REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL 133 OF 2010

WARENG NDOVU ENTERPRISES (2005) LTD.....APPELLANT

AND

KELVIN KISANJI.....RESPONDENT

[Being an appeal from the Judgment of Hon. A. Alego, Senior Resident Magistrate dated 28th June, 2010 at Eldoret Chief magistrate\'s Court in CMCC No. 58 of 2010)

JUDGMENT

The appellant, **Wareng Ndovu Enterprises [2005] Ltd,** was sued by the respondent **Kelvin Kisanji** for damages for injuries he sustained on 8th September, 2009 while engaged as a general worker by the appellant. He pleaded that on the said date while undertaking his assigned duties at the appellant\'s premises, he slipped and fell down and was injured by a moving conveyor belt. In the particulars of negligence, he alleged, among other things, that the appellant failed to provide or avail him with gum boots or other protective gear and that it exposed him to risk of harm and injury. He further pleaded that as a result of the appellant\'s negligence, he sustained various injuries including a fracture of the right humerus. The appellant filed a defence in which it, *inter alia*, denied that the respondent was its employee but that if he was and the said accident occurred, then the same was wholly caused or contributed to by the negligence of the respondent particulars where it enumerated.

At the trial, the respondent testified and called one witness, **Dr. Paul Kipkorir Rono**, of Moi Teaching and Referral Hospital where he was admitted. His case was that on the material date at around mid-day, while on duty, cement had spilled onto the floor and as he tried to collect it together, he slipped and fell on a conveyor belt and got seriously injured. He lost consciousness and was hurt on his right hand, chest, right ear and also lost a tooth. He was taken to Moi Teaching and Referral Hospital where he was admitted for slightly over a week. Later, he was examined by **Dr. Aluda** who prepared a medical report of his injuries. He blamed the appellant for the accident because if it had furnished him with gumboots, he would not have been injured. He further stated that if the conveyor machine had been protected, he would not have been injured. He identified **Naran** as his immediate boss then who assisted him when he was injured.

The appellant\'s case at the trial was presented by **Protus Baraza** who was also engaged by the appellant as a casual worker. He testified that on the material date, he heard a loud noise and when he went to investigate, he found the respondent\'s hand in the conveyor belt. The hand was then removed and the respondent fainted before he was taken to hospital. The appellant\'s witness did not blame the respondent for the accident. He confirmed in cross-examination that if the respondent had had protective gear, he would not have been injured.

In the judgment delivered after the trial, the learned Senior Resident Magistrate, after analyzing the

evidence adduced before her, concluded that the appellant was 100% liable and awarded the respondent Kshs 650,000/=.

That decision has triggered this appeal. The appellant has put forward five (5) grounds of appeal which, in the main, challenge the trial court\'s findings on liability and the assessment of damages.

When the appeal came up for hearing before me on 13th March, 2012, counsel agreed to file written submissions which were duly in place by 3rd July, 2012.

I have considered the record, the grounds of appeal and the submissions of counsel. Having done so, I take the following view of the matter. This is a first appeal. The court should therefore subject the evidence which was adduced before the trial court to a fresh scrutiny and arrive at its own conclusion bearing in mind that it did not see or hear the witnesses testify. The court should also be slow to disturb findings of fact of the trial court. (See **Peter -vrs-Sunday Post Limited {1958] E.A. 424**). The court is therefore duty bound to examine with care whether the findings of fact were not based on evidence adduced before the trail court or whether there was a misapprehension of the evidence or that the trial court acted on wrong principles in arriving at those findings of fact.

I ask myself whether on the evidence adduced before the learned Senior Resident Magistrate, the respondent proved on a balance of probability that the appellant was negligent. As already observed above, the respondent pleaded, *inter alia*, that the appellant failed to provide him with gum boots or other protective gear and further exposed him to a risk of harm or injury. At the trial, he stated that had he been furnished with gum boots, the accident would not have occurred. He further testified that if the conveyor machine had been secured by protective material, he would not have been injured. The respondent received support from the appellant\'s witness, **Protus Baraza,** D.W.1 . In his own words:

“ I can\'t blame him for the accident. If he had protective gears, he would not have had the injury.”

