**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT MERU**

**CIVIL APPEAL NO. 3 OF 2018**

**(Formerly Meru High Court Civil Appeal 37 of 2014)**

**KINORO TEA FACTORY COMPANY LIMITED.....….....APPELLANT**

**VERSUS**

**JOSPHAT KABILU M'IKIRIMA……..……...…RESPONDENT**

**JUDGMENT**

1. The Appeal was transferred to this court by order of the High Court (Majanja J.) on 31st May 2018 as the High Court was of the considered view that the matter subject of the appeal falls within the jurisdiction of the Employment & Labour Relations Court, the appeal therefore was to heard and disposed of by this Court. The Appeal was consequently brought before me for directions on 3rd October 2018 and the parties were both absent prompting me to give the 7th of November 2018 as the date for directions. On 7th November 2018, the Respondent appeared through counsel who indicated that the Respondent would abide the determination of the appeal by this court as the parties had already filed all the requisite papers as well as the submissions. I accordingly reserved judgment for delivery today.

2. The appeal is from a Ruling of the learned trial court the Acting Principal Magistrate D. W. Mburu at Meru in Civil Case No. 240 of 2006 between the Respondent as Plaintiff and the Appellant as Defendant made on 26th September 2014. The grounds of appeal were 7 in total, the gravamen of which was that the learned trial Magistrate erred in fact and law in finding the Respondent was dismissed from employment which was not prayed for in the plaint and was entitled to be compensated for loss of earning, that the award of Kshs. 264,076.80 for loss of earnings was manifestly high as was the award of Kshs. 100,000/- being general damages for soft tissue injuries and that the learned trial Magistrate erred in fact and law in finding the Appellant 100% liable for the accident. The Appellant thus sought that the judgment of the trial court in Meru CMCC No. 240 of 2006 be set aside and the Respondent's suit therein be dismissed with costs to the Appellant and the costs of the appeal be awarded to the Appellant.

3. The Appellant submitted that in finding it responsible, the learned trial Magistrate erred as the Respondent was careless in opening the truck door which is alleged to have hit him causing him the soft tissue injuries. It further submitted that the Respondent did not report to work and the Appellant therefore was not liable for the alleged dismissal from work for which it was held liable by the learned trial Magistrate. The Appellant relied on the case of **Purity Wambui Murithii *v* Highlands Mineral Water Co. Ltd [2015] eKLR** which cited the decision in **Stapley *v* Gypsum Mines Ltd (1953) 2 A.C. 663** for the argument that the manner and injury suffered was unique and the Appellant could not have contemplated it happening before it did as well as the argument that where the employee does not take reasonable precaution, the employer ought not be blamed automatically. The case of **Isaac Simiyu *v* Security Group (K) Limited & Another [2013] eKLR** was cited for the proposition that where the employee absconds from work, the employer cannot be held liable in damages for the termination of employment. The Appellant thus prayed that the appeal be allowed with the general damages being awarded at Kshs. 20,000/-, loss of earnings nil, special damages of Kshs. 1,600/- which were proved.

4. The Respondent submitted that the finding on liability where the Appellant was found 100% liable was based on sound reasoning and that the court should uphold the same as the learned trial Magistrate did not find the Respondent negligent. The case of **Kemfro Africa Limited t/a "Meru Express Services (1976)" & Another *v* Lubia & Another (No. 2) [1985] eKLR** was cited as was the case of **Simon Kibet Langat *v* Miriam Wairimu Ngugi (suing as the Administrator of the Estate of Daniel Mwiruti Ngugi) [2016] eKLR** for the arguments that the principles to be considered in the disturbing of the award on quantum of damages were that there must be an error in principle and that an award of damages is essentially an exercise of discretion. The Respondent submitted that the award of the learned trial Magistrate cannot be impugned.

5. This being a first appeal, *is the duty of the court, as a first appellate court, to analyse and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeing the witnesses and their demeanour and giving allowance for that.* The learned trial Magistrate heard the parties and came to the conclusion that there were injuries suffered and proceeded to make an award of damages. He held the Appellant 100% liable. On my part, the fact that the Respondent ran to the back of the truck and tried to open the rear door alone causing it to hit him before they offloaded the culverts was not entirely the Appellant's fault and liability should have been apportioned on the basis of 50-50. That means that the Respondent was liable to the extent of 50%. In my considered view, the award on damages was not inordinately high if the contribution by the Respondent is taken into account. There was no error on principle in the award of damages and I would therefore not disturb the award on quantum. Having determined that the Respondent was to be blamed to an extent, I would reverse the finding of the learned trial Magistrate to the extent of sharing liability at 50% and therefore substitute the judgment and decree to the extent that the Respondent is entitled to recover the sum of Kshs. 182,618.40 plus the costs of the suit before the Magistrates court only. Each party is to bear their own costs for this appeal.

It is so ordered.

**Dated and delivered at Nyeri this 30th day of January 2019**

**Nzioki wa Makau**

**JUDGE**

I certify that this is a true

copy of the original

**DEPUTY REGISTRAR**