IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 47 OF 2008

NAKURU INDUSTRIES LIMITED.....APPELLANT

VERSUS

PAUL OBADHA ODHIAMBO.....RESPONDENT

[Being an Appeal from the Judgment of Hon. M. Wambani, Snr. Resident Magistrate delivered on 14th March, 2008 in Nakuru CMCC. No.67 of 2006]

JUDGMENT

This appeal arises from the decision delivered on the 14th day of March, 2008 by Hon.M.Wambani SRM in Nakuru CMCC No.67 of 2006 awarding the Respondent damages in the total sum of Kshs.85,000/=.

The Appellant being dissatisfied with the Honourable trial magistrate's decision filed its Memorandum of Appeal on the 11th April, 2008 and listed eight (8) grounds of the appeal as listed hereunder;

ISSUES FOR DETERMINATION:

Upon reading the submissions of both Counsel for the Appellant and Respondent this court finds the following issues for determination;

i. The validity of the Verifying Affidavit;
ii. The date when the accident occurred;
iii. Liability of the appellant
iv. Limitation
v. damages

ANALYSIS:

It is the duty of this appellate court, this being the first appeal, to re-evaluate the evidence on record and arrive at its own independent conclusion keeping in mind that this court did not have an opportunity to neither see or hear the witnesses. Refer to the case of **Arrow Car Ltd** V. **Bimomo and 2 Others,** C.A. 344 of 2001.

One of the grounds of appeal relates to the Verifying Affidavit that had an amendment to it. The appellant filed an application in the trial Court to have the plaint struck out due to the anomaly. Having perused the application and the ruling of the trial magistrate and I am inclined to concur with the ruling, that the amendment to the affidavit was indeed a technical issue and did not go to the substance of the suit and therefore does not warrant the plaint being struck out. Further I find that the appellant ought to have filed

an appeal on the ruling of the learned magistrate's at that point in time.

The next issue relates to the date the accident happened. The plaint states that it occurred on 8th April, 2001 a fact the respondent confirmed at the trial. However DW1 testified that the accident did not occur on the said date and records were produced to this effect. However the said records indicate that an accident did occur on 26th April, 2001. The dispensary records (refer to defence exhibit 'DExb.4') confirm that the accident involved the plaintiff and it shows the injuries suffered as a result thereof. The injuries described therein are similar to the ones suffered by the respondent as particularized in his plaint.

The respondent at the trial was asked about the whereabouts of the treatment card he obtained when he was taken to the hospital. This document would have been able to verify the correct date of the accident. The respondent however testified that the said card was in the possession of the appellant. I do not find this hard to believe as it apparent that the appellant's officer was the one who took the respondent to hospital and the appellant paid the expenses. There is reference to this in the dispensary records.

The varying dates notwithstanding, the respondent was injured while working at the appellant's factory. I find that this fact has been proved to the requisite threshold being on a balance of probabilities.

With regards as to who is to blame for the accident, **DW1** testified that there are sticks for removal of dirt from the machine. However the respondent testified to the effect that the practice adopted was to use hands to do so which is what he did when the machine turned back on and injured him. If there was proper supervision, the supervisor or headman would have prevented the respondent from using his hands to take out the dirt. The respondent however is also culpable as he opted to put his hands into a machine instead of finding a safer way to remove the dirt.

I find that the appellant did not provide a safe system of work and there was lack of supervision. I concur with the trial magistrate's assessment on liability and therefore uphold the same.

In the appellant's submissions, it has been submitted that the claim on negligence had expired as at the date when the suit was filed by the respondent. The accident happened in 2001 and the suit was filed in 2006. I will disallow this ground of appeal as it was trite law at that time (before the advent and enactment of the Employment Act, 2007) that negligence on a contract had a time span of six (6) years. Reference is made to the Court of Appeal decision **Kenya Cargo Handling Services Ltd** V. **David Ugwwang,** C.A. No.64 of 1984 where the court held that the period of limitation for actions for damages for personal injuries founded on contract is different from that founded on tort. A distinction was made with respect to whether the duty allegedly breached existed by virtue of a contract or whether the general duty of care owed by persons generally to others. The latter gives rise to a cause of action in tort whereas the former the duty breached existed by virtue of a contract and limitation for actions founded under contract is six (6) years.

I reiterate this position has since changed with the advent of the Employment Act, 2007 and it is trite law that legislation does not apply retrospectively and the Respondent filed his claim in 2006 before the statute became operational.

The other ground of appeal is relates to quantum. The trial court found that the respondent had proved his injures and awarded him the sum of Kshs.120,000/= as general damages.

The appellant has submitted that the injuries were not proved and further that the award given was excessive.

At the trial, the respondent produced a medical report highlighting his injuries. These injuries are similar to those listed in defence exhibit **"DW4"** – the dispensary records.

The injuries have therefore been proved, again on a balance of probabilities.

For this court to interfere with quantum of damages awarded by the trial magistrate's court, it has to observe the well settled principles set out in various decisions. Refer to the case of **Josephine Angwenyi V. Samuel Ochillo Civil Appeal No. 125 of 2008 wherein** Makhandia , J considered the said principle and stated:

> ***"…….....an appellate court in deciding whether it is justified in disturbing the quantum awarded by the trial court, it must be satisfied that either the trial court in assessing the damages took into account an irrelevant factor, or left out of account a relevant factor 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 ……..."***

It is noteworthy to state at this point that the appellant's counsel did not make any submissions on the award that should have been given by the trial court. The respondent on the other hand has submitted that the award given by the trial court was in tandem with the injuries suffered by the respondent.

Bearing the above principles in mind, I have considered the comparable authorities that were considered by the trial court and in view of the injuries sustained by the respondent I find that the award of the trial Court was indeed excessive and that there is need to interfere with the award. I therefore substitute the same for an award of Kshs.90,000/=. I rely on the case of **Timsales Limited** V. **Penina Achieng Omondi** [2011] eKLR wherein the respondent suffered a cut to her finger after an accident. The Court made this award of Kshs.60,000/= in the year 2011.

When arriving at the award in the sum of Kshs.90,000/= I have taken inflationary trends into consideration together with the fact that the respondent suffered cuts to more than one finger.

FINDINGS

This court makes the following findings:

i. This court is satisfied and finds that the amendment to the verifying Affidavit did not affect its validity.
ii. The date on which the accident occurred as found to have been proven, by way of documentary evidence
iii. The court finds no reason to interefere with the trial magistrate's assessment of liability and upholds the same.
iv. This court finds that the Respondent filed his claim before the advent of the Employment Act 2007 and that the period for limitation for action for damages was founded on contract.
v. The award granted by the trial magistrate is found to be excessive and there is therefore need to interfere with the award.

DETERMINATION:

The appeal is partially successful.

The judgment of the lower court on the issue of quantum is hereby set aside and substituted with general damages in the sum of Kshs.90,000/=

Special damages of Kshs.2,000/= (undisturbed).

Less Contributory negligence of 30% (undisturbed).

In total this works out to Kshs.64,400/=

The Respondent shall be entitled to pro-rated costs in the lower court and each party shall bear its/his own costs on this appeal.

Orders accordingly.

Dated, Signed and Delivered at Nakuru this 22nd day of May, 2015.

A. MSHILA

JUDGE