Given the testimony of both the respondent and the appellant\'s witness, I have no difficulty in finding that the respondent adduced evidence which proved on a balance of probability that the appellant was negligent. Was the appellant 100% per cent liable? In my judgment, I have come to the conclusion that the respondent contributed to the negligence. He admitted in cross-examination that he was at the time of the accident working in sleepers and although he knew he required protective gear, he did not ask for the same for fear of being sacked. He did not demonstrate satisfactorily that the consequence of asking for protective gear was dismissal. The respondent did not explain why he did not have ordinary shoes at the time of the accident. In those premises, in my view, the learned Senior Resident Magistrate should have found the respondent to blame to some degree. In my judgment, the respondent was twenty percent (20%) negligent. With all due respect to counsel for the appellant, the cases he cited in support of his argument that the appellant was not liable at all are clearly distinguishable. In **Mwanyule =vrs= Said t/a Jomvu Total Service Station [2004], 1 KLR 47**, the appellant, a pump attendant, had sought damages from the respondent for injuries sustained when he was attacked by thugs at night. The court held that his trade as a pump attendant did not in itself involve confronting thieves and his employer had

The appellant further relied upon the case of **Spin Knit Ltd =vrs= Alloys Adwera [2006] e KLR**. In that case, the court found that the evidence on liability was scanty which is not the position herein where the appellant\'s witness supported the respondent on the crucial issue of negligence.

On quantum, this court can only interfere on known principles. In **Kemfro Africa Limited t/a Meru Express Service, Gathongo Kanini =vrs= A.M. Lubia & Another [1982 -1988] 1 KAR 727 Kneller J.A**. Said, at page 730, as follows:

“ The principles to be served by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of

the damages. (See Ilango -vrs- Manyoka [1961] E.A. 705, 709, 713; Lukenya Ranching And Farming Co-operative Society Ltd -vrs- Kavoloto [1970] E.A. 414, 418, 419. This court follows the same principles").

Counsel for the appellant has submitted that the award made by the learned Senior Resident magistrate is so inordinately high as to amount to an erroneous estimate of the damages suffered by the respondent. I have considered the award made by the learned Senior Resident Magistrate and observe that the learned Magistrate cited no authority as a guide in her assessment of general damages. In her own words:

" As for quantum this court finds that an award of Kshs 650,000/= as general damages would be convenient in view of the current country inflation and injuries thereto"

The figure awarded by the learned Senior Resident Magistrate, appears to have no sound basis. She therefore failed to take into account relevant factors such as comparable awards for comparable injuries. I am therefore entitled to interfere. In **Luke Osoro and Another =vrs= Daniel K. Cheruiyot [Eldoret HCCA No 113 of 2006] (UR), Ibrahim J.,** as he then was, confirmed an award of Kshs 250,000/= to a plaintiff who had suffered a mid shaft fracture of the right humerous among other injuries. In **Bonface Waiti & Another =vrs= Michael Kariuki Kamau [Nairobi HCCA No. 705 of 2003] (UR), Nambuye J**. as she then was, awarded Kshs 295,000/= to a plaintiff who had sustained a fracture which had healed with an angulated deformity. In **Gideon Chibira Mmbono =vrs= Roseline Chebet Wilson, [Nakuru HCCA No. 43 of 2008] (UR) Maraga J**. as he then was confirmed an award of Kshs 210,000/= for a plaintiff who had sustained a fracture of the right humerous.

In **Joel Juma Mulatya =vrs=Kenya Railways Corporation [Mombsa HCCC No. 113 of 1999] (UR), Khaminwa J**. awarded Kshs 400,000/= to a plaintiff who had sustained a comminuted fracture of the humerous and a head injury.

The respondent herein suffered soft tissue injuries of the right arm, a fracture of the right humerous, laceration on the anterior aspect of the right shoulder, a small cut on the right ear and soft tissue injury of the cervical spine. **Dr. Baya** assessed the degree of permanent disability at four (4) per cent whilst **Dr. Aluda** opined that although the respondent had sustained very severe injuries, the same had healed save for occasional pain which would subside with the use of analgesics. He further observed that the scars would remain a permanent feature on the body of the respondent.

In view of the above injuries which healed with only a 4% permanent disability, I am of the view that the award of Kshs 650,000/= is inordinately high as to amount to an erroneous estimate of the damages suffered by the respondent. Considering comparable awards and comparable injuries previously considered in the cases cited above, I have come to the conclusion that Kshs 350,000/= would adequately compensate the respondent

In view of the foregoing, I allow this appeal and set aside the findings on liability against the appellant at 100% per cent and the award of Kshs 650,000/=. I award the respondent Kshs 350,000/= as general damages for pain suffering and loss of amenities which figure is subject to the said apportionment of liability. The net sum awarded is accordingly Kshs 280,000/=.

The special damages are also subject to the same apportionment. Given the previous relationship between the appellant and the respondent, I order that each party bears his/its own costs of this appeal.

The other orders of the Lower Court remain undisturbed.

Orders accordingly.

DATED AND DELIVERED AT ELDROET THIS 5TH DAY OF SEPTEMBER, 2012.

F. AZANGALALA

JUDGE

Read in the presence of:-

Mr. Kamau for the appellant and **Mr. Chanzu** for the respondent.

F. AZANGALALA

JUDGE

5/09/2012.