REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

APPEAL NO. 6 OF 2018

(Formerly Kisumu HCC Appeal No. 26 of 2017)

(Before Hon. Justice Mathews N. Nduma)

KIBOS SUGAR AND ALLIED INDUSTRIES LTD.....APPELLANT

VERSUS

1.STEPHEN OTIENO ADIE

2.RENE SUPERCLEAN SERVICES.....RESPONDENTS

J U D G M E N T

1. The Appellant being aggrieved by the Judgment and decree of the Senior Resident Magistrate Hon. W. K. Onkunya delivered on 8th March, 2017 in which the learned trial magistrate found that the Appellant was wholly liable for the injuries sustained by the Respondent in the cause of his work at the Respondent's premises and awarded the Respondent Kshs.1,000,000 General Damages in respect thereof, and Kshs.2,823,840 in respect of loss of future earnings all totaling a sum of Kshs.3,823,840.

2. The Grounds of Appeal may be summarised as follows:-

a. That the Learned Magistrate erred in finding that there was sufficient evidence to find the Appellant liable for the injuries suffered by the Respondent in the course of duty.

b. That the Learned Magistrate erred in not finding that there was contribution on the part of the Respondent.

c. The Learned Magistrate applied the wrong Legal Principal in the apportionment of liability.

d. The Learned Magistrate erred grossly in assessment of damages hence arriving at a figure that was inordinately high and in doing so ignored precedent's presented by the Appellant before court.

3. The court guided by the case of **Simon Muchemi Atako & another vs Gordon Osore [2013] eKLR** in respect of a first appeal has evaluated the evidence adduced before the trial court and has drawn its own conclusion on the same, taking into account that the court did not have opportunity to see and have the witnesses testify.

4. The Claimant relied on witness statement dated 15th May, 2015 in which he narrated in detail circumstances that led to the accident that resulted in extensive injuries to his person while at the employment of the Respondent.

5. The Claimant was employed as a casual labourer by the 1st Defendant and was assigned cleaning duties for the Respondent's clients and in particular Kibos Sugar & allied Industries limited the 2nd Defendant. On the fateful day the Claimant was cleaning and oiling machinery at the Kibos Sugar Factory. While cleaning oil spillages and oiling the mortars, the machine was switched on by an employee of the 2nd Defendant and it clipped the clothes worn by the claimant and pulled him into a vice on the conveying belt and crushed the Claimant's hands, legs and other body parts. The Claimant lost consciousness and was taken to Jaramogi Oginga Odinga Teaching and Referral Hospital in Kisumu for treatment. The Claimant was admitted for a month. The Claimant testified that he had since lost capacity to earn a living. The Claimant earned Kshs.1,590 daily as a labourer.

6. The Claimant blamed the defendants wholly for the injuries sustained in that they knowingly exposed the Claimant to risk of injury. The Defendants did not provide the Claimant with a safe working environment and protective clothing and were in breach of duty of care owed to the Claimant in the course of employment. The Defendants were also negligent in employing careless employees who caused to the accident.

7. The Claimant produced a medical report by Dr. Manasseh O. Onyimbi which detailed the extent of injuries and disability caused to the Claimant by the accident.

8. The Claimant relies on the decision by Byram Ongaya J. sitting on appeal No. 15 of 2015 in which while considering an appeal from a Judgment of W. K. Korir Principal Magistrate, Meru dismissed the Appeal and found that the learned magistrate did not misdirect himself in the apportionment of liability arising from a work place injury and in the assessment of damages awarded to the Respondent in that case. In that case Kshs.3,000,000 was awarded as General Damages and Kshs.384,000 was awarded for loss of earning capacity.

9. Justice Nyakundi in **Salome Mantai & Another v Lucia Wanjiru Mwangi Kajiado Civil Appeal No. 39 of 2015** while relying on the cases of **Baker v Will Oughby [1970] AC 467, Statpack Industries v James Mbithi Munyao Civil Appeal 152 of 2003**, stated that there are two elements on the assessment of liability, namely Causation and blame worthiness.

