REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.7 OF 2018

[formerly Nakuru High Court Civil Appeal No.37 of 2014]

JARED ACHINGA NYANDIKA.....APPELLANT

VERSUS

TRANSAFRIC TIMBER LTD.....RESPONDENT

Being an appeal from the judgement and decree from CMCC No.371 of 2012 delivered on 12th March, 2014 by Hon. R Amwayi.

JUDGEMENT

1. The appellant had filed plaint before the trial court on the facts that while in the employment of the respondent he was exposed to danger and risk and where he was injured on 27th February, 2012 while on duty. The appellant claim was that the respondent was negligent for failing to provide him with proper and safe work environment and by not providing him with protective devices such as gloves and thus had an accident and sustained serious bodily injuries. The claim was for general and special damages.

2. The respondent denied the claims made and on a without prejudice basis stated that the appellant was not an authorised employee and therefore there was no obligation or duty of care towards him and the allegations of negligence should not arise. The respondent also denied allegations that there was an accident on 10th February, 2012 on the grounds that there was no report made and where such accident occurred the same was as a result of the appellant's negligence, carelessness and exposure.

3. The trial court delivered judgement on 12th March, 2014 with a finding that both parties contributed to the occurrence of the accident where the appellant was injured on 27th February, 2012 and apportioned liability at 70/30% in favour of the respondent.

4. Dissatisfied with the judgement and decree of the trial court, the appellant filed the appeal on two (2) grounds that;

> *1. The Trial Magistrate erred in law and fact in considering and evaluating the evidence on record hence arrived at a wrong conclusion that the appellant was 70% to blame.*
>
> *1. The trial magistrate failed to appreciate the evidence adduced by the appellant hence wrongly found that the respondent was 30% to blame instead of the respondent being 100% liable.*

5. On these grounds the appellant is seeking for the judgement to be set aside and the respondent held 100% liable or liable to a greater extent and that there be an award of kshs.300,000.00 general damages on 100% basis and costs of the appeal.

6. Both parties addressed the appeal by way of written submissions.

7. The appellant's case is that the trial court magistrate erred in apportioning liability at 70% and the respondent liable at 70% without any basis and contrary to the evidence on record. On 27th February, 2012 the appellant was at work and assigned duties in the breakdown department on the roller and he was required to carry timber and take it to another machine which ordinarily would be done by two people and he was left alone when the accident happened. The respondent failed to provide protective gear and gloves and the work environment was not conductive. The accident was recorded immediately and then he was taken to hospital.

8. The trial court failed to consider this evidence and relied heavily on the defence that the appellant ought to have informed the machine operator that the log had been stuck in the machine in order for him to stop the machine and for the appellant to be able to remove he log. The court also erred by the finding that the appellant had accepted to work alone in the department and therefore exposed himself to risk.

9. Such finding resulted in a wrong finding and apportionment of liability. This should be set aside.

10. In reply to the appeal, the respondent's case is that the court should make a reasonable award fair to both parties. The appeal should be disallowed on the grounds that on a balance of probabilities one form of negligence alleged against an employer should not apply in another case as held in the case of **Muthuku versus Kenya Cargo Service Ltd [1991] 1 KLR.** In this case the parties were in an employment relationship and while at work the appellant failed to wear gloves while operating a roller machine contrary to instructions by the employer. The appellant had been in the employment of the respondent for one and a half years and was not a stranger to its operations and thus exposed himself to danger when he failed to wear protective gear. The appellant contributed to a large extent to his injury and the findings of the trial court should not be disturbed.

11. As a first appeal, this court is required to evaluate the entire record and arrive at its own findings as held in the case of **Wakim Sodas Limited versus Sammy Aritos [2017] eKLR.** his same position had been taken by the Court of Appeal for East Africa in ***Peters –vs- Sunday Post Limited [1958] EA 424*** where Sir Kenneth O'Connor stated as follows:-

> *It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt – vs- Thomas (1), [1947] A.C*

The guiding principles were then enunciated by the court **Wakim Sodas Limited** case cited above to include the following;

> *The appropriate standard of review established in these cases can be stated in three complementary principles:*
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> *a. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;*
>
> *b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and*
>
> *c. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.*

12. What stands out in this appeal is the question of liability. On the one hand the appellant is challenging the apportionment of 70-30% which in his view was not based on the material evidence on record. The respondent on the other part is satisfied with the findings and award of the court on the basis that the appellant contributed to his injury by failing to wear protective gear while he was aware of the dangers.

