REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

ELRC APPEAL NO. 9 OF 2017

(Before D. K. N. Marete)

KIPKEBE LIMITED.....APPELLANT

VERSUS

SAMWEL NYANTIKA NYANTOERA.....RESPONDENT

JUDGMENT

This is an appeal brought out via a Memorandum of Appeal dated 3rd September, 2015. It is grounded as follows;

1. *The Learned Trial Magistrate grossly misdirected himself in treating the evidence and submissions on liability before him superficially and consequently coming to a wrong conclusion on the same.*

2. *The Learned Trial Magistrate did not in the alternative consider or sufficiently consider the demand of contributory negligence based on the evidence adduced and the submissions filed by the Appellant.*

3. *The Learned Trial Magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same.*

4. *The Learned Trial Magistrate misdirected himself in ignoring the principles applicable and the relevant authorities cited in the written submissions presented and filed by the Appellant.*

5. *The Learned Trial Magistrate erred in not sufficiently taking into account all the evidence presented before him in totality and in particular the evidence presented on behalf of the Appellant.*

6. *The Learned Trial Magistrate erred in failing to hold that the Respondent had failed to prove negligence on the part of the Appellant while the onus of proof lay with the Respondent.*

7. *The Learned Trial Magistrate proceeded on wrong principles when assessing the damages to be awarded to the Respondent (if any) and failed to apply precedents and tenets of law applicable.*

8. *The Learned Trial Magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstance that it represented an entirely erroneous estimate vis-à-vis*

the respondent's claim.

9. *The Learned Trial Magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.*

From the onset, this court is warned of its role as a court of first appeal as was established in the authority of **Selle vs. Associated Motor Boat Co. Ltld (1968) E.A, at page 126.** This is to offer a review of the evidence tendered before the trial magistrate, asses this and proceed to form its own independent conclusion about the same always bearing in mind the obvious limitation that unlike the trial court it did not see the witnesses testifying. This is as follows;

….An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v. Ali Mohamed Sholan (1955), 22 E.A.C.A 270).

The appellant in her written submissions lays down a case challenging the trial magistrate's findings on liability and quantum. It is her submission that the party who alleges negligence must prove the same or list his case for dismissal. Her further evidence is that the testimony of DW 1 at cross examination was that he was aware that the machine the cause of the injury had a problem and had reported the matter to the manager. He did not however offer any evidence to the extent of this information to the manager.

The respondent in his evidence does not to any degree link the accident to his place of work. This is because he is unable to proof that he was injured at the work place. It is clearly demonstrated by the appellant that on the date of the injury, he was not on duty. This dilutes his case of negligence to unacceptable levels. It is not sustainable, or at all.

DW 1 further testified on cross examination and acknowledgement of the master roll showing the number of days worked and that this showed that he was not on duty on 13th June, 2006 up to 18th June, 2006. He did not adduce any evidence as to why his name was not in the master roll.

The position on the absence of the respondent from work at the time material to his injury is corroborated by the evidence of DW 1 who in examination in chief testified that the respondent was not at work on the date of alleged injury at work.

The respondent in his written submission dated 16th September, 2016 attempts a case in support of the defence but this does not rebut that of the appellant. Whereas he expresses the requirement by the appellant to provide protective gear at the work place, which is the case under all circumstances, he fails to address the salient features of the appeal – proof of negligence on a balance of probability.

This appeal must therefore succeed at the onset. On a failure of proof of the basis of negligence, one need not belabor on the issue of quantum. It is overtaken by events.

I am therefore inclined to allow the appeal with orders that each party bears their own costs of the same.

Delivered, dated and signed this 15th day of November 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Miss. Mbeka instructed by L.G Menesses, Advocates for the appellant

2. Miss. Mitei instructed by Sila Munyao & Company Advocates for the respondent