IN THE COURT OF APPEAL

AT KISUMU

CORAM: ONYANGO OTIENO, MWERA & J. MOHAMMED, JJ.A.

CIVIL APPEAL NO. 309 0F 2006

BETWEEN

STEPHEN OBURE ONKANGA ………………………................... APPELLANT

AND

NJUCA CONSOLIDATED LIMITED …...................................... RESPONDENT

(An appeal from the judgment & decree of the High Court of Kenya at Kisii (Bauni, J) dated 5th October, 2006

in

KISII HCCA NO. 240 OF 2004)

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JUDGMENT OF THE COURT

The appeal before us is a second appeal against the judgment of the High Court at Kisii (the late Kaburu Bauni, J) dated 5th October, 2006.

The background of this matter is that ***STEPHEN OBURE ONKANGA*** [the appellant herein], filed a suit in the Chief Magistrate's court at Kisumu [trial court] against ***NJUCA CONSOLIDATED LIMITED*** [the respondent herein] being Civil Suit No. 452 of 2004, seeking *inter alia* damages for injuries he sustained during the course of his employment with the respondent.

The appellant's case was that he was employed as a labourer by the respondent, a construction firm, at its construction site at the then proposed Itumbe Tea Factory, Gucha District. He testified that on or about 18th December, 2003, while at the said construction site, the handle of a mattock he was using to break and crash rocks and stones suddenly broke, hitting him on his forehead occasioning him severe injuries, loss, pain and damage. As a result, he sustained injuries on his nose, left eye and lost a tooth. He maintained that it was the respondent's duty to take all reasonable precautions to ensure his safety while at work. He contended that the respondent gave him a defective mattock and failed to give him protective gear, such as a helmet. He further maintained that the resultant accident and injury was occasioned by the respondent's negligence.

The respondent filed a statement of defence and closed its case at the trial court without calling any witnesses to give evidence on its behalf. In its statement of defence, the respondent denied that the appellant was its employee or that the alleged accident occurred on its construction site. The respondent also pleaded in the alternative that if the alleged accident did in fact occur, it was as a result of the appellant's negligence.

After hearing the evidence tendered, the trial court [Mr A Ingutya, Senior Resident Magistrate] in its judgment dated 4th August, 2004, stated and held as follows:

> *"I have considered the plaintiff's evidence carefully and make a finding that the defendant failed in its duty to ensure that the plaintiff was not exposed to danger whilst at work. The fact that the mattock broke while the plaintiff was using it leaves me to conclude that the same was defective and posed a danger to the plaintiff right from the moment he began to use it. I, therefore, hold the defendant wholly to blame for the accident for breach of a fundamental obligation as explained above."*

Based on the foregoing findings, the trial court entered judgment in favour of the appellant in the sum of KShs.250,000/- as general damages and KShs.2,000/- as special damages.

The respondent herein, being aggrieved by the said judgment, filed an appeal in the High Court, being **Civil Appeal No. 240 of 2004**. The said High Court [the late Kaburu Bauni, J], in its judgment dated 5th October, 2006, made the following findings:

> *"There was no proof that the appellant was under any duty to provide the respondent with any protective gear or that the working environment was unsafe. The respondent was the one using the hammer which broke and therefore he cannot pass the blame to the appellant. As to the damages the award of shs.250,000/- general damages was supported by the medical evidence and the court would not have interfered with. The only thing is that the court should have apportioned the liability. Appellant had pleaded that respondent was negligent leading to the accident. The particulars of negligence pleaded were not traversed as provided for in order 6 rule 9 (a) (1) CPR and should therefore have been deemed to have been admitted. Liability should have been apportioned at the ratio of 50:50."*

The learned judge thus dismissed the appeal. He set aside the judgment of the trial court and substituted it with an order of dismissal of the respondent's claim [the appellant herein].

Aggrieved by the said judgment, the appellant filed the instant second appeal. The appeal was heard on 19th February, 2013.

Mr Kennedy Nyamori Nyasimi, learned counsel for the appellant, submitted that the first appellate court erroneously interpreted ***Order 6 Rule 9 (a) (1) of the former Civil Procedure Rules*** to mean that the failure by the appellant herein to file a reply to the respondent's statement of defence meant that he did not traverse the particulars of negligence attributed to him in the defence. He maintained that the proper interpretation was that where a party fails to file a reply to the defence, this is considered to be a joinder of issues. He cited this Court's decision in ***KATIBA WHOLESALER AGENCY (K) LTD V UNITED INSURANCE CO LTD, NAIROBI CIVIL APPEAL NO. 140 OF 2002*** in support of that submission.

Mr Nyasimi further submitted that there was no way that the appellant could have known that the mattock was defective because the handle broke suddenly. He contended that there was no basis for the first appellate court to find that the appellant was liable and contended that nothing warranted the first appellate court to interfere with findings of the trial court. He relied on the cases of ***PETERS V SUNDAY POST LTD, [1958] EA 424, MUMIAS SUGAR CO LTD V FRANCIS WANALO, CIVIL APPEAL 91 OF 2003,*** and ***RICHARD KANYAGO V DAVID MUKII MEREKA, e-KLR, CIVIL APPEAL 206 OF 2002***. He submitted that it is well settled that an appellate court should be slow in reversing the trial court's finding of fact which, in his view, the High Court did not take into account.

