REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CIVIL APPEAL NO. 30 OF 2019

KEBIRIGO TEA FACTORY CO. LIMITED.....CLAIMANT

VERSUS

REBECCA KWAMBOKA ARWASA..... RESPONDENT

JUDGMENT

1. The Appellant vide a Memorandum of Appeal dated 21/3/2017 prays the Court to quash and set aside the judgment by the Senior Principal Magistrate Hon. Nyutu dated 9/3/2017 on the following grounds *interalia:-*

(i) The learned magistrate erred in law in making a finding of damages against the defendant.

(ii) The magistrate erred in finding the Appellant 100% liable for the injuries sustained by the respondent.

(iii) That the award of Kshs.1,000,000 was grossly excessive and was based on erroneous conclusion of law and fact.

(iv) That the magistrate erred in awarding the respondent special damages in the sum of Kshs.15,000.

(v) That the magistrate erred in arriving at a wrong and erroneous conclusion in awarding the respondent Kshs.2,228,40 for loss of earning in absence of concrete documentary evidence.

2. The appellant prays the appeal be allowed with costs and the judgment of the Court be set aside and/or the award of special and general damages and loss of earnings be re-assessed afresh.

3. Both parties filed written submissions and list of authorities.

4. The appellant submits that the respondent did not discharge the burden of prove placed upon her by Section 107, 108, 109 and 112 of the Evidence Act Cap. 80 Laws of Kenya. The appellant relied on the case of **Stack Part Industries –vs- James Mbike in Nairobi Civil Case No. 152 of 2003.** The Appellant submitted that the burden of proof lies on he who alleges. Furthermore, in terms of the case of **Muthuku Kiema –vs- Kenya Cargo Handling Services Ltd. (1991) 225** Omollo Ag. J.A. held:-

> " there is no liability without a fault in the legal system in Kenya, and a plaintiff must proof some negligence against the defendant where the claim is based on negligence.

5. In the preset case, P.W.1 the respondent testified that on 18/2/2013, she was working at Kebirigo Tea Factory, Discharge Section. That she was assigned duties by her supervisor Kennedy Nyariki from 6pm to about 8 p.m. That the supervisor re-assigned P.W.1 duties from Discharge Section to Cyclone section. That P.W.1 explained to the supervisor that she did not know how to work in the Cyclone section. The Supervisor instructed his assistant supervisor Eric Nyambane to show P.W.1 how to work at the cyclone.

6. P.W.1 testified that she was required to remove tea leaves from the drum and take them to the drier. P.W.1 worked at the Cyclone Section until about 4. a.m. That during that time the Motor of that drier machine short circuited. That the supervisor told P.W.1 to take the tea leaves to the conveyor. That P.W.1 carried the tea leaves in a sack twice and on the third time, whilst offloading tea leaves to the Conveyor, the Conveyor trapped her left hand. That a fellow employee quickly switched off the power supply to all machines in the factory upon hearing P.W.1 screaming. P.W.1 extracted her hand from the Conveyor and fellow employees performed First Aid on P.W.1 by pouring spirit on the wound.

7. That the factory driver took P.W.1 to Tenwek Hospital. P.W.1 was taken to the theatre and was admitted in hospital for one month.

8. That the metal plates were fixed in P.W,1's fingers and her skin was grafted.

9. P.W.1 stated that she had never worked at the Cyclone before. That she had not been given any formal training on how to work at the Cyclone Section. That P.W.1 said she had not been informed of the risks associated with working at the cyclone machine.

10. That upon discharge from hospital P.W.1 was examined by Dr. Rante who prepared a medical report produced in Court as exhibit 5 and she paid Kshs.15,000 for the report and produced a receipt as exhibit '6'.

11. P.W.1 testified that she has not fully recovered from injuries because she still experienced pain on her left hand finger during the cold season. That she takes pain killers to ease the pain.

12. P.W.1 testified further that upon discharge, she returned to work but was informed that she could not be taken back since she could no longer perform manual work. P.W.1 testified that even at home she could no longer carry heavy things ad was helped by her husband around the house,

13. P.W.1 stated she used to earn Kshs.18,570 but was now jobless.

14. P.W.1 blamed the appellant for the accident and sought the reliefs prayed for.

15. P.W.2 Dr. Monis Rante testified and produced the medical report of P.W.1. P.W.2 testified that P.W.1 had sustained injuries on the left hand and the arm is not fully functional. P.W.2 stated that the injury translates to 100% loss of limb which is 30% of the total body function.

16. That the contraction in the fingers are permanent as there in no procedure to release the tendon. P.W.2 stated that he was paid Kshs.15,000 by P.W,1 for the medical examinations and the report produced before Court.