10. The court held in statpack case:-

> "***It is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone's negligence and his injury."***

11. The Claimant testified that he blamed Rene Super clean Services the 1st Defendant for placing him in a risky environment without any protective clothing such as gloves, helmet and overall. The Claimant blamed further the 2nd Defendant the employer of the person who switched on the motor while the Claimant was oiling it resulting in the clothes being caught up by the motor and conveyer belt hence the accident and injuries that ensued on his body. The Claimant testified that he was not given any warning that the motor would be switched on, while he cleaned and oiled it. The Claimant did not see the person who switched on the motor.

12. DW 1 for the Appellant testified that he knew the 1st Defendant who the 2nd Defendant had outsourced for cleaning services. That 2nd Defendant had no contract with the Claimant who was a casual employed by the 1st Defendant. DW 1 stated that in terms of the outsourcing agreement, the 1st Defendant took responsibility for all its employees and not the 2nd defendant. DW 1 admitted that the Claimant was injured while working at the premises of the 2nd Defendant and that the 1st Defendant paid the medical bill in respect of the treatment given to the Claimant. He stated also that 1st Defendant paid

the statutory dues in respect of the claimant. DW 1 confirmed that the conveyor machine is operated by employees of the 2nd Respondent.

13. The court notes that RW 1 did not adduce any evidence to rebut the evidence adduced by the claimant regarding how the accident occurred and failure by the defendants to provide the claimant with protective clothing. The evidence that the motor was switched on while the Claimant was cleaning it and oiling it without warning was also not contradicted.

Determination

14. Upon a careful analysis of the evidence adduced by the Claimant and that adduced by DW 1, it is very clear that the Learned Trial Magistrate made a correct assessment of the entire evidence placed before him and came to the correct conclusion of fact that the Claimant had proved on a balance of probabilities that the injuries he had sustained were caused by the negligence of the 1st and 2nd Defendants. The evidence by the Claimant that he was not provided with protective clothing by the 1st Defendant while working in a risky environment at the 2nd Defendant's premises and that the motor was switched on by an employee of the 2nd Defendant without warning while the Claimant cleaned and oiled the machinery was not rebutted at all. This was evidence that showed the 1st and 2nd Defendants had a duty of care to the Claimant, but failed to exercise reasonable care towards the Claimant in the circumstances of the case.

15. The Learned Magistrate relied correctly on the decision of Court of **Appeal in Mumias Sugar Company Limited v Charles Namati CA 151 of 1987** in which Gichuli, Masime and Giculi 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 working, the employer is responsible and will be required to compensate the injured employee."***

16. The court further correctly found that the Appellant had a statutory duty of care to provide a safe working environment for its workers including those outsourced as in the case of the Claimant. The 1st and 2nd Defendants share the blame in equal measure.

Damages

17. With respect to the assessment of damages, the court is of the considered view that the injuries suffered by the Claimant which were not in dispute and the extent of disability properly assessed by the medical doctor who examined him and filed a report were of a serious nature. The Learned Magistrate clearly applied his mind to the facts of the case before him. The Magistrate also considered relevant similar authorities in arriving at the quantum of general damages and in respect of loss of future earnings. Nothing has been placed before this court by the Appellant to have this court arrive at a different conclusion than that arrived at by the trial Magistrate. In this respect weight was placed on the comparative quantum of damages awarded in previous similar decisions in –

i. Simon and Mua v kioga Mkwano & 2 Others

Nairobi HCC No. 287 of 2007

ii. Daniel kosgei v Catholic Trustee Registered & Another

Eldoret HCC No. 111 of 2006

iii. Salome Mantai & Another v Lucia wanjiru Mwangi (2016) eKLR.

18. The Learned Magistrate cannot be said, as is alleged by the Appellant to have treated the matter and issues before him superficially.

19. It is my considered finding that the trial court gave due weight to all the evidence before it, considered and applied correct principles of law to the facts and arrived at a correct decision on the issue of liability and assessment of damages.

20. Accordingly the court dismisses the Appeal with costs and upholds the judgment by the trial court in its entirety including the award of costs and interest at court rates.

Judgment Dated, Signed and Delivered in Kisumu this 6th day of December, 2018

Mathews N. Nduma

Judge

Appearances

L. G. Menezes & Co. for the appellant

Bruce Odeny & Co. for the Respondent

Chrispo – Court Clerk