He further contended that the respondent did not adduce any evidence against the appellant and the judgment of the superior court dated 5th October, 2006, was ambiguous. He, therefore, urged this Court to allow the appeal herein.

Mrs Asuna, learned counsel for the respondent submitted that the interpretation given by the first appellate court to ***Order 6 Rule 9 (a) (1) of the former Civil Procedure Rules*** was correct. She submitted that the appellant did not adduce any evidence to prove that the respondent was negligent as far as the said accident was concerned. She further submitted that the appellant testified that the respondent routinely and regularly checked its equipment. Mrs Asuna argued that no evidence was adduced indicating at what point the appellant realised that there was a defect, if any, on the mattock. She contended that it was possible that the force with which the appellant used the mattock could have caused the same to break. She pointed out that the appellant did not adduce expert evidence to demonstrate the defect in the mattock. She further contended that the allegation by the appellant that the respondent did not provide him with a helmet was secondary and was not the cause of the accident as it would not have prevented injury to the eye and tooth.

Mrs Asuna relied on the case of ***MT ELGON HARDWARE V UNITED MILLERS LTD, KISUMU CIVIL APPEAL NO 19 OF 1996,*** and submitted that where the plaintiff does not file a reply to defence, he is deemed to have admitted the particulars of negligence against him in the defence.

We have considered the grounds of appeal, the submissions by the learned counsel and the law. The jurisdiction of this Court on a second appeal is restricted to matters of law. The court is bound by the findings of fact made by the two courts below unless there is no basis to justify the said findings.

In this regard, this Court is guided by the case of ***KENYA BREWERIES LTD V GODFREY ODOYO, CIVIL APPEAL NO. 127 OF 2007***, where this court held:

> *"In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This court, on second appeal confines itself to matters of law unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. …"*

One of the points of law before us for determination is an interpretation of ***Order 6 Rule 9 (1) and Rule 10 (1) of the former Civil Procedure Rules*** which provides as follows:

> *"9(1) subject to subrule (4), any allegation of fact made by a party in his pleading shall be deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue under rule 10 operates as a denial of it.*
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> *(2) a traverse may be made either by denial or by a statement of non admission and either expressly or by necessary implication.*
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> *(3) subject to subrule (4), every allegation of fact made in a plaint or counterclaim which the party on whom it is served does not intend to admit shall [sic] specifically traversed by him in his defence or defence to counterclaim; and a general denial of such allegations, or a general statement of non admission of them, shall not be a sufficient traverse of them.*
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> *(4) Any allegation that a party has suffered damage and any allegation as to the amount of damages shall be deemed to have been traversed unless specifically admitted.*
>
> *10(1) If there is no reply to a defence, there is a joinder of issue on that defence."*

This Court is guided by the case of ***KATIBA WHOLESALER AGENCY (K) LTD V UNITED***

INSURANCE CO LTD*, *CIVIL APPEAL NO. 140 OF 2002, where this Court gave the interpretation of ***Order VI rules 9 and 10*** as follows:

> *"The effect of this is that where a defence contains allegations of fact, and a reply is filed, as happened in the present case, it is necessary for the plaintiff to deny in the reply any allegation in the defence which he intends to dispute. If he fails to do so then he is deemed to have admitted the defence allegations. **It is only if the plaintiff does not file any reply that there is joinder of issue on the defence which operates as a denial of all allegations contained in the defence**." [emphasis added]*

This Court is also guided by the judgment of ***DENMUS OIGORO OONGE V NJUCA CONSOLIDATED*, *[2012] E KLR CIVIL APPEAL NO. 310 OF 2006***, where *Maraga, JA* stated *[with Onyango Otieno, JA's concurrence*]:

> *"… The proper construction of Rule 8 (1), in my view, is the one stated in **KATIBA WHOLESALER AGENCY (K) LTD V UNITED INSURANCE CO LTD, CIVIL APPEAL NO. 140 OF 2002** where this court stated that:*
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> > *"… where a defence contains an allegation of fact, and a reply is filed, … it is necessary for the plaintiff to deny in the reply any allegation in the defence which he intends to dispute. If he fails to do so then he is deemed to have admitted the defence allegations.*
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> *It is only if the plaintiff does not file any reply that there is a joinder of issue on the defence which operates as a denial of all allegations contained in the defence."*

Judge Maraga, further stated:

> *"In the light of the provisions of Order 6 Rules 9 (1) and 10 (1) and this authority, the appellant having not filed a reply to defence, there was clearly a joinder of issues with the effect that the appellant denied the negligence alleged against him in the defence just as the respondent denied the negligence alleged against him in the plaint. The High Court therefore erred in deeming the appellant as having admitted the allegations of negligence in the defence against him."*

Clearly, therefore, in the instant appeal, as the appellant did not file a reply to the defence, there was a joinder of issues. The effect of that is that the appellant denied the negligence alleged against it in the defence and the respondent denied the negligence alleged against him in the plaint. The High Court, therefore, erred in holding that as the particulars of negligence pleaded were not traversed they were, therefore, deemed to have been admitted.