17. D.W.1 George Sagwe testified for the Appellant. D.W.1 stated that he recalled well the events of 19/2/2013 and that he was well known to P.W.1. That P.W.1 was a seasonal worker at the Tea Factory employed on 3 months casual basis. That PW.1 suffered injuries whilst working at the processing department. That P.W.1 was treated at Nyamira District Hospital and thereafter referred to Tenwek Hospital. That the Appellant facilitated treatment expenses in both hospitals.

18. D.W.1 stated that P.W.1 had not been provided with a dust coat, boots and a Cape. That P.W.1 was given gloves and a shovel to use when feeding the tea into the Conveyor belt. That P.W.1 was required to use the shovel to feed the tea into the Conveyor . That it is not advisable to use the hands to feed the tea as the same could result in an accident.

19. That on the date of the accident, P.W.1 did not use a shovel and instead used her hands. That the accident was as a result of her own negligence. That the Appellant gives guidelines to all employees. That employees know what they are supposed to do and have when doing their duties. The Conveyor machine is visible and well-guarded.

20. That P.W.1 was compensated for the injuries and was paid Kshs.414,298 under Workmen's Compensation. That P.W.1 could not claim further damages.

21. D.W.1 stated that on 19/2/2013 he was not the supervisor of P.W.1. D.W.1 stated that P.W.1 had worked at the processing section for 3 months at the time of the accident. D.W.1 stated that he had no work register to show that P.W.1 had worked at the processing section for 3 months.

22. D.W.1 said he had not record to show that P.W.1 had been provided with protective gear. D.W.1 said he has never worked at the processing section but his duties were to assign duties to employees on a daily basis. D.W.1 said Kshs.414,298 was paid by the insurance company.

23. D.W.1 stated that there was a form filled by the County Occupational and Safety Officer Kisii. That the form is dated 12/9/2014 and it states that P.W.1 should be paid Kshs.1,782,720= WIBA 4. The term is called Workmen Injury Benefits Assessment Form. That the P.W.1 was paid on 21/4/2015.

24. D.W.1 said he was present when the injury occurred and he provided the funds to facilitate transportation of P.W.1 to the hospital.

25. In terms of the case of **Eastern Produce (K) Ltd. –vs- Stanley Kiprono Tarus (2015) eKLR** this being a first Appeal, the Court is bound to evaluate the evidence adduced before the trial Court afresh bearing in mind that it did not hear the testimony of the witnesses directly to assess credibility of the witness.

26. Furthermore, the Court ought not to vary the decision of the trial Court just because it could have arrived at a different decision. The Appeal Court must find misdirection of law or wrong conclusion on evaluation of facts by the trial Court leading to improper apportionment of liability or wrong assessment of damages.

27. In the judgment of the Learned trial magistrate, the evidence is analysed thus:-

> "I have carefully considered the evidence on record. From the onset the accident, and the injury occasioned to the plaintiff have not been disputed. What appears to be in dispute is the Quantum of damages due to the plaintiff. The defendant has stated that the plaintiff was compensated an amount of Kshs.414,298 which the plaintiff feels is not reasonable. This act by the defendant is an

overt admission of liability and therefore it shall not be necessary for me to explain the same."

28. From the testimony by P.W.1, on record vis a vis that by D.W.1 it is manifestly clear that the fact of the accident in the course of duty is not in dispute. However D.W.1 although admitted that he was not the supervisor of P.W.1 on the material date and had no evidence before Court that P.W.1 had been provided with protective gear on the material date, made a general statement of denial of liability to the effect that P.W.1 was wholly to blame for the accident because she used her hands to put tea leaves in the Conveyor instead of a shovel.

29. Clearly this statement by D.W.1 was not borne out of facts in the knowledge of D.W.1. It was merely speculative based on what D.W.1 termed practice at the Processing Department. D.W.1 on the other hand admitted that he had never worked at the processing department but his work was simply to assign duties to casual workers on a daily basis. D.W.1 admitted that he had not assigned P.W.1 duties at the Conveyor department on the material date and was not at the scene when the accident occurred though was attracted to the scene upon happening of the accident.

30. It is the Court's considered finding that this evidence by P.W.1 that she was assigned duties by a supervisor at the Conveyor section for the first time, without any prior training and/or knowledge of how the Conveyor section worked; and was simply left to her own devices without any supervision from a supervisor or an employee with experience in the working of the Conveyor Section is not contradicted at all.

31. The learned trial magistrate was therefore correct in attributing 100% liability to the Appellant for breach of statutory duty of care to its employees and in particular P.W.1 on the material date leading to the serious accident that caused injuries to the left arm of P.W.1 described in the medical report produced by P.W.2, the doctor who had examined P.W.1 and evaluated the extent of disability occasioned P.W.1 by the accident.