13. In evidence, the appellant testified that on 27th February, 2012;

- *while I had been assigned work at a breakdown department on the roller. My work was to carry timber and take to another machine. I had been assigned work and the one who was working at breakdown was not there. It was not my first time at breakdown. The machine had brought the timber and I find out that the timber was heavy. Ordinarily we do the work two people and this day I was alone. i had been assigned this work by Githinji the supervisor while lying the timber, the other had which was beneath was pressed by the roller. …*

14. Upon cross-examination the appellant had further testified that;

- *the timber was heavy and that is why it crushed my hand. The one doing the machine is the one who told me to be fast. I just realised I had been injured by the roller. The roller has got sharp ends… what happened was an accident. If I had gloves the same would have prevented the accident as the gloves were the ne which would have been cut and not my fingers. …*

15. To counter the appellant's case the respondent called one witness before the trial court, Fred Mukuna, a secretary with the respondent and who testified that when the claimant was injured, he visited and witnessed the injury to his hand which had been placed in the roller machine. The machine had no defects and the appellant had worked in this department for over a year. He also testified that;

- *he had been given instructions on how to work on the machine. He got injured when he was removing timber that was stuck in the machine. The timber was in the process of being split. There is a chain that rubs the machine and when it stops the timber stuck. When this happens the employee is supposed to inform the operator Robert Shoya to switch it off… the operator is supposed to be told to switch the machine off. When the machine is switched off it cannot injure or harm anyone. The company provides safety apparel like gloves and we had provided the plaintiff. The plaintiff is to blame for the accident as he failed to inform the operator to switch off the machine so as to remove timber the employee can physically observe and see the timber when stuck. …*

16. From the evidence, the Respondent's version of events sounds implausible.

The witness Mr Mukuna was not physically present at the scene of the accident. He was in charge of all clerical works which keeps records. He recorded the events following a visit to the accident scene. His case was as he was told. He did not witness events unfold.

17. This is unlike the appellant who testified that he was working with Evans and there was a supervisor Mr Githinji. Even where the presence of Mr Githinji as the supervisor was challenged by the respondent, there was admission that he was on duty on this date and also presence was the machine operator Mr Robert Shoya. These are the persons who were physically present on the site and at the accident to witness what exactly happened to the appellant.

18. Even where such witnesses were not called by the respondent, the duty to provide and ensure that an employee is working in a safe environment and that where protective gear is required to be worn is on the employer. In **Mumias Sugar Co. Ltd versus Charles Namatiti CA 151 of 1987, Gichuhi, Masime and Gicheru JJA held:**

> *An employer is required by law to provide safe working conditions of work in the factory and if an accident occurs while the employee is handling machinery the employer is responsible and will be required to compensate the injured employee.*

19. This position is buttressed in the case of **Simba Posho Mills Ltd versus Fred Michira Onguti [2005] eKLR** on the grounds that the employer is wholly to blame for the accident and for breach of the statutory duty under to ensure all precautionary measures are taken and adhered to by its employees.

20. In this case it was not just sufficient for the respondent as the employer to state that the appellant had been provided with gloves and taken through instructions to handle the machine. Where the appellant was left alone at a station which required two employees, he was made to lift heavy timber and as a result he suffered an injury, such arose out of the employer's negligence. To hold the appellant liable is to punish him for a mistake of the employer.

21. In apportioning liability the trial court which heard the witnesses made a finding that;

> ***…****from the above analysis from my findings that both parties contributed to the occurrence of the accident. The defence by failing to provide the plaintiff with gloves and the plaintiff by accepting to perform a task alone which ought to have been performed by two people and by deciding to remove the log from a sharp machine which he knew and failure to inform the machine operator to stop the machine so that he could remove the log. It is my finding that the plaintiff contributed more to the occurrence of the accident and injured himself …*

22. To the contrary and to my view, where the appellant was made to do work meant for two people, was allowed to remove the log from a sharp machine and the machine operator allowed this to happen and the one supervising such work permitted and failed to address as appropriate, greater and or full liability should be borne by the respondent as the employer.

23. The appellant is not without blame in the circumstances. He must share some blame for the accident. Having worked in the department for over a year, his decision to remove a log from a sharp machine he put himself in the harm's way. it fair to split the liability at 50%:50% between the appellant and the respondent. This is warranted here by the circumstances.

24. the general principle applicable is that the assessment of damages is within the discretion of the trial court and the appellate court will only interfere where trial court, in assessing damages, either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is not based on any evidence. see **Kemfro Africa Ltd t/a Meru Express & Another versus A. M. Lubia and Another [1982-88] 1 KAR 727, Peter M. Kariuki versus Attorney General CA Civil Appeal No. 79 of 2012 [2014]eKLR** and **Bashir Ahmed Butt versus Uwais Ahmed Khan [1982-88] KAR 5).**

25. on the assessment of general damages at Kshs.300,000.00 the liability assessed above put into account, the 50%:50% apportionment for the appellant results in Kshs.150,000.00 in general damages.

In the upshot the appeal succeeds. The award for general damages awarded is affirmed as being Kshs.150,000.00 liability will now be apportioned at 50%:50%. The practical outcome on costs is to award the appellant 50% of his costs.

Dated and delivered at Nakuru this 8th day of November, 2018.

M. MBARU

JUDGE

In the presence of:

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