial Court may take into account the fact that a party acted frivolously, vexatiously or with deliberate delay during

conciliation proceedings and in bringing or defending a proceeding.

(9) The Industrial Court may refuse to determine any dispute before it, other than an appeal or review, if the Industrial Court is not satisfied that an attempt has been made to resolve the dispute through conciliation.

(10) Unless the parties to a dispute agree to a longer period, a dispute shall, on the expiry of thirty days from the date of appointment of a conciliator, be deemed to be unresolved.

(11) A certificate issued by a conciliator stating that a dispute remains unresolved after

conciliation is sufficient proof that an attempt has been made to resolve that dispute through conciliation.

(12) The Industrial Court may review?

(a) the performance or purported performance of any function provided for in any written law or any act or

omission of any person or body in terms of any written law on any grounds that are permissible;

(b) any decision taken or any act performed by the State in its capacity as employer on such grounds as are

permissible in law; or

(c) deal with all matters necessary or incidental to performing its functions in accordance with this Act or any other law. ”

Section 87 provides for the matters for which a complaint may be lodged or suit filed in the Industrial Court. It focuses on matters relating to disputes between employers and employees. The instant case on the other hand relates to a claim of tortious liability which in my view does not exclude the Magistrate's court from hearing it.

Further, the preamble of the Employment Act, No. 11 of 2007 is stated as;

“declare and define the fundamental rights of employees to provide basic conclusions of employment of employees, to regulate employment of children, and to provide for matters connected with the foregoing.”

This preamble certainly excludes the Appellant's contention that the instant claim of damages ought to have been exclusively filed in the labour court.

The preamble of the Labour Institutions Act, No. 12 of 2007 is “***to provide for the functions, powers and duties and provide for other matters connected thereto***”.

Section 12 of that Act on which the Appellant's counsel relied on was repealed by Act No. 20 of 2011. It was however applicable then. It spelt out the jurisdiction of the Industrial Court to entertain the following matters:-

- an application, claim or complaint or infringement of any of the provisions of this Act or any other legislation which extended jurisdiction to the Industrial Court.

- any matter which may arise at common law between an employer and employee in the cause of employment, between an employee and employer's organization and a trade union or a trade union or between a trade union, an employer's organization, a federation or a member thereof.

This section again did not exclusively place matters relating to tortious liability in negligence or otherwise under the Industrial Court. Those are matters that are not labour related per se as in the present case.

Furthermore, the Appellant having submitted itself to the jurisdiction of the Magistrate's Court is now estopped to plead that that court had no jurisdiction to entertain the claim. In all, I hold that the court had jurisdiction to hear and determine the claim.

In the end, I find no merit in this appeal. It partly succeeds though only to the extent of the

quantum of damages awarded. Accordingly, I give the following orders:-

1. I set aside the Judgment on liability against the Respondent at the 10% contributory negligence. I substitute it with an order that the Appellant shall shoulder liability at 100%.

2. Damages payable to the Respondent shall be as follows:-

(a) General damages - Ksh. 90,000/=

(b) Special damages - Ksh. 2,000/=

T O T A L - Ksh. 92,000/=

3. Costs of the lower court suit and three quarters of the costs of this appeal shall be borne by the Appellant.

It is so ordered.

DATED and **DELIVERED** at **ELDORET** this 7th day of October, 2014.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

Nyairo & Co. Advocates (absent) for the Appellant

Mr. Marube holding brief for Nyambegera for the Respondent