32. Again, it is apparent the testimony by P.W.2, that P.W.1 had lost 100% use of her left arm which translated to 30% disability of the entire body was not countered at all by the Appellant.

33. This Court finds the testimony by P.W.1 and P.W.2 on the extent of injury and disability occasioned to the person of P.W.1 not to be disputed and therefore factual.

34. The above being true, the finding by the magistrate that Kshs.414,298 compensation by the employer's Insurance was not sufficient on the face of the compensation recommended in the Dosh form discussed in the proceedings in which a much higher compensation had been recommended.

35. The learned magistrate aptly, captured the injuries to P.W.1 to include-

1. **Compound comminuted fracture of the left middle melecarpet bone.**

2. **Dislocation of the left elbow.**

3. **Degloving injuries on the left upper arm, left forearm and left hand.**

36. The Court also held that there were contracture of the left arm with inability to flex the metacarpophalangeal joint; flex the left wrist joint and to hold an object with the left hand.

37. Furthermore, the learned trial magistrate correctly applied the case of Jackline Syombua –vs- BOG Ekalakala Secondary School Embu – HCCC No. 118 of 2006 UR where the Court held:-

> ***" The task of assessing damages in a case such as this is a difficult one. The Court must nonetheless be guided by the relevant precedents in assigning compensatory damages the Court will always bear in mind that the purpose of awarding damages is not to pay as it were for the loss or injury the plaintiff suffered. Damages only assuage the pain or loss suffered by the plaintiff because no amount of money can replace a lost limb***"

38. The court finds no misdirection on the part of the learned magistrate in the assessment of damages for the injury suffered based on 30% loss of body function in the sum of Kshs.1,000,000 for pain and suffering.

39. Furthermore, the Court relied on the case of **Mumia Sugar Company Limited –vs- Francis Wanalo [2007] eKLR** in which the Court of Appeal laid down the principles for the award for loss of earning capacity as follows:-

> "The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when the plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the Labour market, while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future. Loss of earning capacity can be claimed and awarded as part of General damages for pain suffering and loss of amenities or as a separate head of damages.
>
> The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formular for assessing loss of earning capacity. Nevertheless the judge was to apply the correct principles and take the relevant factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability."

40. In the present case, the learned trial magistrate made a separate award of damages for loss of earnings in the sum of Kshs.2,228,400 bearing in mind that P.W.1 had already lost her job and had grossly diminished prospects of getting employment in future. The award was based on a multiplier of lost 10 years of earning multiplied by the Kshs.18,570 salary P.W.1 earned per month at the time of the accident. The trial magistrate correctly noted that P.W.1 was aged 21 years at the time of the accident and would not in addition to the job loss do domestic chores at home and had to largely rely on her husband. This piece of evidence was not contradicted at all.

41. This Court finds no basis whatsoever to fault the reasoning and finding of the trial court on the apportionment of liability and on the assessment of general damages for pain and suffering and for loss of earning.

42. It is also not in dispute that the special damages of Kshs.15,000 was adequately proved vide the testimony of P.W.1 and P.W.2. There is no basis at all for the challenge made by the appellant to this award. The case of **Coast Bus Service ltd. –vs- Murunga Danyi & 2 Others – Civil Appeal No. 192 of 1992** is at hand in this respect. The special damages had been properly pleaded and were proved by production of proper receipt by the doctor who prepared the medical report.

43. Accordingly the Appeal lacks merit in its entirely and is dismissed.

44. The Court makes the following final Orders:-

(a) The decision by the trial magistrate is upheld holding the Appellant 100% laible for the injuries caused to the respondent in the course of duty.

(b) The award of General damages for pain and suffering in the sum of Kshs.1,000,000 is upheld.

(c) The award of Kshs.2,228,400 for loss of earning capacity is equally upheld.

(d) Special damages in the sum of Kshs.15,000 is also awarded accordingly.

(e) The aforesaid award is made less the sum of Kshs.414.298 already paid to the respondent as the learned magistrate correctly found.

(f) The Appellant to meet the costs of the suit at the trial Court and the cost of Appeal before this Court.

Dated and delivered at Nairobi this 28th day of January, 2021.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this judgment has been delivered to the parties online with their consent. They have waived compliance with ***Order 21 rule 1 of the Civil Procedure Rules*** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by ***Article 159(2)(d)*** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under ***Article 48*** of the Constitution and the provisions of ***Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)*** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MATHEWS N. NDUMA

JUDGE

Appearances

M/s Mose & Milimo & Co. Advocates for the Appellant

M/s Nyamurongi & Co. Advocates for the respondent

Chrispo: Court clerk