REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 56 'B' OF 2009

ELDORET STEEL MILLS LTD. …… APPELLANT

VERSUS

GEORGE OCHIENG OWINO …… RESPONDENT

(Being Appeal against Judgment from Eldoret Chief Magistrate's Court delivered on 30th day of April, 2009

by Hon. G.A. M'masi – Senior Resident Magistrate)

J U D G M E N T

This appeal is against the judgment of the Senior Resident Magistrate at Eldoret delivered on 30th April, 2009 in Eldoret **SPMCC. No 983 of 2003** and is based on four grounds viz;-

(1) That, the learned trial Magistrate erred in law and fact in awarding damages whereas the plaintiff did not prove his case on a balance of probabilities.

(2) That, the learned trial Magistrate erred in law and fact in applying wrong principles while assessing damages.

(3) That, the learned trial Magistrate erred in law and in fact in awarding damages which were in ordinately excessive in the circumstance.

(4) That the learned trial Magistrate erred in law and in fact, in shifting the burden of proof to the defendant contrary to law.

The case arose from injuries sustained by the plaintiff (herein respondent) **George Ochieng Owino** while in the course of his employment with the defendant (herein appellant) **Eldoret Steel Mills.**

In the plaint dated 14th July 2003, the plaintiff averred that at the material time he was an employee of the defendant at its steel compressing section and on the 13th October, 1997 while diligently and lawfully engaging in his duties of feeding hot metal into a compressor machine he sustained burns from hot metal inserted from the opposite direction by a fellow employee hitting him on the neck thereby causing great pain and serious injuries.

It was also averred by the plaintiff that it was a term of the employment contract, express and/or implied and/or statutory duty on the part of the defendant to ensure safety for the plaintiff while embarking on his duties and not to expose him to risk of danger, injury or damage which the defendant knew or ought to have known, to provide relevant safety gear, provide and maintain proper tools and appliances, keep and maintain qualified staff, provide and maintain a safe working environment and take all reasonable measures to ensure that the working system in place was proper and safe for the plaintiff but this, the defendant breached.

The plaintiff contended that the defendant was negligent and/or in breach of statutory duty such that he sustained serious body injuries, loss and damage. The plaintiff therefore prayed for judgment against the defendant for general and special damages as well as costs of the suit and interest.

In its statement of defence, the defendant denied all the allegations made by the plaintiff and contended that, if the plaintiff suffered injuries as alleged then the same was occasioned solely and/or substantially by his own negligence. In the alternative, the defendant averred that in accepting employment, the plaintiff freely accepted to run the risks of all purely accidental harm foreseeable, connected with and incidental to such employment. To that extent, the defendant invoked the doctrine of **"Volenti not fit injuria"** and prayed for the dismissal of the plaintiff's case with costs.

After considering all the evidence adduced and tendered in support of the respective cases, the learned trial magistrate found in favour of the plaintiff and entered judgment against the defendants for Kshs.1,500/-, special damages and Kshs.200,000/- general damages as well as costs of the suit and interest.

Being dissatisfied with the said judgment, the defendant preferred this appeal on the grounds stated hereinabove. In arguing the grounds on behalf of the appellant, learned counsel, **Mr. Okoth,** submitted that the respondent did not state how the appellant was responsible for the accident or what was done by the appellant to avoid the accident. He (the respondent) was the one who contributed to the accident. Learned counsel went on to state that there was no corroboration of the respondent's evidence, therefore, the veracity of what he stated could not be ascertained. The 100% liability against the appellant was not explained by the learned trial Magistrate.

As to the respondent's injuries, Mr. Okoth, submitted that these was soft tissue injuries which healed and if the learned trial magistrate had considered the authorities cited by the appellant, then she would have arrived at a different conclusion. An award of Kshs.200,000/- for soft tissue injuries was thus not justified.

It was contended by the appellant that the learned trial magistrate shifted the burden of proof to the appellant and that there was no proof that the appellant contributed to the accident.

