IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, VISRAM & SICHALE, JJ.A)

CIVIL APPEAL NO. 24 OF 2008

BETWEEN

EAST AFRICAN PORTLAND CEMENT COMPANY LTD. ……….. APPELLANT

AND

TILIKIA KELOI ………………………………………………... RESPONDENT

(Being an Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Aluoch, J) delivered on 26th October, 2000

in

CIVIL CASE NO. 4650 OF 1987*)*

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JUDGMENT OF THE COURT

This is an appeal arising from the judgment of Aluoch, J (as she then was) delivered on 26th October, 2000.

A brief background to this appeal is that **EAST AFRICAN PORTLAND CEMENT COMPANY** (hereinafter the appellant) was sued by **TILIKIA KELOI** (hereinafter the respondent) arising out of injuries sustained by the respondent whilst working as a conveyor attendant. It was the respondent's case that the appellant failed

> ***"… to take all reasonable precautions for …"*** his safety as a result of which the ***"… crane suddenly snapped and ran wild in consequence whereof …"*** the respondent was hit by the crane and he sustained injuries. The respondent sought general as well as special damages.

The appellant filed a defence dated 31st December, 1987 and denied liability and blamed the respondent solely for causing the accident or alternatively the same was substantially contributed by the negligence of the respondent.

The trial proceeded before Aluoch, J who entered judgment for the respondent in the sum of Kshs. 350,000.00 as general damages and Kshs. 3,431.00 as special damages, costs and interest. She further directed ***"… that interest for special damages be calculated from the date suit was file (sic) i.e. 23rd***

November, 1987 till date of judgment, which is today 26th October, 2000 whilst interest on general damages of Kshs. 350,000.00 be calculated at court rates from the date of judgment (26th October, 2000) till payment in full.”

The appellant was dissatisfied with the said outcome, hence this appeal. In the memorandum of appeal dated 29th February, 2008 the appellant faulted the learned judge on the basis that she erred in;

i. finding that the appellant was solely liable for the accident.

ii. failing to find that the respondent was contributorily negligent.

iii. that the assessment of general was manifestly excessive.

iv. that she awarded special damages which were not specifically proven.

v. she erred in allowing the production of documents without calling the makers.

During the plenary hearing before us on 21st April, 2016, Mr. Kisinga learned counsel for the appellant urged us to find that there was contributory negligence as the respondent failed to confine himself to the sentry box but instead was looking outside the sentry box thus exposing himself to danger, operating the crane which he knew had a mechanical fault. He relied on the authority of **Olive Muthoni Karuri v Njoro Cnning Factory (K) Ltd. [2011] eKLR** for the proposition that liability attaches to one who contributes to the causation of the accident. It was counsel’s further submission that the respondent had a corresponding duty to take reasonable precaution to ensure safety at his workplace. For this proposition he relied on this court’s decision of **Purity Wambui Muriithi vs Highlands Mineral Water Co. Ltd. [2015] eKLR.**

It was counsel’s submission that the respondent was 50% liable. On the quantum of damages awarded, it was counsel’s contention that the same was excessive and did not tally with awards in the year 2000. The appellant had made a suggestion of Kshs. 220,000.00 which was rejected by the trial judge. Counsel further submitted that the special damages awarded were not specifically proved.

In his rejoinder, Mr. Mwai, learned counsel for the respondent, opposed the appeal. It was his view that looking out of the sentry box was not negligence. Further, that the appellant should have fixed the mechanical problem so as not to expose the respondent to danger and lastly that the quantum of damages was not excessive.

We have considered the record, the submissions of counsel before us, the authorities cited and the law. This is but a first appeal. The position of the law as regards a first appeal is that as the first appellate court, this Court has a duty to re-consider the evidence, evaluate it and draw its own conclusion while appreciating that it did not have the advantage, like the trial court had, of seeing and hearing he witnesses. This Court in **Sumaria & Another v Allied Industries Ltd, (2007) KLR 1** expressed itself as herein under:

> ***“Being a first appeal the court was obliged to consider the evidence, re-evaluate it and make its own conclusion bearing in mind that a court of appeal would not normally interfere with a finding of fact by the trial court unless if it was based on misapprehension of the evidence or that the judge was shown demonstrably to have acted on a wrong principle in reaching the finding he did.”***

It is not denied that the appellant knew that the machine he was operating was faulty. This knowledge notwithstanding, he operated the machine. There was no evidence that he was forced to operate the machine.

