REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU

CIVIL APPEAL NO. 11 OF 2015

FORMERLY KAKAMEGA HIGH COURT CIVIL APPEAL NO. 70 OF 2008

(Before Lady Justice Maureen Onyango)

JOSEPHAT KALICHE AMBANI .....APPELANT

-Versus-

FARM INDUSTRIES LIMITED .....RESPONDENT

(Being an appeal from the judgement and decree of the Hon. C. N. Ndekwa in Butali RMCC NO.29 of 2007 delivered on the 11th September 2008)

FARM INDUSTRIES LIMITED.....RESPONDENT

- Versus-

JOSEPHAT KALICHE AMBANI.....APPELANT

J U D G E M E N T

The Appellant, **Josephat Kaliche Ambani**, filed suit against the Respondent **Farm Industries Limited** by way of a plaint dated 8th February, 2007 seeking an award of damages on account of injuries to his left knee that he allegedly sustained while working for the Respondent. According to the plaint filed, the Appellant held the Respondent liable for negligence for failing to provide him with proper working conditions. He averred that the Respondent failed to provide him with proper safety gear thereby exposing him to danger.

The Respondent filed a defence dated 22nd March, 2007 in which it denied liability. It averred that if the accident did actually occur it was due to negligence on the part of the Appellant.

The case was duly heard and the trial magistrate sitting at the Senior Resident Magistrate's Court at Butali delivered her judgment on 11th September, 2008. In dismissing the claim the learned trial magistrate stated thus ***"It is therefore my finding that the plaintiff was working alone and the injuries were self-inflicted. The plaintiff was fully in control of the tools he was working with …and he cannot blame the defendant for what befell him."*** The Appellant thereby being aggrieved by the Trial Magistrate's decision preferred the appeal subject of this judgment and put forward a total of 4 grounds of appeal as outlined herein under:

1. **That the learned trial magistrate's finding on liability was against the weight of the**

evidence amounting to miscarriage of justice

2. That the trial magistrate erred in law and in fact in failing to appreciate the injuries sustained by the appellant

3. That the learned trial magistrate erred in law and in fact in basing his judgment on the conjectures and suppositions which were not on record

4. The learned trial magistrate erred in law in failing to assess the quantum of damages payable to the plaintiff

When the appeal came up for hearing, parties opted to proceed by way of written submissions. The Appellant submitted that the accident was due to the negligence of the Respondent who failed to provide the Appellant with the right appliances for dismounting a tractor's rim from the tyre. He argued that though he was provided with gumboots and gloves those were not adequate safety gear for the kind of task he was ordered to undertake. Further he submitted that the law obliges employers to provide their workers with adequate working equipment and a safe work system and the Respondent failed to oblige.

The Appellant took issue with the trial court's statement that the injury was self-inflicted and submitted that he was given express instruction by his supervisor(DWI) to repair the puncture and in the process he got injured. The Appellant argued that the trial court's inference was that he inflicted the injury on himself intentionally which was not the case. The Appellant concluded by arguing that he suffered great damage from the injury and he ought to have been compensated. He relied on the case of ***Jeredi Ukilu Osango vs.- Geowave Ship Contractors Ltd Civil Appeal No. 49 OF 2013***

The Respondent opposed the appeal and argued that the Appellant had failed to prove his case on a balance of probabilities. It argued that the Appellant's claim against it was that of tort of negligence and the burden of proof was upon him to establish that the Respondent was indeed negligent.

On the issue of liability the Respondent submitted that the Appellant utterly failed to establish a causal link between his injuries and the negligence of the Respondent and thus no liability could be attached on the Respondent. Further that though the trial magistrate did not go further to assess the damages that would have been payable to the Appellant had he succeeded, the omission was not fatal. The Respondent relied on the case of ***M'mbwiria M'arachi vs.- M'mukiri Marimi &3 Others [2009]Eklr*** where the court held that the purpose of assessing damages by the court of first instance is to ensure that parties are not subjected to further expenses and failure to do so does not go to the root of the case. The Respondent urges this court to dismiss the appeal with costs.

This being a first appeal the court's role is to re-evaluate and re-assess the evidence adduced before the trial Court putting in mind that the trial Court saw and heard the parties. See the case of **Selle versus Associated Motor Boat Co.(1968) EA 123** at page 126 where in **Sir Clement De Lestang V.P.** made the following observation:-

> **"An appeal to this court is by way of a 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 in the case generally (Abdul Hameed Saif versus Ali Mohamed Sholan (1955) 22 E.A.C.A 270) followed."**

The Appellant testified that on or about 21st June, 2005 he was working as a casual labourer with the Respondent. He was instructed by his supervisor to change of a tractor tyre. While he was trying to disengage the rim from the tyre, the rim bounced and hit him on the left knee. He was taken to Nala Hospital in Kakamega where he received treatment. He later visited Dr. Mubisu(PW2) who prepared a

medical report for him and produced it as exhibit in Court and stated that the nature of the Appellant's injury was blunt soft tissue injury.

Simon Mukoto Musami(DWI) was a supervisor working for the Respondent around the time the accident occurred. He told the court that indeed the Appellant was an employee of the Respondent and that he was actually hurt on the material date. He however blamed the accident on the Appellant whom he said was not keen while carrying out the repair and that is why he was hurt. He testified further that the Appellant had been provided with the necessary safety gear and it was due to his carelessness that he was hurt.

From the analysis it is clear that the main issue for determination in this appeal is whether the Respondent provided a safe working environment for the Appellant. The Appellant argues that the injury was due to the Respondent's negligence for failing to provide him with a proper working system. On the other hand, the Respondent argues that he provided the Appellant with protective gear and the accident was not within its control. That it occurred due to the Appellant negligence and there is nothing the Respondent would have done to protect him.

It is not in doubt that the Appellant was injured whilst working for the Respondent. The question that begs an answer though is: whose fault was it and who is liable? The Respondent testified that the Appellant was provided with safety gear. It is clear from the evidence that a metal rod bounced and hit the Appellant on the knee. Could the Respondent foresee this? An employer has a duty to provide his workmen with a safe place of work and not merely to warn them against unusual dangers known to them. The employer's duty is to see that care is taken and he is liable even if failure to exercise reasonable care and skill is that of an independent contractor. The employer is excused from liability only if the danger is due to a latent defect, not discoverable by reasonable care and skill on the part of anyone. Equally an employee is under a duty to exercise due care and diligence when carrying out his duties so as not to harm himself, his employer or 3rd parties. See. ***Charlesworth and Percy on Negligence, 12th Edition paragraph 11-03***

In the presence case, the Appellant had been provided with gloves, gumboots and an overall. He was using a metal rod to separate the tyre from the rim when the accident occurred. DW1 testified that the Respondent did not have a machine for separating a tyre from a rim. In the words of DW1 "**when he was separating the tyre from the rim, the metal he was using to hit the tyre flew and hit him"** . In my opinion this is proof that the Appellant was not provided with appropriate working tools and it was while he was improvising with inappropriate tools that he was injured. No evidence was adduced by the Respondent to show that the Appellant was trained to repair tractor tyre punctures. DW1 testified that the Appellant was employed as a farm head but was injured while repairing a puncture.

In his testimony the Appellant stated that the supervisor instructed him to remove the rim, that he was supposed to use common sense to remove the rim, that the overall, gumboots and helmet that were supplied to him by the Respondent as protective gear would not have protected the knee from injury.

In **HALSBURY'S, LAWS OF ENGLAND, 4TH EDITION** it is stated at paragraph 662 (p. 476) as follows:-

> ***"The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal connection must be established."***

In **BONIFACE MUTHAMA KAVITA V CARTON MANUFACTURERS LIMITED CIVIL APPEAL NO. 670 OF 2003[2015]eKLR Onyancha J** observed that:

> ***"The relationship between the Appellant and the Respondent as employer and employee creates a duty of care. The employer is required to take all reasonable precautions for the safety of the employee, to provide an appropriate and safe system of work which does not expose the employee***

to an unreasonable risk.

According to **Winfield and Jolowicz on Tort 13th Edn.p.203** **…Employers liability is defined: -.**

> ***"At common law the employers duty is a duty of care, and it follows that the burden of proving negligence rests with the plaintiff workman throughout the case. It has even been said that if he alleges failure to provide a reasonable safe system of working the plaintiff must plead, and therefore prove what the proper system was and in what relevant respect it was not observed."***

In the Plaint the Appellant pleaded the particulars of negligence as follows-

a) Failing to ensure the safety of the Plaintiff while engaged in the said work

b) Failing to provide the Plaintiff with protective gears including gloves

c) Failing to ensure that the Plaintiff was fully instructed on the dangers likely to arise and the precautions to be observed and/or that he had received sufficient training and/or was adequately supervised

d) Failing to provide and maintain safe means of access to the Plaintiff's place of work and failing to make or keep the Plaintiff's place of work safe.

It is further pleaded in the alternative that the Respondent was negligent by:-

a) Failing to take any adequate precaution for the safety of the Plaintiff while he was engaged upon the said work.

b) Exposing the Plaintiff to a risk of damage or injury of which they knew or ought to have known.

c) Failing to provide the Plaintiff with adequate equipment to enable him carry out the said work safely.

d) Failing to provide and maintain adequate or suitable plant tackle or appliance to enable the said work to be carried out safely.

e) Providing unsafe system of work.

For the Appellant to succeed in his claim, he had to prove, among others, that he was injured while engaged on duties that he was assigned or expected to perform in the course of his employment with the defendant. The Defence witness conceded that the Appellant was injures as he was removing the rim using a piece of metal. There is therefore no dispute that the injury occurred in the course of duty.

Further, the Appellant had to prove any one or more of the particulars of breach of statutory duty, negligence or breach of contract pleaded as against the Respondent employer.

The trial magistrate in dismissing the appellants claim found that the Appellant's injuries were self inflicted. This would only be the case where the Appellant deliberately injured himself which is not the case. The injury was an accident and therefore cannot be deemed to have been self inflicted.

In **HCCCA 65 OF 2002 SIMBA POSHO MILLS LTD VS FRED MICHIRA ONGUTI 2005 EKLR**, the plaintiff general worker was injured by a machine roller when his supervisor asked him to push maize into a new machine which had just been installed. His right fingers were caught by the machine. The Respondent blamed the Appellant for his own negligence as the machine‘s installation had not been completed and a certificate of competence of new machine had also not been issued. It was contended that the Appellant was not allowed to fiddle with the machines. The trial magistrate apportioned liability but on appeal, **Kimaru J** allowed the appeal and held the employer wholly to blame for the accident and

for breach of the statutory duty under the Factories Act.

In **Mumias Sugar Co. Ltd Vs 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."***

The above decision of the Court of Appeal reminds the Respondent of its statutory duty of care to provide a safe working environment for its workers. In my view, the Respondent in this case failed to observe its common law duty of care by an employer of ensuring that all reasonable steps are taken to ensure that the Appellant was safe while engaged in the work of repairing a puncture. I find that there was sufficient evidence on record to prove the particulars of negligence as pleaded in the plaint as observed herein above.

Consequent upon the foregoing I find that the trial magistrate misdirected herself in assessing the evidence on record and thereby arrived at a wrong conclusion that the Appellant's injuries were self inflicted and was therefore responsible for the accident.

In my view, the Appellant proved, on a balance of probability that the Respondent had a statutory duty and obligation to provide a safe working environment which included not exposing him to tasks which could result in injury or loss. The Respondent is liable for any injury that its employee, the Appellant, sustains in the course of employment. In this case, the DW1 instructed the Appellant to repair a tractor puncture without supplying him with proper tools or protective gear.

I therefore find and hold the Respondent wholly liable for the accident and injury occasioned to the Appellant while he was engaged upon the work of repairing the puncture. Consequently, I allow this appeal, set aside the order of the trial magistrate dismissing the Appellant's suit with costs and substitute the same with judgment for the Appellant on liability at 100%.

On quantum, the Appellant submitted that even if his claim on liability was dismissed the court ought to have assessed the reasonable amount of quantum that would fairly compensate him. I do agree with the Appellant's submission to the extent that a trial court and this court are not courts of last resort. They must assess damages even where the party claiming is unsuccessful in a claim for general damages. In **LEI MASAKU V KALPAMA BUILDERS LTD CIVIL APPEAL NO. 40 OF 2007[2014] eKLR** Mabeya J held that:

> ***There is the issue of failure to assess damages. It has been held time and again by the Court of Appeal that the court of first instance must assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the Appellate Court needs to know the view taken by the court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behoves this court to assess quantum.***

The injuries sustained by the Appellant are not disputed. According to the medical report of Dr. P. W Okech, he sustained soft tissue injury being a cut wound on the left knee. According to PW2 Dr. Anthony Mubisu Swalo who examined the Appellant on 23rd June 2007 the Appellants impairment was estimated at 10%. PW2 testified that he expected that in future the Appellant would suffer from chronic pain, stiffness and swelling which will be recurrent. His diagnosis was blunt soft tissue injury to the left knee. This was not contested by the Respondent. The Appellant urged the court to assess damages at Kshs. 200,000/- relying on the case of JEREDI UKILU OSANGO V GEOWAVE SHIP CONTRACTORS LTD CIVIL APPEAL NO. 49 OF 2013[2014]eKLR. In that case the Appellant suffered soft tissue injury to the head which healed leaving a 4cm scar and was awarded Kshs. 180,000/-. The Respondent on the

other hand urged the court to award Kshs. 50,000/- relying on the case of GILBERT ODHIAMBO OWUOR V NZOIA SUGAR CO. LTD. [2012]eKLR. The Respondent did not indicate the nature of injuries sustained by Gilbert Odhiambo Owuor. I am satisfied that the injuries sustained by the Appellant were more serious than those suffered by the Appellant in **Jeredi Ukilu Asango** case whose injuries were stated to have completely healed leaving only a 4cm scar. PW2 stated that the Appellant was likely to suffer residual effects of the accident being chronic pain, stiffness which will be recurrent. It is my opinion damages of Kshs. 200,000/- as proposed by the Appellant are reasonable.

Having made the above determinations I am persuaded to interfere with the trial magistrates judgment. I therefore set aside the trial magistrates judgment dismissing the Appellant's suit and substitute therewith judgment for the Appellant as follows-

i) the Appellant is awarded general damaged of kshs 200,000/-with interest from the date of this judgment until payment in full;

ii) the Appellant is awarded Kshs. 1,500/-

iii) the Appellant is awarded costs of the suit and costs of the appeal

Dated, delivered and Signed in Kisumu this 27th day of October, 2016

MAUREEN ONYANGO

JUDGE