In response, the respondent through learned counsel, **Mr. Barasa**, submitted that there was evidence from a doctor (PW2) to show that the respondent suffered injuries. Therefore, the appellant was held 100% liable as it did not call any witness to give an explanation of how the accident occurred and controvert the respondent's evidence to that effect. Mr. Barasa, contended that the authorities cited by the respondent were proper and showed that injuries sustained were similar to those of the respondent. The award of Kshs.200,000/-, was therefore reasonable as the respondent suffered severe burns and it took time for his skin to return to normal. The judgment made in favour of the respondent was not an error.

Regard being given to the foregoing submissions, the role of this court is specific i.e. to re-consider the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

Briefly, in his testimony, the respondent **(PW1)** stated that he was on duty at the appellant's premises on the material date. He was at a steel mill machine inserting hot steel into the machine which was in full roll when steel inserted on the other side of the machine by a co-worker landed on him and caused burns on the left side of his neck in the presence of the appellant's engineer Jack Odhiambo and the supervisor Joseph Ogutu. He (respondent) was taken to a clinic by the supervisor and thereafter to the Moi Teaching and Referral Hospital where he underwent further medical treatment. He was later examined by Dr. Aluda (PW2) who prepared a medical report. He was also examined by Dr. Gaya who prepared a second medical report.

Dr. Samuel Aluda (PW2) examined the respondent on 7th May 2002 and confirmed that the injuries suffered were soft tissue injuries which left skin pigmentation. The report by Dr. Gaya dated 8th June, 2004 was produced by consent of both the respondent and appellant. Other than Dr. Gaya's report, the appellant did not lead any evidence at the trial.

From the evidence availed at the trial, it was apparent that the respondent's employment with the appellant company and the occurrence of the accident leading to the injuries suffered by the respondents were factors which were not at all and/or substantially disputed. The respondent established that he was injured by hot steel which emanated from a different direction from where it was inserted into the machine by a fellow worker. The respondent indicated that the machine was faulty. He said that the machine had a mistake and this was not disputed by the appellant. He also indicated that the hot steel landed on and burnt the left side of his neck. This strongly implied that he had not been provided with protective gear and was thus exposed to the risk of injury.

It was thus established on a balance of probability that the respondent's injuries were as a result of the appellant's negligence and breach of statutory duty in failing to provide a safe system of work and to provide protective gear to the respondent. Since there was nothing to show that the respondent may have contributed to the accident in any manner the learned trial magistrate cannot be faulted for finding that the appellant was 100% liable for the accident and its consequences.

In that regard, grounds one and four of the grounds of appeal are unsustainable. Grounds two and three relate to the quantum of damages awarded to the respondent by the learned trial magistrate. It is the appellant's contention that the award was inordinately excessive and was based on wrong principles.

As per the medical report by Dr. Aluda dated 7th May, 2003, the respondent suffered second and fourth degree burns on the left side of the neck. The report by Dr. Gaya dated 8th June 204 confirmed the injury but did not indicate its degree. Both doctors confirmed that the injury healed but left skin pigmentation on the relevant neck region. The learned trial magistrate based her assessment of general damages on the decision in the case of **George Thambura v.s. Taam Construction High Court Civil Case No. 228 of 1996 at Nakuru.** In that case, the plaintiff was awarded Kshs.600,000/- general damages for burns to the chest, face and both hands caused by hot water from a vehicle's radiator.

The learned trial magistrate quite correctly, noted that the injuries, in that case were of a severe nature and extensive as compared to this case. She considered that decision along with the decisions cited by the appellant and arrived at the figure of Kshs.200,000/- general damages. It is worth noting that these decisions relied upon by the appellant were made years ago when the standards of living were much lower.

All considered, this court does not think that the learned trial magistrate erred in her assessment of general damages, neither did she apply wrong principles in the assessment. Grounds two and three of the appeal are also unsustainable.

All in all. The appeal lacks merit. It must and is hereby dismissed with costs.

Ordered accordingly.

J.R. KARANJA

JUDGE

(Delivered and signed this 3rd day of March 2011 in the presence of Mr. Okoth for appellant and Mr. Wabuyumbe for Mr. Buluma for respondent)