REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CIVIL APPEAL NO 4 OF 2017

ZAKHEM INTERNATIONAL CONSTRUCTION LIMITED........APPELLANT

VS

EVANS KARIUKI NYAGA..RESPONDENT

(Appeal from the Judgment of Hon. N.S Lutta, SPM delivered on 8th March 2017

in Mariakani SPMCC No 375 of 2016)

JUDGMENT

1. This appeal arises from the judgment of Hon. N.S Lutta, SPM in Mariakani SPMCC No 375 of 2010. The brief facts of the case as presented before the lower court are that the Respondent, who was employed by the Appellant as a machine operator was injured while offloading cargo by use of a bobcat machine whose windshield had been removed. Arising from the accident, the Respondent lost sight in his left eye, in addition to multiple injuries on the skull.

2. In its Memorandum of Appeal, the Respondent cites the following grounds:

a) That the learned trial Magistrate erred in law and fact by holding the Appellant 100% liable for the accident despite overwhelming evidence on record that the Respondent was substantially to blame for the accident, which finding was untenable and manifestly unjust;

b) That the learned trial Magistrate erred in law and fact by disregarding the Appellant's evidence on record to the effect that the Appellant had provided the Respondent with protective gear thereby arriving at a finding on liability that was untenable, unfair and manifestly unjust;

c) That the learned trial Magistrate erred in law and fact by awarding the Respondent Kshs. 3,071,970 as general damages for loss of earning capacity against the weight of evidence on record proving that the Respondent was able bodied and could still earn a living, which finding was untenable, unfair and manifestly unjust;

d) That the learned trial Magistrate erred in law and fact in awarding Kshs. 3,071,970 as general damages for loss of earning capacity, which award was erroneously calculated, highly exaggerated, inordinately high and an erroneous estimate of the damages awardable;

e) That the learned trial Magistrate erred in law and fact in failing to judiciously analyze the Appellant's evidence and submissions on record thereby arriving at a finding on both liability and quantum that was unfair, untenable and manifestly unjust.

3. This is a first appeal and as restated by the Court of Appeal in ***Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR*** the duty of a first appellate court is to consider and evaluate the evidence on record and draw its own conclusions, always bearing in mind that it has neither seen nor heard the witnesses.

4. Further, as held in ***Kenya Ports Authority v Kuston (Kenya) Limited [2009] 2 EA 212*** in discharging its mandate, the first appellate court must stick to the evidence on record without introducing extraneous matters that were not canvassed at the trial.

5. The present appeal raises the twin issues of liability and quantum of damages. On liability, the Appellant faults the trial court for apportioning blame at 100% to nil. In its written submissions filed on 12th July 2018, the Appellant submits that the Respondent had been warned by a mechanic not to use the bobcat machine without its windshield. The Appellant adds that the Respondent was an experienced

machine operator who was aware that the bobcat machine was not suitable for the work he was doing.

6. The Appellant concludes that the Respondent knew or ought to have known that using a bobcat machine without a windshield was a dangerous engagement. He was therefore the author of his own misfortune.

7. From the record of appeal four things emerge; first, that the Appellant was allocated the wrong machine for the assignment; two, that the machine itself was incomplete as its windshield had been removed and three, that at the time of the accident, the Appellant did not have protective gear. Taking these factors into consideration, the question is whether the Respondent contributed to the accident that led to his injuries.

8. From the evidence of the Appellant's mechanic, James Thuita (DW 1 as recorded by the trial court), the Safety Officer, Paul Asewe had authorized the work to continue and the Respondent had not been issued with goggles. Thuita further testified that the suitable machine for the work would have been a forklift not a bobcat machine.

9. Between the Respondent who was a machine operator and Paul Asewe, the Safety Officer, the latter carried the superior burden to determine the safety of the machine employed for the work. What is more, the Appellant owed the Respondent a duty of care to avail both an appropriate machine and protective gear for the assignment. Having failed in its duty, the Respondent cannot fault the trial Magistrate for assigning 100% liability on it.

10. Regarding the issue of quantum, the test is whether the trial Magistrate applied its discretion properly. On this account, the Court was referred to the decision in ***Printing Industries Limited & another v Bank of Baroda [2017] eKLR*** where the Court of Appeal cited with approval the earlier decision in ***United India Insurance Co Ltd v East African Underwriters (Kenya) Ltd [1985] E.A 898*** where the following was stated:

> ***"The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established; first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account or fifthly, that his decision, albeit a discretionary one, is plainly wrong."***

11. From the medical reports on record, it is evident that the Respondent completely lost sight in his left eye making it impossible for him to continue working as a machine operator. In arriving at the damages payable to the Respondent, the trial Magistrate adopted the degree of incapacity of 30% returned by the Appellant's Doctor despite the fact that the Respondent's own Doctor had returned an assessment of 50%. At the time of the accident, the Respondent was 25 years old. The multiplier of 25 years adopted by the trial Magistrate was therefore reasonable in the circumstances.

12. Overall, this Court finds no reason to interfere with the award by the learned trial Magistrate. The Appellant's appeal therefore fails and is dismissed with costs to the Respondent in this Court and in the court below.

13. It is so ordered.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 31ST DAY OF JANUARY 2019

LINNET NDOLO

JUDGE

Appearance:

Mr. Morara for the Appellant

Mr. Njoroge for the Respondent