In the case of **Purity Wambui Muriithi v Highlands Mineral Water Co. Ltd [2015] eKLR** this Court

citing the provisions of Section 6(1) of the Occupational Safety & Accident Act which provides that:

> ***"Every occupier (employer) shall ensure the safety, health and welfare at work of all persons working in his workplace."***

rendered itself thus:

> ***"It, therefore, follows that as general rule the employer is liable for the injury or loss that occurs to his employees while at the workplace as a result of the employer's failure to ensure that safety. Does this mean that the employer would always be liable in circumstances regardless of what caused the accident in question? We do not think so. We say so because where an accident happens due to the employee's own negligence it would be unfair to hold the employer liable. Further Section 13(1)(a) of the Occupational Safety and Health Act provides:***
>
> > ***"13(1) Every employee shall, while at work place –***
>
> a. ***ensure his own safety and health and that of other persons who may be affected by his acts or omissions at workplace. Therefore, the employee is also required to take reasonable precaution to ensure his/her safety at the workplace while performing his/her duties."***

By parity of reasoning, we find that the respondent was under a corresponding duty to ensure his safety. He knew that the machine was faulty and there was no evidence that he was forced to operate the machine. We therefore find that he contributed to the causation of the accident and apportion his liability at 10%.

However, as regards the general damages, the learned judge awarded a sum of Kshs. 350,000.00. The appellant submits that the same should have been Kshs. 220,000.00.

Firstly, it is important to restate that this Court will not be inclined to disturb the findings of a trial judge on the quantum of damages merely because we think that if we had tried the case, we would have given a larger sum. In order to justify a reversal of the findings of the trial judge on the quantum of damages awarded, we should be convinced that the judge acted upon some wrong principle of law, or that the amount awarded was so low or extremely high to make it an entirely erroneous estimate (See **Rook v Rairrie [1941]1ALL E.R 297.** This principle was echoed with approval by this Court in **Butt v Khan [1981] KLR 349** wherein it held as per Law, J.A. that:

> ***"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."***

In **Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v. A.m. Lubia and Olive Lubia** (1982 –88) 1 KAR 727 at p. 730 Kneller J.A. said:-

> ***"The principles to be observed 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 damage. See Ilango v Manyoka [1961] E.A. 705, 709, 713; Lukenya Ranching And Farming Co-operatives Society Ltd v Kavoloto [1970] E.A., 414, 418, 419. This Court follows the same principles."***

And in **Gicheru V Morton and Another (2005) 2 KLR 333** this Court stated:

> ***"In order to justify reversing the trial judge on the question of the amount of damages it was***

generally necessary that the Court of Appeal should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the Appellant was entitled."

In our considered view, the award of Kshs. 350,000.00 was not excessively high and we do not deem it fit to interfere with the sum awarded as general damages.

As regards the special damages of Kshs. 3,431.00 the learned trial judge rendered herself as follows:

"The special damages pleaded by the plaintiff are in my view most reasonable. In any event, they were not challenged by the defendant who called no oral evidence. I will therefore grant the plaintiff special damages amounting to a total Kshs. 3,431.00."

With all due respect to the learned judge, the onus of proof lay on the respondent to prove his claim on the balance of probability. It mattered not that the appellant did not adduce evidence to controvert the claim for special damages. The special damages had to be specifically proven. The respondent tendered no proof of the special damages. It is therefore our conclusion that the learned judge erred in awarding the sum of Kshs. 3,431.00 as special damages.

The upshot of the above is that we find that the appeal succeeds partially and the respondent is liable to the tune of 10% on the causation of the accident; the award of general damages of Kshs. 350,000.00 shall thus be reduced by 10% to Kshs. 315,000.00; interest on the above sum shall be paid from the date of the judgment of the High Court i.e. 26th October, 2000.

The ward of Kshs. 3,431.00 as special damages is set aside. The appeal is allowed to that extent.

As this appeal had partially succeeded, each party shall bear its/his own costs.

Dated and delivered at Nairobi this 15th day of July, 2016.

E. M. GITHINJI

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JUDGE OF APPEAL

ALNASHIR VISRAM

…………………

JUDGE OF APPEAL

F. SICHALE

……………….

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR