REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT KERICHO

CIVIL APPEAL NO. 9 OF 2018

JAMES FINLALY (K) LTD.....APPELANT

VERSUS

BENARD KIPSANG KOECHI.....RESPONDENT

JUDGMENT

1. The respondent filed a plaint dated 12/6/2003, alleging that on 18.4.2003, while in the course of employment by the appellant, the knife he was using to prune tea slipped and seriously cut his right hand. As a result he suffered pain, loss and damage. He blamed the accident on the breach of statutory duty, negligence and also breach of contract of employment by the employer. He set out the particulars of negligence, breach of statutory duty and contract of employment and then prayed for General damages as well as special damages.

2. The appellant filed defence on 22.7.2003 denying the occurrence of the alleged accident and denying the alleged negligence and breach of statutory duty attributed to it by the respondent. It further blamed the accident on the respondent's sole and / or contributory negligence and breach of duty. It also set outthe Particulars of negligence and or contributory negligence and prayed for the suit to be dismissed with costs.

3. The respondent filed a reply to the defence reiterating that the alleged accident occurred on the stated date but denied that it was caused by his sole or contributory negligence or when he was engaged in a frolic of his own.

4. During the trial the respondent testified as PW 1 and told the court that he worked for the Appellant since 2002and that on 15/4/2003 he was working in the appellant's Chemugundai estate as check Pay roll No. 11. On the said day he was assigned the duty of tea pruning using a pruning knife but about 11.00 a.m. he by the knife slipped accidentally and cut his right hand. He then reported to his supervisor Mr. Juma who referred him to Chemugundai Hospital where he was stitched and given a sick off for 5 days. After the sick off the supervisor assigned him light duties of collecting litter.

5. The respondent blamed the appellant for his injuries because it provided him with a defective knife, which was held together by a rubber band (strap). He contended that he had previously asked the company for a better knife but the accident occurred before the promised knife had been provided. He further blamed the employer of failure to provide him with hand gloves, which would have helped him.

6. He testified that he was injured on the right hand thumb tendon and the same had not fully healed since he was feeling pain. He produced Medical Report prepared by Dr. Ayuoga as exhibit 2 and contended that he was not given all the other treatment sheet from hospital. He also stated that all his employment documents were lost.

7. Mr. Kennedy SigeOkoth testified as DW 1 for the appellant. He told the court that he was the Nurse in charge of Chemasinde Estate from 2003. He confirmed that the respondent was also employed by the appellant until he left on 18/4/2003. DW 1 produced accident register for 11.4.2003 (exh.D.1) which showed that only one person was injured that day but it was not the respondent.

8. He admitted that patients was not given treatment records except a card in case of any referral. He further admitted that the Estate had 693 workers and he used to see about 30 patients per day. He explained that when a person was injured, he was given referral sheet by the supervisor Mr. Juma which was used for treatment. He maintained that on the material day he never received any referral from the supervisor.

9. After the hearing, both parties filed submissions. The respondent submitted that his evidence on employment relationship and injury while in the course of employment was not rebutted and urged the court for Kshs 450,000 general damages plus Kshs 5500 special damages.

10. The appellant submitted that the respondent caused the injury through sole or contributory negligence. It cited several judicial precedents where the court found that the plaintiffs injured in similar circumstances as in this case were solely to blame for negligence. It therefore prayer for the suit to be dismissed with costs.

11. However, the appellant submitted that the correct question of general damages for injuries suffered was Kshs 30000 and cited supporting authorities.

12. Upon consideration of the pleadings evidence and submissions, the trial court reached the conclusions that the respondent had proved that he was injured while in the course of employment. The court went to apportion blame by holding the respondent 20% negligent, and then awarded kshs 280000 as general damages considering that the respondent had suffered soft tissues injuries, time lapse and incident of inflation. The awarded was fortified by citing the case of **Great Lakes Transport Co. Ltd v KRA [2009} KLR 720.**The respondent was also awarded special damage of kshs 5500 as prayed.

13. This appellant was aggrieved and filed this appeal in the High court at Kericho on 14.1.2013 but the same was transferred to this court on 1/11/2018 on account of jurisdiction. The appeal seeks for the setting aside of the lower court decision on both liability and quantum of damages on the following grounds:-

a) The learned trail magistrate erred by arriving at

a finding on liability, which was not supported

by evidence.

b) The learned trial Magistrate erred in law and fact in basing findings on irrelevant matters.

c) The respondent's case was not proved on balance of probability as is required by law.

d) The trial Magistrate should have found that there was no basis on which the Appellant court e blamed for the incident alleged and injuries sustained.

e) The learned trial magistrate's assessment of compensation was inappropriate and irregular vis-a-vis the circumstances of the case

f) The learned trial magistrate erred on all points of fact and law in as far as both liability and assessment of quantum is concerned.

14. Before this court, the appellant compressed the said grounds of appeal into two namely the issue of liability and quantum of damages.

15. On the issue of liability, the appellant submitted that the respondent did not prove any of the particulars of negligence pleaded in the plaint. It contends that the finding on liability was not supported by evidence. It further contended that DW 1 denied that the respondent was injured on the material date and even produced the Accidents Register.

16. On the other hand, the appellant argued that the respondent was solely to blame for negligence. It contended that it did not owe the respondent absolute duty of care and submitted that the respondent should have exercise due cause and skill. It maintained that respondent was injured due to its negligence.

17. Foremphasis, it cited Court of Appeal decision in **Abdala Baya Mwanyule –vs Swalahadin Limited t/a Jomvu Total Petrol Station [2004] 1 KLR 47**and **HCCA No. 152 of 2003Statpack Industries Limited V James Mbithi Munyao[2005] eKLR w**here the two courts agreed that the employees who were injured due to a slip of the knife it was not due to the negligence of the employer.

18. As regards quantum of damages, the appellants submitted that the respondent suffered a deep cut on the right hand but the award given was too high in the circumstances. It argued that the claimant having suffered soft tissue injuries which healed completely would have been adequately compensated by an award of Kshs. 50,000 upon prove of his case on a balance of probability.

19. For Emphasis he cited several precedents where the High court reduced awards made by the lower court for soft tissue injuries. One of the cases referred were **Canaan Agricultural Contractors Ltd vs Bavas Mutayo [2013] eKLR** where the court reduced an award of Kshs 250,000 to Kshs 150,000.

20. The appellant urged this court to reduce the quantum of damages in this case because it is manifestly excessive in the circumstances.

21. The respondent opposed the appeal and urged the court to dismiss it with costs. He submitted that he proved his case on a balance of probability and the trial court arrived at the right decision on both issues of liability and quantum of damages.

22. He contended the court was right in finding that he had proved that he was injured while in the course of employment by the applicant. He contended that the appellant did not dispute the fact that he was provided with a faulty pruning knife and no gloves or any protective clothing.

23. For emphasis he relied on **HCCA No. 2765 of 1985 Karita v Mbuthia (UR)** where the court found the employer negligent for failure to take precautions to guard his employees from being injured by the machine. The court went on to say that under common law the employer had a duty of care to fence of the machine or at least those parts, which were dangerous to the user of the machine.

24. The respondent further cited **Winfield and Jolowiczon Tort by W V H Rogers, 14 edition, London Sweet and Maxell at page 213**

216where the author states that the employer must take reasonable care to provide, his workers with the necessary plant and equipment and safety devices and is liable for any accident caused by the absence of some item of equipment consequently.

25. Further the respondent relied on the **Boniface Muthama Kavita v canton manufactures, Ltd [2015] e KLR** where the Onyanja J. held that the relation between employer and employee creates a duty of care and the employer is required to take precautions for safety of the employee to avoid exposing the employee to unreasonable risk.

26. As regards the quantum of damages, the respondent argued that the award should not be disturbed. He relied on the court of Appeal decision in **Mkube v Nyamuro [983] KLR of 403** where the court held that appellant court will not interfere with a finding of fact by the trial court unless it is based on no evidence on the court has acted on wrong principles in reaching his conclusion.

27. He also relied on **Khan v Buth[1982-88] KLR1** where the court held that an appellant court will not disturb an award for damages unless it is inordinately high or low and it is shown that the Judge proceeded on wrong principles or misapprehended the evidence in some material respect. In the end the respondent prayed for the appeal to be dismissed with costs.

Mandate of this court

28. This being a first appeal, my duty is well cut out, namely, to review and re-evaluate the evidence and draw my own conclusions to test whether the decision reached by the trial court should stand. The said mandate has been restated by the Court of Appeal in numerous decisions including ***Kenya Ports Authority vs Kuston (Kenya) Limited (2009) 2 EA 212*** where it held inter alia that:

> ***"On a first appeal from the High Court, the court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."***

Issues for determination

29. Having carefully considered the pleadings, evidence and submissions, it is a fact that the respondent was employee of the appellant. Although the appellant denied in its defence that the respondent was its employee, DW 1 admitted under Oath that the respondent was indeed employed by the appellant until 18/4/2003.The issues of determination are:

(a) ***Whether the respondent suffered injuries on 18/4/2003 while in the cause of his employment.***

(b) Whether the appellant was to blame for respondents' injuries.

(c) Whether the respondent merits any reliefs.

Whether respondent was injured while on duty

30. The respondent's case is that he was injured while on duty on 18/4/2003. He alleges that he was provided with a defective pruning knife but no protective gloves or clothing. He states that the knife slipped because of the defect and cut him the right hand. However, the appellant denied the said allegation and produced accidents register for 18.3.2003 to prove that the respondent did not report any accident that day.

31. The respondent maintained that he reported the accident to his supervisor Mr. Juma and he went to see the resident Nurse in the appellant's Dispensary who referred him to Chemugundai Hospital which also belong to the employer. All the treatment records were retained by the employer's hospital. However he produced medical report prepared by Dr Ayuoga.

32. The burdens of proof is on the plaintiff to prove his case on balance of probability. The respondent amended his plaint during the hearing to read that the accident occurred on 18/4/2003 and not 18/3/2003 but the appellant did not produce any treatment records to dispute that the respondent was injured on 18/4/2003. It just relied on treatment Register for 18/3/2003 to 19/3/2003 which were filed before the said amendment of the plaint.

33. DW 1 admitted on oath that all treatment records are retained at the hospital. Consequently, my only conclusion to draw from the failure to produce the treatment Register for 18/4/2003 is that, the same would have been against the defence case. Therefore, I find and hold that the respondent's evidence on record shows that on a balance of probability, the respondent was injured while on duty of pruning his employer's tea on the material day. The said duty was assigned to him by the supervisor Mr. Juma. DW 1 confirmed that Juma was the supervisor but he has since left the company.

Liability

34. The respondents' case is that he was provided with a defective knife which was bound by rubber band but he was not provided with hand gloves or protective clothes. However, the appellant contended that the respondent was negligent in the manner in which he handled the pruning knife. It maintained that provision of hand gloves would not have protected the respondent since he was negligent.

35. In my view, the issue before the court is the common law doctrine of employer's duty of cause. The Book of **Winfield and Jolowicz on Tort by WVH Rogers, 14 edition, London Sweet and Maxwell of page 213** the author states that:-

" If a worker is injured just because no one had taken the trouble to provide him with an obviously necessary safety devise, it is sufficient and in general satisfactory to say that the employer has not fulfilled is duty."

36. In the case of **Boniface Muthama Kavita,** *Supra* Onyancha J. held that:

"The relationship between the appellant and the respondent as employer and employees creates a duty of care. The employer is required to take all reasonable precautions for the safety of the employee to provide an appropriate and safe system of work which does not expose the employee to unreasonable risk "

37. However, it is my view that the said duty of care is not absolute and it does not absolve the employee from the duty to exercise due care to avoid exposing himself from foreseeable risk. An employee is not a robot that must be programmed to work in particular way. Consequently, an employee will solely or largely to take the blame if he exposes himself to injuries due to his negligence.

38. In the case of **South Nyanza Sugar Co. Ltd v Omwando [2017] e KLR:**

"That as a result of the foregoing the panga he was using to cut the sugar cane slipped from his hands and cut him. What was it that the appellant was required to do or failed to do so as to prevent the slipping of the panga from the respondents' hand? I cannot think of any....I do not see how being given gloves and boots would have stopped the panga from slipping... The respondent was just careless and reckless."

39. Again in **Wilson Nyanyu Musigisi vs Sasini Tea & coffee Ltd [2006] e KLR,** the court held that:

"The Appellant was undertaking manual work. He was not operating a machine. He was cutting grass using a slasher. The swing of the slasher was within his control. He controlled the rate at which he swung he slasher to cut the grass. The court wonders how the respondent can be made liable in the performance of such a manual task. The appellant was given a duty. He performed it badly. He injured himself. He now blames the respondent. In law the only compensation that can be paid to the appellant, (if indeed he was lawfully employed by the respondent) is under the workmen compensation Act"

40. The foregoing supports my view that the employer's duty of care is not absolute and it does not extend to cases where the employee is just acting negligently, carelessly and recklessly. If the employee is doing manual work without any machine, he is expected to be in control of his work and has an implied duty to exercise due care to avoid exposing himself to foreseeable risks.

41. However in this case the respondent gave some evidence of a defective knife, which was not rebutted. He stated that the knife slipped because it was tied together using a rubber band or straps. I would imagine that the point which was tied was the part for holding.

42. The respondent stated that he complained about the defect on the working tool to the supervisor who promised to replace it with a better one but failed to do so until the accident occurred. It was not denied by the appellant that such complaint was raised about the defect on the pruning knife. It was also not disputed by the appellant that the knife could slip due to the defect.

43. In my view, the said piece of evidence about the defect on the knife distinguishes this case from the above-cited cases, which were relied upon by the appellant at the lower court. Therefore, I find that the accident on 18/4/2003 was caused by the negligence of both the appellant and the respondent. The appellant failed to provide the respondent with a good pruning knife and instead provide him with a defective one, which could slips while working.

44. However, I must add that the respondent was largely to blame for the accident because he is the one who accepted to use the defective knife and he was in control of the tool. He controlled how took hold it and the amount of force to apply to it. He proceeded to prune the tea so carelessly and without exercising the right judgment on how much force to apply on the defective knife that it slipped and cut his hand. There was nothing much the employer could have done to prevent the defective knife from slipping from the respondent's grasp.

45. In view of the foregoing analysis, I find that the trial was right to the extent that he apportioned liability between the parties though, without given any reasons. However, the trial court fell into error by blaming the employer more than the employee contrary to binding precedents which were cited to him by the appellant in its written submission filed on 12.8.2015.

46. For the reasons and observations stated above, I find and hold that the respondent was more to blame for his misfortune than the appellant. Consequently, I set aside the apportionment of liability by the trial court and hold that the respondent was to blame 70% and the appellant 30%.

Relief

47. In view of the above finding that the respondent was injured in the course of employment and the appellant is also to blame, I find that the respondent is entitled to compensatory damages.

48. The trial court awarded Kshs 280000 as general damages for the deep cut wound on the right hand. In doing so, he was guided by the case of **Great Lakes Transport Co, Ltd v KRA [2009] KLR 720** inflation factors and time lapse.

49. It is well-settled principle of law that appellate court will not disturb discretionary award of damages except if the trial court proceeded on wrong principles or misapprehended the evidence. In the case of **Butt v Khan [1982-88] KAR 1** the court held that: -

"An appellate court will not disturb an award of damages unless it's 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."

50. One of the material evidence to consider in determining the quantum of damages to award is a doctor's opinion in the medical Reports produced by the parties. In this, case the respondent produced medical Report by DrAyuoga as exhibit 2. The said medial Report was not included in the Record of Appeal herein.

51. The said omission hiders this court from determining whether the award by the trial court was inordinately high. Consequently, I will not disturb the award.

52. In conclusion, I have found that the appeal partially succeeds and it is allowed by setting aside the finding on liability by the lower court and substituting therewith the order that the appellant was only 30% liable for the respondents injury. The award of Kshs. 280000 general damages and Kshs 5500, special damages remains, meaning that the appellant shall pay the respondent Kshs 285,500 x30% = 85,650. The appellant is award half costs of the appeal because his appeal only succeeds partially.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 10TH DAY FEBRUARY, 2022.

ONESMUS N MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE