REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CIVIL APPEAL NUMBER 3 OF 2015

BETWEEN

KENYA PORTS AUTHORITY [KPA] ……..... APPELLANT

VERSUS

OLIVER K. MWASARU ……. RESPONDENT

[An Appeal from the Judgment of the Learned Senior Resident Magistrate at Mombasa [T. Mwangi] dated 23rd June 2006, in Senior Resident Magistrate's Court Civil Case Number 521 of 2004]

BETWEEN

OLIVER K. MWASARU …….....… PLAINTIFF

VERSUS

KENYA PORTS AUTHORITY…….....….DEFENDANT

Rika J

Court Assistant: Benjamin Kombe

Lumatete, Muchai & Company Advocates for the Appellant

J.A. Abuodha & Company Advocates for the Respondent

JUDGMENT

1. The Respondent was employed by the Appellant Corporation as a Casual Employee. He was injured while at work. He was offloading a Container from a Ship at the Port, when his hand was caught between the Container and the Trailer, sustaining laceration on the right forearm; open fracture of the 5th

metatarsal right hand; fractured distal end of the 4th metatarsal; and lacerations of the 5th metatarsal. He initiated a Claim for damages in the Learned Magistrate's Court at Mombasa. The Court found in his favour, awarding general damages at Kshs. 400,000, less contributory negligence of 15%, and compensation of Kshs. 73,080 paid under the Workmen's Compensation Act, leaving him with an award of Kshs. 266,920. Special damages were awarded to him at Kshs. 4,500, bringing the principal sum to Kshs. 271,420. He was granted costs and interest.

2. The Respondent was dissatisfied and filed Civil Appeal Number 50 of 2007 at the High Court in Mombasa, based on the following grounds:-

a) The Learned Magistrate erred in failing to hold the Respondent wholly or substantially liable for the alleged accident.

b) The Learned Magistrate erred in fact and law, in arriving at a decision against the weight of evidence adduced.

It was proposed by the Appellant to ask the Court to allow the Appeal; Judgment in the Magistrate's Court set aside; with costs met by the Respondent.

3. The Appeal was transferred to the Employment and Labour Relations Court by the High Court, on the ground that it no longer falls within the jurisdiction of the High Court. It was registered as Appeal Number 3 of 2015 at this Court.

4. Parties agreed on the 12th May 2015, to have the Appeal considered and disposed of on the strength of their Written Submissions. These were confirmed to be on record, on the last mention in Court on the 1st September 2015.

5. Parties agree that the Respondent was employed by the Appellant on casual terms, and that he was injured as concluded in the Medical Report availed to the Trial Court.

Appellant's Submissions

6. The Appellant submits that Appellant's Witnesses at the Trial [DW1 and DW2] did not tell the Court who was to blame for the accident. The Learned Magistrate apportioned liability at 85% against the Appellant, and 15% against the Respondent. The Respondent was not working alone. He worked with 3 Other Employees. The Court did not address itself on whether, the Co-Employees were injured. As none was reported to be injured, the Respondent must have been highly negligent. It was not the first time the Respondent was performing the task. He ought to therefore, have borne liability equally with the Appellant.

7. The assessment of general damages at Kshs. 400,000 was manifestly excessive or inordinately high, as to be oppressive to the Appellant. Citing the Court of Appeal decision in **KEMFRO AFRICA LIMITED t/a MERU EXPRESS SERVICE & ANOTHER v. A.M. LUBIA & ANOTHER [1982-1988] 1 KAR 777,** the Appellant submits that the Court can interfere with the decision of the Magistrate's Court if:

- The Magistrate in assessing damages, took into account an irrelevant factor, or left out a relevant one
- The amount is so inordinately low or so inordinately high, that it must be wholly erroneous estimate of the damage

8. The Respondent had worked for the Appellant as a Casual Employee, and was familiar with his work. He was partly to blame for the accident. He had been issued protective gear in form of gloves. The Respondent urges the Court to find its two grounds have merit, and allow the Appeal.

Submissions by the Respondent

9. The Respondent submits his evidence before the Learned Magistrate was consistent and unchallenged by that adduced by the Appellant's Witnesses. An award of general damages at Kshs. 266,920 was sufficient and reflected the gravity of the injuries sustained by the Respondent. The assessment was reasonable considering factors such as inflation and the nature of injuries suffered. The fact that the Respondent's Co –Employees were not injured is not evidence that the Respondent was negligent. The Respondent gave evidence that the winch swayed, trapping the Respondent's hand between the Container and the Trailer. There is no ground to warrant interference with the Trial Court's apportionment of liability. The Respondent urges the Court to dismiss the Appeal.

The Court Finds:

10. The principles to be observed by the Appellate Court, in determining whether to interfere with the quantum of damages awarded by the Trial Court, are as stated in the case of ***KEMFRO AFRICA LIMITED v. A.M. LUBIA*** cited in the Submissions of the Appellant above. The Appellate Court must be satisfied that:

- The Trial Court, in assessing damages took into account an irrelevant factor or left out a relevant factor.
- The amount granted in damages is inordinately low, or so inordinately high that in must be a wholly erroneous estimate of the damage.

11. The Court is not able to discern any flaws in the Trial Court's Judgment based on the first ground. There is no irrelevant factor shown to have been taken into account by the Trial Court. There was no relevant factor left out in the decision. The Appellant has not shown this Court any such factors, either wrongly included or omitted by the Trial Court in arriving at its assessment of general damages.

12. There similarly was nothing to suggest the damages awarded to the Respondent, at Kshs. 266, 920 were inordinately low or so high as to be wholly erroneous estimate of the damage.

13. The medical evidence at the Trial was not contested. The extent of the Respondent's injuries was not contested. The evidence on the occurrence of the accident was largely undisputed. The Respondent was to hold the container with 4 other Employees, and ensure it fitted in the Trailer. The Ship swayed, causing the container to sway. The container landed on the Respondent's hand, occasioning him the injuries.

14. The Respondent testified he was not trained [page 47 of the Record]. He had been employed as a Casual. DW2 however told the Trial Court that the Employees were trained before assignment of the tasks. Both Witnesses for the Appellant were not able to apportion blame for the accident. The Trial Court found the Respondent had worked for 1 year, and was therefore familiar with his role. It was the finding of the Court that the Respondent ought to have detected early enough the swaying of the winch, and removed his hands from the Trailer to avoid the injury. The Court apportioned the Respondent 15% liability finding that he, in a small way, contributed to his injuries.

15. The Court does not find any ground to justify interference with the apportionment of liability. The Employer has a duty under legislation and common law to provide the Employee with a safe and healthy work environment; maintain machinery in good order; prevent Employee exposure to workplace hazards; and inform and educate Employees on safety at the workplace. 85% apportionment of liability against the Appellant, in the absence of clear evidence that the Appellant had taken reasonable steps to ensure its Employees were safe, cannot be faulted for being disproportionate. Section 29 of the Factories Act Cap 514, in force at the time of the accident reflected the duty of care owed to Employees by their Employers stating: ''*No person shall be employed at any machine or process liable to cause bodily injury, unless he has been fully instructed as to the dangers likely to arise in connection therewith and the precautions to be observed, and – [a] has received sufficient training in work at the machine or in process; or is under adequate supervision by a Person who has thorough knowledge and experience of the machine or process"*. This duty of care is to be found both under legislation and common law. The record does not contain any material to show that indeed, the Respondent, engaged as a Casual Employee, had been trained, informed or educated adequately by the Appellant on his role. He testified he was not trained, but

was contradicted on this by DW2. No training manuals or programmes for Casual Employees were exhibited in the Trial Court. Casual engagement does not seem to this Court to create an atmosphere where Employees are taken through sufficient training by their Employers, so as to avoid workplace accidents as occurred to the Respondent. Employers who engage Casual Employees have the obligation to ensure such Employees gain adequate knowledge of the tools of trade entrusted the Employees, and ensure Employees are conversant with all the health and safety measures at the workplace. Looked at differently, it is the apportionment of 15% liability upon the Employee, which would be questionable. There was no obligation on the part of the Trial Court to consider that the Respondent's Colleagues escaped unhurt. Such a consideration would perhaps have resulted in the Judgment being faulted for taking into consideration an irrelevant factor. Mere supply of gloves by the Employer to the Employee does not seem to have been an adequate safety measure.

16. The assessment of general damages, based on the decisions of the Superior Courts supplied by the Parties; taking into consideration the dates those decisions were made; the devaluation of the Kenyan currency and inflationary trends; was a fair assessment. The sum which was proposed by the Appellant of Kshs. 70,000 was inordinately low. The grant of Kshs. 400,000, less contributory negligence at 15%, was in the view of this Court a fair, adequate, regular award, and consistent with existing Judicial Precedents.

17. The Appellant has in all, not shown that the Trial Court erred in failing to hold the Respondent wholly or substantially liable for the accident, or erred in fact and law, in arriving at a decision contrary to the weight of the evidence. IT IS ORDERED:-

[a] The Appeal is dismissed on both grounds.

[b] Costs of the Appeal to the Respondent.

Dated and delivered at Mombasa this 4th day of December 2015

James Rika

Judge