It has been alleged that the judgment of the High Court dated 5th October, 2006, was ambiguous. We note that the learned Judge allowed the appeal, dismissed the suit and then proceeded to say what he would have done had he upheld the decision of the magistrate's court. This was very proper in law and in our view, did not render the judgment of the High Court ambiguous.

We note that both the trial court and the High Court found that the appellant was an employee of the respondent and that the accident occurred at the respondent's construction site.

We are guided by the case of ***ONYANGO & ANOTHER V LUWAYI*, *(1986) KLR 513***, where this court held that it would not interfere with the findings of fact of the two courts below unless it was clear that the magistrate and the judge had so misapprehended the evidence that their conclusions were based on incorrect basis. Based on the foregoing, this court should not interfere with the said findings of fact as found by the learned magistrate who heard and saw the parties as they testified before him. We note that the respondent did not challenge the allegation that the appellant was not supplied with protective helmet.

On the issue of quantum, we note that both the trial court and the High Court awarded the appellant damages of KShs.250,000/=. In the case of ***KIMATU MBUVI T/A KIMATU MBUVI & BROS V AUGUSTINE MUNYAO KIOKO*, (2006) e-KLR**, this Court stated:

> *"It is generally accepted by courts that the assessment of damages in personal injury cases is a daunting task as it involves many imponderables and competing interests for which a delicate balance must be found. Ultimately the awards will very much depend on the facts and circumstances of each case. As Lord Morris stated in **H. West & Son Ltd v Shephard, [1946] AC 326 at page 353**:*
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> > *"The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."*

These are well laid down principles that do guide us in considering this instant appeal.

Law, JA in ***BUTT V KHAN*, [1981] KLR 349** stated:

> *"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 a figure which was either inordinately high or low."*

That decision was subsequently followed in ***KITAVI V COASTAL BOTTLERS LTD*, [1985] KLR 470** where Kneller, JA stated at page 477:

> *"The Court of Appeal of Kenya, then should, as its fore-runners did, only disturb an award of damages when the trial judge has taken into account a factor he ought not to have taken into account or failed to take into account something he ought to have taken into account or the award is so high or so low that it amounts to an erroneous estimate. **Chanan Singh v Chanan Singh & Handa, [1955] 22 EACA 125, 129 (CAK); Butt v Khan, CA 40 of 1997**."*

In the instant appeal, we find no reason to disturb the award of damages awarded by the trial court and as apportioned by the High Court.

We further note that the trial court and the High Court disagreed on the issue of liability. The trial court found that the respondent was 100% liable for the accident while the High Court indicated that liability should have been apportioned at the ratio of 50:50.

General apportionment of liability is an exercise of discretion by the judge. This court can only interfere with the apportionment of liability made by the superior court where it is satisfied that the same was based on no evidence or on wrong principle and is, therefore, wrong. See ***KARANJA V MALELE,* (1983) KLR 142**.

In assessment of liability there are two elements to be considered namely, causation and blameworthiness. See ***BAKER V WILLOUGHBY*, (1970) AC 467**.

In the instant case, it is not in dispute that the appellant was injured when the handle of a mattock that had

been provided by the respondent broke. The appellant gave evidence that the respondent failed to provide him with a helmet that would have prevented his injuries. This was not rebutted by the respondent and it stands. He further testified that the respondent regularly checked its equipment. It is, also, probable that the appellant took the mattock in good condition and used it in such a way that he caused the handle to break. In the circumstances, both the appellant and respondent were negligent and liability should be apportioned between them.

This court is guided by the case of ***BERKLEY STEWARD LTD & OTHERS V LEWIS KIMANI WAIYAKI, (1982-88) 1 KAR 1118*** where it held that where there was no concrete evidence to distinguish between the blameworthiness or otherwise of the two drivers both should be held equally to blame.

Accordingly, in the instant appeal, as there was no concrete evidence to distinguish between the blameworthiness or otherwise of the appellant or the respondent, both should be held equally to blame.

In our view, therefore, the apportionment of liability by the High Court at the ratio of 50:50 was correct. In the result, the appeal is allowed to the extent that the judgment of the High Court dismissing the appeal is hereby set aside. In its place the respondent is found to have been 50% liable. It shall pay to the appellant KShs.125,000/= being civil damages together with KShs.2,000/= being special damages. The respondent is to pay half the costs of the appeal and half the costs of the High Court. Judgment accordingly.

Dated and delivered at Kisumu this 12th day of July, 2013.

J. W. ONYANGO OTIENO

JUDGE OF APPEAL

J. W. MWERA

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR