REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 46 OF 2017

KAPSUMBEIYWA TEA ESTATE.....APPELLANT

VERSUS

STEPHEN I. MUKHAYA.....RESPONDENT

(Being an appeal from the Judgment of Principal Magistrate Hon. Cherono

at Kapsabet PMCC No. 35 of 2013 delivered on 14th April 2017)

JUDGMENT

1. The Appellants lodged an Appeal challenging the decision of Hon. Cherono at Kapsabet PMCC No. 35 of 2013 delivered on 14th April 2017.

2. The Respondent instituted the primary suit by way of a plaint seeking damages for injuries sustained at his workplace in the Appellant's premises on 5th June 2008.

3. The trial court found the Appellant 80% liable and awarded general damages at kshs. 200,000/- less 20%, special damages at kshs. 1,500/- and costs. The Appellant being aggrieved with the entire decision of the court appealed against the same vide a Memorandum of Appeal dated 13th April 2017 which had the following grounds of appeal;

a) That the learned trial magistrate's decision on liability was erroneous

b) That the learned trial magistrate erred both in law and fact in basing her finding on irrelevant matters

c) **That the learned trial magistrate erred in law and fact in failing to appreciate or take into account the Appellant's submissions.**

4. The Appellant filed submissions on 21st July 2022. It submitted that the jurisdiction to determine claims arising out of injury within employment rests exclusively with the director of Occupational Health and Safety as provided under section 16 and 23(1) of WIBA. It cited the case of **Law Society of Kenya v Attorney General & Another (2019) eKLR** and further submitted that the suit was instituted in 2013 and the Respondent allegedly sustained the injuries in 2008 which was after WIBA came into force. Therefore, the trial court lacked the jurisdiction to entertain the suit.

5. The Appellant submitted that the Respondent was not injured as he would have been given a referral note to go to the hospital and the outpatient register on the material date does not include the Respondent's name. Further, the Respondent's evidence that he did not go to work the following day was controverted by the attendance checklist produced by DW1.

6. The burden of proof was on the Respondent to prove that he was injured while at work and it was due to the Appellant's negligence. Despite pleading the particulars evidence must be adduced to prove them.

7. On quantum, the Appellant submitted that the trial magistrate awarded damages for injury of a dislocation of elbow which was not supported by any evidence. The medical report was prepared by Dr. Aluda and was not produced by the maker of the document thus the same should be disregarded. Further, that the award was excessive and inordinately high. Had the Respondent sufficiently proven his case the award of kshs.50,000/- would have been sufficient.

8. The Respondent filed submissions on 13th August 2021. He submitted that the trial magistrate correctly assessed the evidence adduced in liability. Further, that the Respondent was an employee of the Appellant and was on duty on the day he was injured was not probatively controverted by the Appellant.

9. The relationship between the employer and employee created a statutory duty of care on the Appellant. From the testimony it was patently clear that the Appellant had not provided the Respondent with any protective gear and this resulted to the Respondent getting injured. He cited the case of **Mumias Sugar Co. Ltd vs Charles Namiti CA 151 of 1987** and **Van Davanter vs Workmen's Compensation Commissioner (1962) 4 SA** in support of this submission. He also cited sections 32, 34, and 53 of the repealed Factories & Other Places of Work Act, Cap 514

10. It is therefore not in doubt that the Appellant was negligent as it failed to provide protective gear to the Respondent.

11. On quantum of damages the Respondent submitted that the trial magistrate took into account the correct principles in assessing damages. Further, the Respondent submitted that special damages were proven by the production of the medical report and receipt as PExh 2(a). The party and party cists were assessed by consent and therefore the same is binding on all the parties.

12. Upon perusal of the pleadings, the record of appeal and submissions by both parties, I have identified the following issues for determination:

a) Whether the Trial court had jurisdiction to handle the matter

b) Whether the plaintiff was injured at work

c) Whether the damages awarded were excessive

Whether the Court had Jurisdiction to handle the Matter

13. The Appellant contends that the trial court had no jurisdiction to handle the matter as the jurisdiction to determine claims arising out of injury within employment rests exclusively with the director of Occupational Health and Safety as provided under section 16 and 23(1) of WIBA. However, **the Law Society of Kenya vs Attorney General & Another (2019) eKLR** decision does not apply in the present suit as the suit was instituted in 2013, before the decision was delivered. It is trite law that precedents cannot be applied retrospectively therefore this ground fails in its entirety.

Whether the Plaintiff was injured at Work

14. DW1 testified that he was a supervisor at the estate and could not provide any proof of the same. If indeed he was the supervisor, he still could not produce any evidence that they provided protective gear. The Appellant failed to controvert the evidence that the Respondent was injured at work on the material date. In the premises, the Respondent proved that he had been injured at work.

Whether the Damages awarded were Excessive

15. It is trite law that an appellate court will not interfere with an award for damages by a lower court unless it is show that the court acted on wrong principles or that it awarded excessive damages that no reasonable court will allow it to stand. Further, that the court has taken into account matters that it ought not to.

16. The injuries sustained were a dislocation of the left elbow joint and sever pain during and after the injury. The same were proven by way of a medical report and the testimony of PW2 who produced the treatment chit from Nandi Hills Dispensary and the medical report by Dr. S. I Aluda. It is a well-established principle that courts award damages based on comparable decisions. In in the case of **Fred Barasa Matayo vs Channan Agricultural Contractors {2013} eKLR** the court reviewed downwards an award of Kshs. 250,000/= to Kshs. 150,000/= for moderate soft tissue injuries that were expected to heal in eight months' time. In **Purity Wambui Muriithi vs Highlands Mineral Water Company Ltd {2015} eKLR** the award of Kshs. 700,000/= was reduced to Kshs. 150,000/= for injuries to the left elbow, pubic region, lower back and right ankle. Given that the nature of the injuries were soft tissue and similar to the above cited authorities I find that the award was not excessive.

17. In the premises the appeal fails in its entirety and is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 31ST DAY OF JANUARY 2022.

E. O. OGOLA

JUDGE